

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0919-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD G. PERRY,

Defendant-Appellant.

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Argued March 6, 2023 – Decided July 28, 2023

Before Judges Gooden Brown and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 17-05-0475.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Kevin S. Finckenauer, of counsel and on the brief).

Robert John Lombardo, Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; Tiffany M. Russo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On June 22, 2017, a Morris County grand jury returned a three-count indictment charging defendant Richard Perry with two counts of second-degree sexual assault, N.J.S.A. 2C:14-2(b) (counts one and two), and one count of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count three). Following a jury trial, defendant was convicted of all three counts and sentenced to an aggregate eight-year prison term, subject to an eighty-five percent period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant was also sentenced to Parole Supervision for Life, N.J.S.A. 2C:43-6.4, and ordered to comply with the requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23.

The convictions stemmed from allegations by then-eleven-year-old Z.H.,<sup>1</sup> the niece of defendant's then-fiancée, that defendant touched her chest and vagina while she slept at his house. At trial, in addition to Z.H.'s testimony, the State presented Z.H.'s hearsay statements describing the incident to her aunt and a detective under the "tender years" exception to the hearsay rule, N.J.R.E. 803(c)(27), as well as a purportedly inculpatory audio recording of a consensually recorded telephone conversation between Z.H.'s aunt and

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<sup>1</sup> We use initials to protect the confidentiality of the victim. N.J.S.A. 2A:82-46; R. 1:38-3(a).

defendant. Prior to trial, defendant unsuccessfully moved under the Rape Shield Law, N.J.S.A. 2C:14-7, to introduce evidence that Z.H. had previously been sexually abused in a similar manner by her father to support defendant's theory that Z.H. had imagined or fabricated the allegations based on the previous abuse.

On appeal, defendant raises the following points for our consideration:

POINT I

THE ADMISSION OF REPETITIVE, CORROBORATIVE HEARSAY STATEMENTS ADMITTED PURSUANT TO THE TENDER YEARS EXCEPTION WAS UNDULY PREJUDICIAL, CUMULATIVE, AND REQUIRES REVERSAL.

POINT II

[DEFENDANT'S] RIGHT TO PRESENT A COMPLETE DEFENSE WAS INFRINGED WHEN THE TRIAL COURT REFUSED TO ALLOW HIM TO PRESENT EVIDENCE AT TRIAL OF Z.H.'S PRIOR, SIMILAR SEXUAL ABUSE BY HER FATHER TO EXPLAIN WHY SHE MIGHT HAVE IMAGINED OR FABRICATED THE ALLEGATIONS AGAINST [DEFENDANT].

POINT III

Z.H.'S AUNT AND DETECTIVE BOST IMPROPERLY INVADED THE PROVINCE OF THE JURY BY OFFERING THEIR INTERPRETATIONS OF DEFENDANT'S STATEMENTS THAT THE JURY SHOULD HAVE EVALU[A]TED ON ITS OWN AND BY PERSONALLY OPINING

ON . . . DEFENDANT'S GUILT. (NOT RAISED BELOW).

POINT IV

THE TRIAL COURT ERRED IN APPLYING AGGRAVATING FACTOR FOUR WHEN THERE WAS NO APPLICABLE BREACH OF TRUST AND IN SENTENCING [DEFENDANT] MORE HEAVILY BECAUSE HE MAINTAINED HIS INNOCENCE. ADDITIONALLY, THE TRIAL COURT ERRED IN FAILING TO MERGE THE ENDANGERING THE WELFARE OF A CHILD CONVICTION WITH THE SEXUAL ASSAULT CONVICTION BASED ON THE SAME CONDUCT.

Because the evidence of prior sexual abuse by Z.H.'s father was improperly excluded and lay opinion testimony interpreting defendant's statements during the consensual recording was improperly admitted, we reverse and remand for a new trial.

I.

Following the adjudication of various pretrial motions, a four-day trial was conducted from December 9 to 12, 2019. At trial, Z.H., her aunt, R.S., Morris County Prosecutor's Office Detective Mike Bost, and Jefferson Township Police Department (JTPD) Detective Sergeant Justin Gjelsvik testified for the State. We glean the following facts from the trial record.

Z.H. testified that on October 1, 2016, she and her younger brother spent the night with R.S. at defendant's apartment, where R.S. and her son resided with defendant.<sup>2</sup> After eating dinner and watching "scary" movies, the children went to bed at about 11:00 p.m. The boys slept on "[her] cousin's bed," while Z.H. slept on an air mattress "on the floor" in the same room. According to Z.H., she was awakened when defendant entered the room, turned on the overhead light, knelt down beside her, and touched her "[b]oobs" and "vagina."

