

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1414-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANGEL R. FLORES,

Defendant-Appellant.

Argued February 1, 2023 – Decided March 10, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 16-06-0376.

Thomas P. Belsky, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Thomas P. Belsky, of counsel and on the briefs).

Michele C. Buckley, Assistant Prosecutor, argued the cause for respondent (William C. Daniel, Union County Prosecutor, attorney; Michele C. Buckley, of counsel and on the brief).

PER CURIAM

Defendant Angel Flores appeals his conviction, alleging several erroneous evidentiary rulings in the Law Division's December 28, 2018, and April 18, 2019 orders. Defendant also challenges his sentence, which imposed \$2,000 and \$750 penalties payable to the Sex Crime Victim Treatment Fund ("SCVTF"), N.J.S.A. 2C:14-10(a)(2). After careful review of the record and relevant law, we affirm defendant's conviction but remand for the limited purpose of reconsideration of the SCVTF penalties.

We discern the following facts from the record. In January 2016, nine-year-old Y.M.¹ lived in a three-story house in Plainfield with her family. Y.M., her parents and her brothers lived on the first floor, while her aunt and older cousins, A.L. (twelve years old) and L.L. (eleven years old), lived on the second floor. Defendant lived in a room on the third floor, which he had rented for the past twelve years.

On January 2, 2016, Y.M. was having a sleepover with her cousins A.L. and L.L. on the second floor of the house. At some point during the night, the three girls decided to go up to the third-floor apartment to borrow some movies

¹ We use initials to protect the privacy of the victim and the confidentiality of these proceedings. Rule 1:38-3(c)(9).

from defendant. Defendant let the girls in to look through a box of DVDs he had; in their search, Y.M. came across a pornographic movie. A.L. told Y.M. to put down the DVD and the girls went back to the second floor with other movies they borrowed.

After some time, the girls grew bored and wanted to exchange the movies they selected for others. On the second trip to defendant's room, Y.M. went up alone while the other girls stayed behind in their apartment. While Y.M. was in defendant's room, defendant closed his door and locked it. Defendant then pulled down Y.M.'s pants and underwear while she was on his bed and "lick[ed] her private parts." After this incident, defendant gave Y.M. money and told her not to tell anyone about the incident.

After about ten minutes, A.L. and L.L. believed that Y.M. was taking too long and went upstairs to get her. A.L. testified that, when she approached defendant's door, she heard moaning coming from inside the room. At that point, A.L. knocked on the door; after approximately two minutes, Y.M. opened the door with defendant behind her. According to A.L. and L.L., Y.M.'s face was red, and she appeared nervous or scared. All three girls then returned to the second floor.

Once back downstairs, A.L. noticed that Y.M. had money in her hand that she was trying to hide; A.L. did not believe that Y.M. had the money before she went to defendant's room. A.L. began to question Y.M. about what she was doing in defendant's room, why she was there for so long, and why she suddenly had money. Y.M. initially denied that anything happened, but A.L. did not accept Y.M.'s answers and continued to inquire. At that point, A.L. lied to Y.M. by telling her that she could see through the keyhole in defendant's room; A.L. also told Y.M. that she would tell her mother if Y.M. did not answer truthfully.

Ultimately, Y.M. ended up telling A.L. that defendant was "licking her private part"² and that he gave her money so she would not say anything about the incident. Y.M. then offered to give A.L. some of the money or to buy her McDonalds so that she would not tell her mother. A.L. and L.L. waited until the following day to tell their mother what Y.M. told them; A.L.'s mother informed Y.M.'s mother of what her daughters told her. A.L.'s mother then called the police.

² A.L. understood "private part" to mean her vagina.

Detective Brian O'Malley³ of the Union County Prosecutor's Office was assigned to investigate the allegations of sexual assault made by Y.M. On January 3, 2016—the same day the incident was reported—O'Malley conducted a forensic interview of Y.M. This interview was videotaped and played for the jury at trial. O'Malley subsequently conducted interviews of Y.M.'s cousins, A.L. and L.L., as well as an interview of Y.M.'s mother.

