SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1601-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TODD J. SMITH, a/k/a
JOHN SMITH and
JOHN D. SMITH,

Defendant-Appellant.

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Argued May 2, 2023 – Decided June 30, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 16-08-2489.

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

Maura M. Sullivan, Assistant Prosecutor, argued the cause for respondent (Grace C. MacAulay, Camden County Prosecutor, attorney; Maura M. Sullivan and

Krysten A. Russell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his jury trial convictions for several sex offenses pertaining to children. The crimes for which defendant was convicted can be grouped into two categories: those where defendant exposed himself in front of his toddler son, T.J., and those where he engaged in sexual acts with an underaged neighbor, C.C., who was T.J.'s middle-school-aged babysitter.[1] Defendant was aided by his then-fiancée, Jennifer Soohoo. Defendant and Soohoo groomed C.C. and together they had intercourse with her on multiple occasions, including one instance where T.J. was within view. Soohoo pled guilty and agreed to testify against defendant in exchange for a sentence of probation. C.C. also testified against defendant at trial.

Defendant contends the trial court committed multiple errors, including: (1) preventing defendant from cross-examining Soohoo on the sentence she would have faced had she not entered into a cooperation agreement with the prosecutor; (2) denying defendant's severance motion; (3) allowing the State to introduce inadmissible hearsay statements attributed to C.C.'s mother; (4)

[1] We use initials to protect the identities of the child victims of sexual offenses. R. 1:38-3(c)(9); see also R. 1:38-3(c)(12); N.J.S.A. 2A:82-46.

committing cumulative errors; (5) failing to find the endangering statute impermissibly vague as applied to three counts; (6) failing to properly instruct the jury on the offense of lewdness; (7) allowing the prosecution to amend the indictment on the day of trial; and (8) violating sentencing guidelines and imposing an excessive sentence.

After carefully reviewing the record in light of the governing legal principles, we are constrained to reverse and remand for a new trial based on the limitations the trial court imposed on the cross-examination of Soohoo. Those restrictions violated constitutional principles recognized by our Supreme Court in State v. Jackson, 243 N.J. 52, 70 (2020)—a case that was decided after the present trial but nonetheless applies to this matter. We decline to hold this Confrontation Clause error was harmless beyond a reasonable doubt. We further direct on remand that the trial court reconsider defendant's severance motion. Although the trial judge considered a number of relevant considerations, he did not make specific findings with respect to all of the factors spelled out in State v. Cofield, 127 N.J. 328, 338 (1992).

We need not address defendant's hearsay contentions because they were not raised to the trial court. We anticipate that at the retrial, defendant will make a timely objection to the testimony he challenged for the first time on appeal.

With respect to the lewdness convictions, the trial court failed to instruct the jury on the mens rea element of the offense as interpreted by our Supreme Court in State v. Hackett, 166 N.J. 66, 76 (2001). We direct that at the retrial, the court instruct the jury in accordance with the Supreme Court's interpretation of the mens rea element.

We decline to address defendant's as-applied challenge to the constitutionality of the endangering-the-welfare-of-a-child statute because that argument was not properly raised below. Defendant will be permitted on remand to challenge the statute as impermissibly vague as applied.

Given our decision to vacate defendant's convictions and remand for a new trial, we need not address his contentions regarding cumulative error, the day-of-trial amendment to the indictment, and the sentence imposed.

I.

We discern the following pertinent facts from the trial record.[2] In 2013, C.C. was fourteen years old. She lived two houses away from the home of defendant and Soohoo. Defendant and Soohoo had a son, T.J., who was born in

[2] These facts are derived from the testimony elicited at trial. As we are reversing defendant's convictions, he is once again presumed innocent.

2010. In 2013, C.C. began babysitting T.J., but was only allowed to do so when Soohoo was present.

In April 2013, while C.C. was at defendant's house to babysit, defendant made sexual advances toward C.C. Soohoo encouraged C.C. to submit, and C.C. did. Soohoo inserted a spermicidal material inside C.C. and then defendant had intercourse with her. As that was happening, T.J. was sitting within view. Soohoo filmed the assault on a cell phone, but the recording was never recovered by law enforcement. A similar incident occurred about one month later, though, on that occasion, T.J. was not in the room. Defendant had intercourse with C.C. a third time a few weeks later. C.C. testified that on two of the occasions, though she could not remember which two, she was provided alcohol before intercourse; but she said she did not feel intoxicated either time.