Z.H. recounted that she was wearing pajamas and had covers over her at the time. She explained that defendant touched her under the covers, but over her clothing. According to Z.H., while the boys were sleeping, defendant touched her with "[o]ne hand" while "[t]he other hand" was "beside his legs." During the touching, defendant asked whether Z.H. wanted him "to keep going and [Z.H.] said no." Z.H. "told [defendant] to go and . . . asked . . . where [her] aunt was." Defendant replied her aunt "was in the bathroom," "turned off the light," and "walked out." After defendant left the room, Z.H. "went to the bathroom, knocked on the door, . . . and told [R.S.] what [had] happened."

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<sup>2</sup> Z.H. was fourteen years old at the time of trial. Her brother was five and her cousin was six years old when the offense occurred.

R.S. testified that at about 3:00 a.m., while she was in the bathroom taking a shower, Z.H. knocked on the bathroom door and told her that defendant had "touched [her]" on "[her] private parts," as Z.H. gestured "towards her chest and her vagina." R.S. stated she was "shocked" and "started crying." After apologizing to Z.H., R.S. gathered the children, called 9-1-1, and waited with the children in her car for the police to arrive. Upon their arrival, officers escorted R.S. and the children to the JTPD and then to Deirdre's House, a child advocacy center where forensic interviews in child sex abuse cases were conducted.

At Deirdre's House, Detective Bost, who was the lead investigator, conducted a video recorded forensic interview of Z.H. at approximately 6:40 a.m. that morning.<sup>3</sup> Bost had received "training to forensically interview children under the age of twelve." The recorded interview was played for the jury at trial. During the interview, Z.H. described the incident to Bost in detail, explaining that at around 3:00 a.m., defendant "started touching [her] in certain places that" made her feel "uncomfortable" while she was "sort of asleep." Z.H. explained that at the time, she was sleeping on an air mattress in her cousin's

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<sup>3</sup> By that time, R.S. had reached Z.H.'s mother and obtained consent for the interview.

room while her brother and cousin shared the bed. She described hearing the light switch turn on as defendant entered the room and "bent down" next to her. According to Z.H., during the touching, in response to her questions, defendant told her that her aunt was "in the bathroom" and the boys were "on the bed sleeping." Z.H. stated that the touching continued until she told defendant that she "was tired" and "want[ed] him to leave [her] alone," at which point defendant "left the room" and went into his bedroom. Z.H. said that immediately afterwards, she went into the bathroom and told her aunt what had happened, prompting her aunt to call the police.

During the interview, Bost presented Z.H. with an "anatomical drawing of [a] female" and asked her to name the specific body parts. Z.H. then "circled" with a "marker" the areas of her body where defendant had touched her, describing the areas as her "boobs" and her "vagina." Z.H. further stated that defendant touched her "[o]ver" her clothes with "[o]ne hand," while his "other hand . . . was . . . down by his leg." Z.H. also said that "[t]he covers were over [her]." Z.H. recalled that defendant "kept on asking [her if she] want[ed] [him] to keep on [touching her]." After she "told him to stop, . . . he just stopped, and then he left," and she immediately went to tell her aunt what had happened.

Immediately following the forensic interview, Bost obtained authorization to conduct "a consensual intercept" between R.S. and defendant. Bost described a consensual intercept as "a phone call . . . placed to the suspect" by "a victim or a witness in the investigation" without the suspect's knowledge that the phone call was being placed at the behest of law enforcement and was being recorded. According to Bost, the "purpose" of a consensual intercept was to elicit "a confession or incriminating statements" from the suspect, and only R.S.'s consent was required to record the conversation.<sup>4</sup>

To that end, Bost asked R.S. to call defendant and told her what to say to defendant during the conversation. Once R.S. composed herself, she placed the call at 9:10 a.m.<sup>5</sup> The recorded conversation was played for the jury. The conversation began as follows:

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<sup>4</sup> Pretrial, defendant had unsuccessfully moved to suppress the statements made in the consensual intercept. He does not challenge that ruling on appeal.

<sup>5</sup> Bost testified that R.S. was "in a very emotional state." She "was hysterically crying, blaming herself" because the incident had occurred on her watch. According to R.S.'s testimony, R.S. had started dating defendant about a year earlier when she had "enrolled [her] son into his karate school." She had moved in with him about four months after they started dating, and he had proposed to her about four months after she moved in. Although they had separated for a few days after she had discovered that he was "sexting" another woman, they had reconciled about one week before the incident occurred.

[R.S.]: . . . Listen, [Z.H.] told me that you touched her in her private area and on her chest. Why did you do that?

[DEFENDANT]: I don't know what you're talking about.

[R.S.]: What do you mean you don't know what I'm talking about? Babe, you -- like why would you do that to her?

. . . .