After the interview, Y.M. was referred to the Child Protection Center "for a physical, mental, psychological evaluation and exam." Approximately one month after the alleged abuse—on February 17, 2016—Dr. Gladibel Medina⁴ conducted a medical exam and evaluation on Y.M. Prior to conducting the physical exam, Dr. Medina testified that she met with Y.M. and her mother and explained that the purpose of the visit was for diagnosis and treatment. Because Y.M. advised the physician that a man pulled her clothes down and put his mouth on her "front private part," Dr. Medina's physical examination included an examination of Y.M.'s genital area. Dr. Medina testified that she did not find

³ O'Malley was promoted to the rank of sergeant sometime after his involvement in this case.

⁴ Dr. Medina testified at trial and was recognized as an expert in "pediatrics and child sexual abuse."

any gross abnormalities or infections and provided a prescription for Y.M. to be tested for various sexually transmitted diseases ("STD").

On June 8, 2016, a Union County grand jury returned Indictment No. 16-06-0376, charging defendant with two counts of first-degree aggravated sexual assault, in violation of N.J.S.A. 2C:14-2(a)(1) (counts one and two); second-degree sexual assault, in violation of N.J.S.A. 2C:14-2(b) (count three); and third-degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4(a) (count four).

On December 28, 2018, the court issued an opinion and order, granting the State's motion to admit: (1) Y.M.'s videotaped statement to O'Malley under the tender years exception to the hearsay rule, N.J.R.E. 803(c)(27); and (2) Y.M.'s statement to Dr. Medina, as a statement made for the purpose of medical diagnosis or treatment, pursuant to N.J.R.E. 803(c)(4). Defendant's motion for a Michaels hearing⁵ to prohibit introduction of Y.M.'s statements to O'Malley and A.L. at trial was denied.

After considering the applicable factors, O'Malley's testimony, and the videotaped statement itself, the court found that Y.M.'s statement made during the forensic interview was "sufficiently trustworthy." The court reasoned that:

⁵ State v. Michaels, 136 N.J. 299 (1996).

At the outset of the interview, [Det.] O'Malley ask[ed] open-ended questions regarding the victims' age, date of birth, school, and information about members of her family in order to build a rapport. In addition, any discussion regarding sexual abuse was elicited from the victim in response to [Det.] O'Malley asking if she knew why she was being interview. Y.M. did not hesitate or indicate uncertainty as to the details of the abuse. Y.M. disclosed the alleged incidents of sexual abuse perpetrated against her by the defendant. Each account was clear and unwavering in identifying the defendant, the location[,] and circumstances surrounding the abuse[,] and each account specifically detailed the nature of the acts. Y.M. was able to articulate the different parts of the body on both a female and male anatomical diagrams. Y.M. also used those diagrams to illustrate what she alleges was done to her by the defendant. Y.M. provided further detail regarding monies given to her by the defendant in order to not report the abuse and even went so far as to explain how, when[,] and where she spent the money.

This [c]ourt finds that Y.M.'s description of the acts defendant performed on her contain details and terminology that is unexpected from children of her age (nine years old), specifically, the detail she provided concerning the defendant's kissing and/or licking of her genitals, further bolstering the trustworthiness of these statements.

Moreover, there is no evidence before this [c]ourt that indicates Y.M. had any motive to lie or fabricate these allegations. Nor is there any indication appearing within the statement to suggest that Y.M.'s statement was coerced, manipulated[,] or subject to the influence of anyone or thing other than her own experiences with the defendant.