[DEFENDANT]: I don't know --

[R.S.]: You have me. Why would you do that? I know you didn't mean to hurt her or anything, I just want to know why. Like why would you do that?

. . . .

[DEFENDANT]: I -- I just told you.

As R.S. continued to press defendant for "an explanation," defendant insisted that he would talk to her once she came home, "but not over the phone."

Nonetheless, the conversation continued:

[R.S.]: . . . Baby, listen. I know people make mistakes. Just talk to me. I want to know why, that's it.

. . . .

[DEFENDANT]: I don't (unintelligible) -- I don't know.

. . . .

[R.S.]: . . . [J]ust answer me this. Did . . . you touch her under her clothes or over her clothes?

[DEFENDANT]: No, no.

[R.S.]: No; what?

[DEFENDANT]: I mean over -- I didn't -- no.

[R.S.]: You didn't know?

[DEFENDANT]: I said over.

[R.S.]: It was over her clothes?

[DEFENDANT]: Yes.

. . . .

[R.S.]: Did you touch her vagina?

[DEFENDANT]: No, I was -- can you come home and we can talk?

[R.S.]: I want some answers before I come home.

As R.S. continued to pressure defendant for answers, defendant said, "I was drinking." The conversation continued:

[DEFENDANT]: I'm sorry for drinking last night. I'm sorry for everything that's happening right now. I'm sorry for everything.

. . . .

[R.S.]: Did you finger her or did you just touch her over her clothes?

. . . .

[DEFENDANT]: No, I just -- oh my God.

[R.S.]: You know that I'm jealous, so I just want to know.

. . . .

[DEFENDANT]: . . . I'll talk to you. I said -- my head is pounding from all the drinking we did last night.

Defendant again apologized, asked R.S. to come home, and ended the call at 9:32 a.m.

During her trial testimony, R.S. acknowledged that she and defendant had been drinking after the children went to bed. When questioned about the consensual intercept, R.S. testified that during the recorded conversation, defendant "admitted that he [had] touched [Z.H.]." Gjelsvik, who was also assigned to the investigation and had transported R.S. and the children to Deirdre's House, was present during the consensual intercept. Gjelsvik also testified that during the conversation, "after a while[, defendant] admitted to touching the alleged victim on the . . . outer portions of her clothing."

Similarly, during his direct testimony, Bost stated that "[d]uring the consensual intercept," defendant "admitted to touching [Z.H.] on her breast and

her vagina area . . . over her clothing." On cross-examination, Bost acknowledged that there were multiple instances where defendant denied the allegations. However, he testified that he did not interview anyone else in connection with the investigation because defendant admitted that he did it during the consensual intercept.

Following the verdict, defendant was sentenced on March 20, 2020, and this appeal followed.

## II.

Defendant argues that allowing R.S.'s and Bost's testimony that defendant admitted touching Z.H. during the consensual intercept "constituted inadmissible lay testimony that improperly interfered with the jury's factfinding" by "opining on [defendant's] guilt" and "offering . . . personal interpretation[s]" of otherwise "ambiguous statements that could potentially be construed as an admission." According to defendant, "[t]he admission of such improper testimony directly implicating the ultimate issue of defendant's guilt violated [defendant's] rights to due process and a fair trial and warrants the reversal of his convictions."

Defendant acknowledges that he did not object to the testimony at trial. When a defendant does not "object to any of the trial court rulings that he [or

she] contends were error, we review the issues presented for plain error." State v. Clark, 251 N.J. 266, 286-87 (2022).

Under that standard, an unchallenged error constitutes plain error if it was "clearly capable of producing an unjust result." The possibility of an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached."

[Id. at 287 (citations omitted) (first quoting R. 2:10-2; and then quoting State v. Melvin, 65 N.J. 1, 18-19 (1974)).]

"Plain error is a high bar and constitutes 'error not properly preserved for appeal but of a magnitude dictating appellate consideration.'" State v. Santamaria, 236 N.J. 390, 404 (2019) (quoting State v. Bueso, 225 N.J. 193, 202 (2016)). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated "in light of the overall strength of the State's case.'" Clark, 251 N.J. at 287 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

Lay opinion testimony is admissible subject to two conditions set forth in N.J.R.E 701. First, the lay witness's opinion must be "rationally based on the witness' perception"; second, the opinion must "assist in understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. To satisfy the first condition, the "witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies." State v. Sanchez, 247

N.J. 450, 466 (2021) (quoting State v. LaBrutto, 114 N.J. 187, 197 (1989)). The second condition limits lay testimony only to that which will "assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue." Id. at 469 (quoting State v. Singh, 245 N.J. 1, 15 (2021)). The second element therefore precludes "lay opinion on a matter 'as to which the jury is as competent as [the witness] to form a conclusion.'" Id. at 469-70 (alteration in original) (quoting State v. McLean, 205 N.J. 438, 459 (2011)).

Bost's testimony exceeded the bounds of permissible lay opinion testimony. Defendant correctly asserts that his statements were ambiguous and at no point contain an explicit admission of touching Z.H. sexually. Nevertheless, Bost testified that defendant admitted touching Z.H. "on her breast and vagina area . . . over her clothing." Although Bost acknowledged that there were multiple instances where defendant denied the allegations, he also confirmed that he did not conduct any further investigation because defendant repeatedly admitted to the allegations during the consensual intercept.

Our courts recognize that "juries 'may be inclined to accord special respect to' police testimony," especially in cases that rest on credibility disputes. State v. Trinidad, 241 N.J. 425, 446 (2020) (quoting State v. Frisby, 174 N.J. 583, 595

(2002)). Consequently, although "an officer is permitted to set forth what he or she perceived through one or more of the senses," McLean, 205 N.J. at 460, an officer acting as a lay witness may not "interpret[] facts for the jury bearing directly on [a] defendant's guilt," State v. Smith, 436 N.J. Super. 556, 574-75 (App. Div. 2014). See Frisby, 174 N.J. at 594 (holding that officer's testimony implicating the defendant by "necessary inference" constitutes improper lay opinion).

Defendant never admitted to touching Z.H.'s breast or vagina—at most, he admitted to touching her over her clothes. Consequently, by testifying that defendant admitted to touching Z.H.'s "breast and . . . vagina area," Bost presented his belief regarding the significance of defendant's statements as a fact, even though there was no support for that conclusion apart from his own interpretation. See State v. Brockington, 439 N.J. Super. 311, 323 (App. Div. 2015) (holding testimony "exceeded the bounds of permissible lay opinion testimony" when the officer "stated his conclusions . . . supported only by his interpretation of what he had observed").

Bost's testimony had the capacity to harm defendant in two ways: first, given the nature of the offense and the alleged circumstances, the detective's interpretation of defendant's statements could easily amount to an opinion on

defendant's guilt; second, by using the same language Z.H. used to describe defendant's alleged conduct, the detective may have unfairly bolstered Z.H.'s credibility in a case that hinged entirely on credibility. Either harm supports a finding of plain error. See State v. R.K., 220 N.J. 444, 461 (2015) (holding that in "pitched credibility battle" between the victim and the defendant, improper credibility bolstering was prejudicial and constituted plain error); see also Frisby, 174 N.J. at 596 (holding in credibility battles, "[a]ny improper influence on the jury that could have tipped the credibility scale was necessarily harmful and warrants reversal").

The prejudice created by Bost's testimony was not eliminated by the judge's limiting instruction that it was the jury's "function . . . to determine whether or not the statements were actually made by . . . defendant" and, "if made, whether the statements . . . [were] credible." Instead, the prejudice was exacerbated by Bost repeating that defendant admitted to touching Z.H. See Singh, 245 N.J. at 18 (finding detective's references to the defendant that implied guilt were "fleeting," and thus "d[id] not amount to plain error"). The prejudice was further compounded by R.S.'s testimony.

R.S.'s testimony that defendant admitted touching Z.H. satisfied the technical requirements of Rule 701 because it was based on her perceptions and

assisted the jury in determining a disputed factual issue. N.J.R.E. 701. Moreover, R.S. was not a police witness. Thus, standing alone, the admission of R.S.'s testimony does not constitute error, much less plain error. R.S. did not say where defendant touched Z.H. or whether it was done with sexual intent, both of which were questions for the jury. The fact that a jury can evaluate evidence for itself does not render testimony about that evidence categorically "unhelpful," nor does the lay witness "usurp[] the jury's role" in offering the testimony. Singh, 245 N.J. at 20. Instead, the testimony is admissible because the jury remains "free to discredit" the witness's opinion. Ibid.

R.S.'s testimony only becomes problematic in conjunction with Bost's improper testimony, particularly given the prosecutor's treatment of defendant's purported admissions during her summation. During her summation, the prosecutor stated:

[L]adies and gentlemen, you can convict on the word of a child alone. You can convict on words alone. You can also convict on the word of a child and a witness. You don't just have [Z.H.]; you have [Z.H.] and [R.S.]. But, ladies and gentlemen, you don't just have even that. You have [Z.H.]. You have [R.S.]. And you have [defendant's] words, his confession, his statement where he admitted to touching [Z.H.] on the chest and on the vagina.

[(Emphasis added).]