In considering Dr. Medina's testimony, the court found that Y.M.'s statements to the physician were made in good faith and for the purpose of obtaining a medical diagnosis and/or treatment. Specifically, the court reasoned:

Y.M. had not previously been taken to see her pediatrician after the alleged sexual abuse. A month had passed since the allegations were made. Accordingly, the importance of Y.M. seeing a physician was particularly acute. While Dr. Medina did testify that she did not establish an ongoing physician-patient relationship with Y.M. or review any testing results, this does not indicate to this [c]ourt that the examination was for the purpose of evidence gathering. Dr. Medina prescribed Y.M. for [STD] testing that was a necessary diagnostic tool . . . to uncover and treat any infection or disease transmitted to Y.M. as a result of the alleged assault. The results of these tests were to be transmitted to the defendant's mother for follow up, if necessary. Further, without knowing the nature and extent of the contact defendant had with Y.M., Dr. Medina would be unable to properly tailor the scope of her physical examination of the victim. Clearly, important diagnostic and treatment related measures such as the focus on the outer vaginal exam with the proper equipment were undertaken as a result of the examination. Without the specific disclosure to Dr. Medina, including her report of pain, she would have no way of knowing where to look for possible injuries requiring medical attention and she certainly would not have the information necessary to determine that STD testing was medically appropriate.

On April 18, 2019, the court also granted the State's motion to admit Y.M.'s out-of-court statements to A.L. under the tender years exception. After finding that A.L. testified honestly and deeming her a credible witness, the court explained its reasoning:

The statements made by Y.M. that defendant would lick her private part and touch her are deemed reliable based on the timing, content[,] and circumstances. First, the timing of Y.M.'s disclosure supports its reliability. A.L. had observed pornographic movies in defendant's room, went upstairs after her sister felt that Y.M. was taking too long to get [a] new movie, found the door was locked[,] and heard the sounds of a pornographic movie. When Y.M. opened the door[,] she was red in the face and was in possession of money that she did not have before. While Y.M. did not come down the stairs and volunteer this difficult and embarrassing information to her cousin, this court finds that pointed questioning engaged in by A.L. does not alter reliability of Y.M.'s disclosure under the circumstances. Next, Y.M.'s description of the acts defendant performed on her that were rela[y]ed to A.L. contained details and terminology that is unexpected from children her age (nine years old). Moreover, this [c]ourt rejects the defense['s] argument that the detail A.L. provided concerning the defendant's kissing versus licking Y.M.'s genitals is inconsistent. This [c]ourt finds that these descriptions are consistent descriptions of the same or substantially the same acts and serve to bolster the trustworthiness of Y.M.'s statement and not contradict the statement, as the defendant argues.

The matter was tried by a jury beginning on April 29, 2019. On May 16, 2019, the jury returned a verdict, finding defendant not guilty on count one, but

guilty as to counts two, three, and four. On September 20, 2019, defendant was sentenced to an aggregate term of twenty-five years' imprisonment with a period of twenty-five years of parole ineligibility. In addition to other fines and penalties, the court imposed \$2,000 and \$750 SCVTF assessments for counts two and four. This appeal followed.

On appeal, defendant presents the following arguments:

POINT I

THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS, ALLOWING THE JURY TO HEAR THREE DIFFERENT TIMES, Y.M.'S UNTRUSTWORTHY HEARSAY CLAIM AGAINST A.F., DEPRIVED A.F. OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

- A. Y.M.'s Hearsay Statements to A.L. and Detective O'Malley Were Not Admissible Under N.J.R.E. 803(c)(27) Because They Lacked the Necessary Degree of Trustworthiness.
- B. Y.M.'s Hearsay Statement to Dr. Medina Was Not Admissible Under N.J.R.E. 803(c)(4) As It was Untrustworthy Given Insufficient Evidence to Conclude That Y.M. Believed She was Making the Statement for the Purpose of Medical Diagnosis and Treatment.
- C. The Trial Court Failed to perform its Gatekeeping Duties and Evaluate the Admissibility of Y.M.'s Hearsay Statements Under N.J.R.E. 403.