Critically, the prosecutor repeated Bost's interpretation of defendant's statement during her summation. By highlighting defendant's purported confession as interpreted by Bost, the prosecutor added to the risk that the improper testimony would influence the jury's deliberations. See Clark, 251 N.J. at 275 (holding that prosecutor's comment on evidence "that should have never been before the jury in the first place" compounded harmful error). This case "involved a question of guilt dependent entirely on the jurors' resolution of who was telling the truth." State v. C.W.H., 465 N.J. Super. 574, 606 (App. Div. 2021). The consensual intercept was the State's only evidence that did not rely on Z.H.'s word to confirm the allegations. By exceeding the scope of permissible lay opinion testimony, Bost's testimony had the capacity to influence the jury's credibility determinations. We are persuaded that the resulting prejudice deprived defendant of a fair trial and that his convictions must therefore be reversed.

### III.

We also reverse based on the judge's denial of defendant's pretrial motion to introduce evidence of Z.H.'s prior sexual abuse by her father when she was six years old. The abuse had been the subject of a criminal prosecution that resulted in Z.H.'s father pleading guilty to a fourth-degree crime. Pretrial,

defendant had moved to introduce evidence of the prior sexual abuse to support a defense that Z.H. either imagined or fabricated the allegations against him based on the previous abuse by her father. Applying the Rape Shield Law, the motion judge denied the motion, foreclosing using the defense at trial. Defendant contends that in denying the motion, the judge "failed to analyze the evidence under the appropriate standard." As a result, defendant asserts he was "deprived . . . of the ability to present a complete defense," which in turn "impinged" his rights to "due process and a fair trial."

"[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." Singh, 245 N.J. at 12 (alteration in original) (quoting State v. Nantambu, 221 N.J. 390, 402 (2015)). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted.'"" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). "A trial court's 'discretion is abused when 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)).

The Rape Shield Law governs the admissibility of "evidence of the victim's previous sexual conduct" in prosecutions for sexual-assault-related offenses. N.J.S.A. 2C:14-7(a). "[S]exual conduct" is defined as "any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact." N.J.S.A. 2C:14-7(f). Under the statute, "'evidence of the victim's previous sexual conduct' is presumed inadmissible at trial," State v. Schnabel, 196 N.J. 116, 128 (2008) (quoting N.J.S.A. 2C:14-7(a)), and may not be offered without a court order memorializing the court's finding that the evidence satisfies a statutory exception. N.J.S.A. 2C:14-7(a).

To that end, "[a]s occurred here, first the defendant is required to make application for an in camera hearing to determine the admissibility of the evidence." State v. Garron, 177 N.J. 147, 166 (2003) (citing N.J.S.A. 2C:14-7(a)). At the hearing, the trial court should admit evidence of the victim's previous sexual conduct only if: (1) it is "relevant and highly material"; (2) it meets the requirements of subsections (c) and (d) of the statute; and (3) its probative value "substantially outweighs its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim." N.J.S.A. 2C:14-7(a).

Under N.J.S.A. 2C:14-7(c) and (d), evidence of past sexual conduct is only relevant if "it is material to proving the source of semen, pregnancy or disease[.]" or "if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively" consented.

[State v. Perry, 225 N.J. 222, 234-35 (2016) (alteration in original) (citation omitted) (first quoting N.J.S.A. 2C:14-7(c); and then quoting N.J.S.A. 2C:14-7(d)).]

In the context of child sexual abuse cases, in State v. Budis, 125 N.J. 519, 533 (1991), our Supreme Court expanded the scope of relevance to include evidence "offered to show a child's knowledge of sexual acts," holding that

evidence of a child's prior sexual abuse and knowledge of sexual acts is relevant to "rebut[] the inference that [the child] acquired the knowledge to describe sexual matters from her experience with [the] defendant," and to demonstrate that the child "had the knowledge to initiate the sexual acts as described by [the] defendant."

[Schnabel, 196 N.J. at 131 (alterations in original) (quoting Budis, 125 N.J. at 534).]

The Budis Court added:

When evidence is offered to show a child's knowledge of sexual acts, its relevance also depends on whether the prior abuse closely resembles the acts in question. The reason for requiring similarity between the acts is that prior acts are more likely to affect the child's ability to describe the acts in question if they closely resemble the previous ones.

When assessing the prejudicial effect of such evidence, the court should consider the likely trauma to the child and the degree to which admission of the evidence will invade the child's privacy. Such prejudice may be diminished if the evidence can be adduced from sources other than the child.

[Budis, 125 N.J. at 533 (citations omitted).]

To be sure, "[t]he statute's purpose "is to protect the privacy interests of the victim while ensuring a fair determination of the issues bearing on the guilt or innocence of the defendant."" State v. J.D., 211 N.J. 344, 355 (2012) (quoting State v. P.S., 202 N.J. 232, 261 (2010)). To that end, "[i]t 'is designed to "deter the unwarranted and unscrupulous foraging for character-assassination information about the victim" and "does not permit introduction of evidence of the victim's past sexual conduct to cast the victim as promiscuous or of low moral character."" Ibid. (quoting Schnabel, 196 N.J. at 128). "Those concerns apply equally to a child-victim." Schnabel, 196 N.J. at 128.

Nonetheless, our courts have recognized "that a literal interpretation and application of the statute's mandate could impinge on a defendant's right of confrontation, guaranteed both under the federal and state constitutions." J.D., 211 N.J. at 356 (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). Included in those interests are a defendant's right to have "a meaningful opportunity to

present a complete defense." Budis, 125 N.J. at 530-31 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). To reconcile the competing interests, our Supreme Court has construed the statute to allow "evidence of prior sexual conduct that is only material (not highly material) and that only has probative value outweighing (not substantially outweighing) its prejudicial impact." Garron, 177 N.J. at 172.

As such, our courts use a two-step analysis to determine whether the Rape Shield Law bars certain evidence. Perry, 225 N.J. at 236-37. "The first step requires the trial court to ascertain whether evidence encompassed under the Rape Shield Law is relevant and necessary to resolve a material issue in light of the other evidence that is available to address that issue." Ibid. Evidence is relevant when it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. "[T]he analysis focuses on 'the logical connection between the proffered evidence and a fact in issue.'" State v. Williams, 190 N.J. 114, 123 (2007) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004)). "Relevancy consists of probative value and materiality," State v. Buckley, 216 N.J. 249, 261 (2013), and "[r]elevance is measured in terms of the opportunity of the defendant to present a complete

defense," State v. Desir, 245 N.J. 179, 193 (2021) (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 3.2 on R. 3:13-3 (2023)).

If the evidence is relevant, the second step requires the court to "decide whether, under N.J.R.E. 403, the probative value of the contested evidence outweighs the prejudicial effect to the victim in the context of the Rape Shield Law." Perry, 225 N.J. at 237. "Probative value 'is the tendency of the evidence to establish the proposition that it is offered to prove.'" Buckley, 216 N.J. at 261 (quoting State v. Wilson, 135 N.J. 4, 13 (1994)). "Under the Rape Shield Law, the probative value of a victim's prior sexual conduct "'depends on clear proof that [the conduct] occurred, that [it is] relevant to a material issue in the case, and that [it is] necessary to a defense.'" Perry, 225 N.J. at 237 (alterations in original) (quoting State v. J.A.C., 210 N.J. 281, 300 (2012)). Prejudice "includes the trauma to the victim, the degree to which the evidence sought to be admitted would invade the victim's privacy, the 'impact of a given ruling on a victim reporting sexual abuse,' as well as the need to guard victims from excessive cross-examination and prevent undue jury confusion." Ibid. (quoting J.A.C., 210 N.J. at 300).

Still, "[t]he determination of whether evidence of a victim's prior sexual conduct is admissible 'is exquisitely fact-sensitive' and 'depends on the facts of

each case." Id. at 238 (quoting J.D., 211 N.J. at 358). The trial court must "weigh the relevance of the proffered evidence, its necessity to the defense, and its apparent veracity against its potential to humiliate the victim, invade [his or] her privacy, and confuse the jury." J.D., 211 N.J. at 358. "When evidence of prior sexual conduct satisfies the two-step analysis . . . , it is admissible and courts are required to 'impose case-specific parameters, where appropriate, to any such evidence admitted.'" Perry, 225 N.J. at 238 (quoting J.A.C., 210 N.J. at 301).

Here, on November 15, 2018, the motion judge conducted a pretrial hearing to determine the admissibility of Z.H.'s prior sexual abuse under the Rape Shield Law. In a March 25, 2019 order and written decision, the judge determined the evidence was inadmissible. First, the judge described the evidence as follows:

The prior sexual "conduct" here is the sexual molestation of this victim by her father in 2011 when she was [six] years of age. That case is State v. [C.H.]. [C.H.] entered a negotiated plea of guilty in that case.

The allegations in the instant case occurred almost [five] years later when the complaining witness was [eleven] years of age. She is now [thirteen] years of age . . . . At the time she testifies she will be [thirteen] or [fourteen] years of age.

Next, applying the principles outlined in Budis, the judge determined:

This [c]ourt finds that the evidence proffered is not relevant to any issue reasonably understood to be in this case. The defense proffer rests on the proposition that the evidence should be allowed to show an alternate source of sexual knowledge on the part of this complaining witness. This [c]ourt finds that this proposition is not supported by the facts and circumstances of this case, with particular focus on the age of the complaining witness ([eleven]),<sup>6</sup> and the particular allegations in the case. The allegations here have to do with improper sexual contact over clothing. In this [c]ourt's view, there is nothing in the allegations here (inappropriate touching) that would be beyond the capacity of an [eleven]-year-old to perceive and articulate.