POINT II

BECAUSE THE TRIAL COURT DID NOT DETERMINE A.F.'S ABILITY TO PAY BEFORE IMPOSING THE MAXIMUM SCVTF PENALTY FOR COUNTS TWO AND FOUR THIS COURT SHOULD REMAND THE MATTER FOR AN ABILITY TO PAY HEARING. (Not Raised Below).

We defer to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Appellate courts review the trial court's evidentiary ruling "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under this deferential standard, "[w]e 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)). However, not every mistaken evidentiary ruling will lead to a reversal of conviction. Ibid. "Only those that have the clear capacity to cause an unjust result will do so." Ibid.

We first reject defendant's contention that the court erroneously admitted Y.M.'s statements to O'Malley and A.L. under N.J.R.E. 803(c)(27), the tender-years hearsay exception. The Rule allows the admission of a statement made by

a child under the age of twelve "relating to sexual misconduct" on a finding of certain conditions.⁶ In the instant matter, the focus is on the second condition, which requires a judge to conduct a Rule 104 hearing to determine that there is a "probability that the statement is trustworthy" "on the basis of the [statement's] time, content[,] and circumstances." N.J.R.E. 803(c)(27)(b).

In determining the trustworthiness of a statement under the tender-years exception, our Supreme Court—relying on Idaho v. Wright, 497 U.S. 805, 821-22 (1990)—identified the following non-exhaustive factors that courts should consider: (1) the spontaneity of the statement, whether it was made without prompting or suggestive questioning; (2) whether the account provided by the declarant is consistently repeated; (3) the mental state of the declarant; (4) the use of terminology unexpected of a child of a similar age; and (5) the declarant's motive to fabricate. State v. P.S., 202 N.J. 232, 249 (2010) (citing Idaho, 497 U.S. at 821-22). Here, the court conducted the requisite hearing and thoroughly analyzed each of these factors when considering Y.M.'s statements to O'Malley

⁶ Here, there is no dispute that defendant was on notice of the State's intent to use the statements at issue. In addition, Y.M. testified at trial. Therefore, two of the three conditions outlined in N.J.R.E. 803(c)(27) are not at issue in this matter.

and A.L. We discern no abuse of discretion as the record supports the court's findings and we decline to second-guess its conclusions.

We also find no abuse of discretion in the court's admission of Y.M.'s hearsay statement to Dr. Medina under N.J.R.E. 803(c)(4). Under this exception, a hearsay statement is admissible provided it "is made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment." N.J.R.E. 803(c)(4)(A); see also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 803(c)(4) (2022) ("The N.J.R.E. 803(c)(4) exception to the hearsay exclusionary rule is well known . . . and is based on the assumption that the declarant is more interested in obtaining a diagnosis and treatment culminating in a medical recovery than he is in obtaining a favorable medical opinion culminating in a legal recovery."). However, "statements as to the cause of the symptoms or conditions" are not admissible because they are not relevant to the patient's treatment. Cestero v. Ferrara, 57 N.J. 497, 501 (1971) (emphasis in original).

Here, Dr. Medina's Rule 104 testimony supports the court's finding that she was examining and evaluating Y.M. to determine a medical diagnosis and/or treatment, and Y.M.'s statements were clearly made in good faith response for those purposes. Prior to conducting the physical exam, Dr. Medina met with

Y.M. and her mother and explained that the purpose of the visit was for diagnosis and treatment. Contrary to defendant's position, the fact that Dr. Medina did not establish an ongoing physician-patient relationship with Y.M. does not indicate that the examination was for the purpose of evidence gathering. Cf. State v. Pillar, 359 N.J. Super. 249, 289 (App. Div. 2003) (holding that, if a doctor's examination "was conducted for evidence gathering purposes," the hearsay statements would be inadmissible under N.J.R.E. 803(c)(4)). In the instant matter, Y.M.'s statement regarding her abuse directly impacted the course of Dr. Medina's examination, particularly the outer vaginal examination performed and the prescription for STD testing.