The complaining witness's statements reveal a reasonably mature [eleven]-year-old who says: ". . . He started touching me in certain places that I felt uncomfortable with . . . [.]" She reveals familiarity with sexual anatomy, and also the consciousness of what is appropriate touching [and] what is not. Her complaint is straightforward, coherent and not beyond the capacity of an [eleven]-year-old in this [c]ourt's view. This [c]ourt finds there was nothing in the nature of the allegations here to make them the type of information that an [eleven]-year-old child would not otherwise know about but for prior sexual molestation.

. . . .

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<sup>6</sup> In Budis, the Court reasoned that the "balance of relevance and prejudicial effect" can "vary with the age of a child." 125 N.J. at 533. "As children mature, they likely will learn about sexuality from many sources. Thus, evidence of prior sexual experience is less probative in cases involving older children. Conversely, the possibility of prejudice increases as a child matures." Id. at 533-34.

This [c]ourt also finds a material difference in the witness's complaint in the earlier case and the facts alleged here. In the earlier complaint it was alleged that the defendant had used his penis to contact the victim's vaginal area and her buttocks. In the instant case, the allegation distinctly does not involve the defendant's penis but rather an allegation of touching with the hands over the clothing.

This court also finds that any relevance or probative value of the evidence proffered is outweighed by the prejudicial effect of the proffered evidence on the jury's consideration of the case and on the victim. The admission of this evidence of prior molestation is harmful and prejudicial to the victim. This unfortunate child has been subjected not once but twice to actions that have generated sexual molestation charges against adults. To have this publicly disclosed during the undoubtedly traumatic experience of bearing witness to these latest allegations would unnecessarily add injury to insult, . . . without any real relevance or probative value. It seems to this court that [the] princip[al e]ffect would be to present this young girl to the jury as "damaged goods[.]" This is prejudice without probative value.

[(Eighth and ninth alterations in original) (footnote omitted) (citation omitted).]

Subsequently, defendant moved for reconsideration based on the alternate theory that the evidence should be admitted because "it properly supports a defense that the current complaint was the product of nightmare, dream or imaginings resulting from the prior incident." In a May 23, 2019 order and

written decision, the judge denied defendant's motion for reconsideration for substantially the same reasons. The judge explained:

Although the [c]ourt recognizes a possible "dream or nightmare" defense in the case, this is not exclusively dependent on the evidence of the prior incident being admitted, and it does not appear upon reflection that this proffer passes muster in light of logic, the materially different allegations in the two cases, and the [j]urisprudence and standards for admission in this area of law. . . .

. . . At the time [the victim] testifies she will be [thirteen] or [fourteen] years of age. There has been no evidence that she has any difficulty distinguishing dream from reality; in any event that capacity can be tested and argued based on what she testifies to and how she testifies about it.

On appeal, defendant renews his argument that the evidence should have been admitted to support his defense that "Z.H. either dreamed of the abuse or had a flashback of the prior abuse that she imputed to [defendant]." According to the initial police report of the prior sexual abuse, among other things, Z.H. alleged that "her father sometimes c[ame] into her bed at night and rub[bed] her crotch area with his hands." Following the disclosure, Z.H. underwent a psychosocial evaluation, and the evaluating doctor noted that Z.H. began having violent nightmares after the sexual abuse and exhibited anxiety about the prospect of future abuse. As a result, defendant asserts that the similarity of the

allegations "clearly" makes them "relevant, and indeed necessary, to support a claim by the defense that the [instant] allegations were either imagined or fabricated."

Contrary to defendant's argument, the judge applied the correct standard. Nonetheless, based on our jurisprudence, we conclude that the evidence was relevant to defendant's claim that Z.H. either imagined, dreamt, or had a false memory of the sexual assault that she then imputed to defendant.<sup>7</sup> Further, we are convinced that the probative value of the evidence outweighed its prejudicial effect. Thus, the evidence should have been admitted. See Schnabel, 196 N.J. at 131-32 (finding that evidence of prior sexual abuse should have been admitted "for the jury to properly determine the credibility" of the minor victims' testimony because "there were credibility issues among the stories advanced," and "[w]ithout knowing that the victims had previously been abused," the jury was asked to evaluate expert testimony describing Child Sexual Abuse Accommodation Syndrome "on an incomplete record").

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<sup>7</sup> For the reasons stated by the judge, we reject defendant's contention that despite Z.H.'s age, the prior abuse was relevant to "help the defense explain how it is that Z.H. could have described such specific abuse without [defendant] having perpetrated it."