In addition, the court tailored Y.M.'s statement to Dr. Medina to include only that which was necessary for diagnosis or treatment. Specifically, the court admitted the portion of Y.M.'s statement that communicated that an individual made oral contact with her genitals and what her symptoms were; however, the court did not admit portions of the statement that characterized defendant's behavior as "bad," or included his identity, as this information was not necessary for Dr. Medina's treatment or diagnosis of Y.M.

We also find unpersuasive defendant's argument that the court erred in admitting repetitive and cumulative testimony about Y.M.'s statements pursuant

to N.J.R.E. 403. N.J.R.E. 403 provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." It is further well-established that trial judges have "broad discretion to exclude evidence as unduly prejudicial pursuant to N.J.R.E. 403." State v. Nantambu, 221 N.J. 390, 402 (2015).

With respect to child sexual abuse cases, courts have recognized that "testimony by the victim is often the indispensable element of the prosecution's case," as "[f]requently, there is no visible physical evidence that acts of sexual molestation have occurred," and a "victim's account of the sexual abuse may be the best and sometimes the only evidence that a sexual assault has taken place." State v. D.R., 109 N.J. 348, 358-59 (1988). We have recognized, however, that trial judges "must serve as gatekeepers when repetitive corroborating hearsay evidence is proffered pursuant to [N.J.R.E.] 803(c)(27)." State v. Smith, 158 N.J. 376, 391 (1999). Accordingly, "a trial court should be cognizant of its right under N.J.R.E. 403, to exclude evidence if it finds[,] in its discretion, that the prejudicial value of that evidence substantially outweighs its probative value." Ibid. (quoting State v. D.G., 157 N.J. 112, 128 (1999)).

In State v. Burr, 392 N.J. Super. 538, 573 (App. Div. 2007), we considered, and rejected, the defendant's argument that a video was unduly prejudicial as a "repetitive, corroborative statement of [the child's] trial testimony." Id. at 564. We determined that the taped statement had probative value because it was "closer in time to the alleged sexual assault than the trial" and because it confirmed that the statements made to the prosecutor's office were "largely consistent with those made . . . at trial." Id. at 573. As in Burr, Y.M.'s videotaped statement was highly probative as it was obtained the day after the incident and more than three years before trial.

Similarly, Y.M.'s statement to A.L. is of central relevance because it was made immediately after the incident. Finally, Y.M.'s statement to Dr. Medina was in the context of a medical examination and its admission was tailored to that purpose. We discern no undue prejudice or abuse of discretion in the statements' admission.

Finally, the State concedes, and we agree, that the court erred in assessing the maximum SCVTF penalties applicable under N.J.S.A. 2C:14-10 without providing a statement of reasons or determining defendant's ability to pay. Among other things, the statute provides for assessment of a penalty not to exceed \$2,000 for sex offenders convicted of a first-degree offense and \$750 for

sex offenders convicted of a third-degree offense. N.J.S.A. 2C:14-10(a)(1), (3).

In State v. Bolvito, 217 N.J. 221 (2014), our Supreme Court held that:

[T]he SCVTF penalty is mandatory in cases in which a defendant is convicted of a sexual offense identified in the statute. We further hold that a sentencing court may impose an SCVTF penalty against a defendant in any amount between a nominal figure and the upper limit prescribed by N.J.S.A. 2C:14-10(a) for the degree of the offense at issue. In setting an SCVTF penalty, the sentencing court should consider the nature of the offense, as well as the defendant's ability to pay the penalty during any custodial sentence imposed and after his or her release. We further hold that the sentencing court should provide a statement of reasons as to the amount of any penalty imposed pursuant to N.J.S.A. 2C:14-10(a).

[Id. at 224.]

Here, because the maximum penalties were imposed and the court did not provide a statement of reasons for imposing the specific penalties nor did it consider defendant's ability to pay them, we must remand for the limited purpose of reconsideration of the SCVTF penalties in conformity with Bolvito.

Affirmed in part and remanded for reconsideration of the SCVTF penalties.

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



CLERK OF THE APPELLATE DIVISION