In reaching this conclusion, we are mindful of both the underlying purpose of the Rape Shield Law and the deferential standard by which we review a trial court's evidentiary rulings. See J.A.C., 210 N.J. at 301 ("We review the trial court's evidentiary ruling, entitled to substantial deference under the 'abuse of discretion' standard of review, in light of the Legislature's objective in enacting N.J.S.A. 2C:14-7 and th[e] Court's construction of the statute.").

We have also considered the judge's observation during the pretrial hearing that defendant could have advanced "a dream or nightmare" defense "even in the absence of prior misconduct." Indeed, at trial, defendant marshalled such a defense by questioning Z.H. during cross-examination about the "scary movies" she had watched with her aunt and defendant, whether Z.H. had ever had nightmares after watching scary movies, and whether it was possible that defendant had simply been trying to wake her up from a nightmare when he was touching her. Z.H. denied having a nightmare and the possibility that defendant was attempting to awaken her, effectively foreclosing further development of the defense. However, buttressing the "dream or nightmare" defense on watching scary movies was an entirely different strategy from relying on the prior sexual abuse to support the defense. In having to rely on the former instead of the latter, defendant was deprived of a complete defense and "the jury was

asked to evaluate the [defense] . . . on an incomplete record." Schnabel, 196 N.J. at 132.

We acknowledge Z.H.'s privacy concerns. "On balance, we believe that these factors do not outweigh the significant probative value of the evidence." Budis, 125 N.J. at 540. We rely on the trial judge at the re-trial to address those concerns by, among other things, eliciting the evidence through another witness to protect Z.H. from further trauma, limiting the evidence of the prior sexual abuse to factually similar allegations, and issuing an appropriate limiting instruction so that the jury does not consider the evidence as an attack on Z.H.'s character. See id. at 533, 540 (suggesting ways to address the child's privacy concerns when evidence of previous sexual conduct is admitted, including eliciting the evidence "from another witness, the official documents involving the convictions arising out of the prior abuse, or by stipulation" as well as "deliver[ing] an instruction on the limited purpose of the evidence"). Indeed, rather than prejudice Z.H. in the jury's eyes, "the contrary is true. Sympathy for her plight [is] the more likely response." Id. at 540 (quoting State v. Budis, 243 N.J. Super. 498, 513 (App. Div. 1990)).

#### IV.

Based on our decision, we need not address the arguments regarding the admission of Z.H.'s hearsay statements to her aunt and Detective Bost under N.J.R.E. 803(c)(27), and the sentence. As to defendant's sentence, we merely note the State concedes the child endangerment count should have merged. As to the admission of Z.H.'s hearsay statements, we briefly point out defendant concedes both statements satisfied the technical requirements of N.J.R.E. 803(c)(27). Thus, defendant does not challenge the judge's pretrial ruling following a Rule 104 hearing that the statements were sufficiently trustworthy.<sup>8</sup> See State v. D.G., 157 N.J. 112, 128 (1999) ("N.J.R.E. 803(c)(27) requires the court to find, in a hearing conducted pursuant to N.J.R.E. 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy.").

However, defendant renews his argument that the statements should otherwise have been excluded as "unduly prejudicial and cumulative" under N.J.R.E. 403. According to defendant, given "Z.H.'s mature trial testimony," the introduction of "repetitive, explicit out-of-court statements detailing the allegations . . . . violated [his] rights to a fair trial and due process." See State

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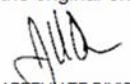
<sup>8</sup> During the pretrial hearing conducted on December 6, 2017, both R.S. and Bost testified consistent with their trial testimony, and Z.H.'s video recorded interview was played in its entirety.

v. Smith, 158 N.J. 376, 391 (1999) (cautioning trial courts to "serve as gatekeepers when repetitive corroborating hearsay evidence is proffered pursuant to [N.J.R.E.] 803(c)(27)" and to "'be cognizant of [the] right under N.J.R.E. 403, to exclude evidence if [the court] finds in its discretion, that the prejudicial value of that evidence substantially outweighs its probative value.'" (quoting D.G., 157 N.J. at 128)).

As defendant acknowledges, following the pretrial ruling, the judge "left open the issue of whether [the statements] should otherwise be suppressed pursuant to N.J.R.E. 403." Specifically, the judge stated he would "consider the defense to have a standing objection on [Rule 403 grounds] and it may be renewed." However, at trial, defense counsel never renewed the N.J.R.E. 403 argument.<sup>9</sup> Because we reverse on other grounds, we leave the determination of whether to exclude the statements on N.J.R.E. 403 grounds to abide defendant's retrial and express no opinion on the merit of the argument.

Reversed and remanded for a new trial.

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

  
CLERK OF THE APPELLATE DIVISION

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<sup>9</sup> Both the judge and the attorneys at trial were different from the motion hearing.