After the third assault, C.C. told defendant that she no longer wanted to have intercourse with him, and she stopped going to his house. Soon after, C.C. told a friend about what had happened. The friend shared the information with C.C.'s mother. When asked by her mother, C.C. refused to give details about the assaults and became upset. Because C.C. was exhibiting severe anxiety, her mother enrolled her with a therapist. In April 2014, C.C.'s mother learned that C.C. had disclosed the abuse to her therapist and that the Division of Child

Protection and Permanency had been contacted. That led to C.C. reporting the assaults to a Camden County Prosecutor's Office detective in a recorded statement.

On June 12, 2014, a police officer went to defendant's home with a warrant for defendant's arrest. On the same day, defendant's home was searched, and police seized cell phones, cameras, laptops, DVDs, and a VHS recorder. Soohoo gave a statement to police, which she later admitted was untruthful, wherein she denied ever observing sexual contact between defendant and C.C.

A forensic examination of defendant's cell phone and a camera found in his home revealed a number of sexually explicit videos. In several of the videos, which were recorded between 2012 and 2014, T.J. can be seen or heard in close proximity to the sexual conduct. In one video, defendant was filming Soohoo in sexual poses and T.J.'s voice can be heard. Soohoo testified he was in the room when the recording was made. In another video, T.J. can be seen interacting with Soohoo while she lay naked on a couch as defendant filmed. There was another explicit video of Soohoo where T.J. can be heard in the background, and Soohoo testified he was about three feet away from her. Finally, there was a video of defendant engaging in sexual conduct with a woman who was not Soohoo in which T.J. can be heard opening the door to the

room.[3] The review of the cell phone also revealed a text message defendant sent to Soohoo saying, "[a]ll my movies suck. We got to make more."

In August 2016, defendant and Soohoo were charged by a superseding indictment with: five counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7) (counts[4] one, seven, fifteen, seventeen, and twenty-five); three counts of second-degree sexual assault by force, N.J.S.A. 2C:14-2(c)(1) (counts two, eight, and eighteen); five counts of second-degree sexual assault based on age, N.J.S.A. 2C:14-2(c)(4) (counts three, nine, sixteen, nineteen, and twenty-six); three counts of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (counts four, twenty-seven, and twenty-nine); four counts of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (counts five, six, twenty-eight, and thirty); two counts of second-degree endangering by causing a sexual act knowing it would be filmed, N.J.S.A. 2C:24-4(b)(3) (counts ten and twenty); two counts of second-degree endangering by filming a sexual act, N.J.S.A. 2C:24-4(b)(4) (counts eleven and twenty-one); three counts of third-degree

[3] Defendant was acquitted of the endangering charge that stemmed from this incident.

[4] The counts were renumbered when the superseding indictment was issued and again when some of the counts were dismissed. We use the numbering from the superseding indictment.

endangering by engaging in sexual conduct, N.J.S.A. 2C:24-4(a)(1) (counts twelve, twenty-two, and twenty-three); two counts of third-degree endangering by causing harm making the child abused, N.J.S.A. 2C:24-4(a)(2) (counts thirteen and twenty-four); four counts of second-degree endangering, N.J.S.A. 2C:24-4(a) (counts fourteen, thirty-two, thirty-three, and thirty-five); three counts of fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1) (counts thirty-one, thirty-four, and thirty-six); and one count of second-degree endangering by engaging in sexual conduct, N.J.S.A. 2C:24-4(a)(1) (count thirty-seven).

On August 17, 2018, the trial court denied defendant's motion to sever the counts pertaining to T.J. from those pertaining to C.C.

Defendant was tried over the course of five non-consecutive days in May and June 2019. On the first day of trial, after the jury had been selected, the judge granted the State's motion to amend the indictment to correct the municipalities in which the offenses alleged in counts thirty-one through thirty-five occurred.

At the close of the State's case, the judge granted defendant's motion to dismiss counts one, four, seven, fifteen, seventeen, twenty-five, twenty-seven, and twenty-nine—the first-degree aggravated sexual assault and third-degree aggravated criminal sexual contact charges. The State did not oppose that

motion. Those counts were predicated on C.C. being intoxicated, which the State conceded had not been proven beyond a reasonable doubt.

The jury acquitted defendant of counts thirteen, twenty-four, twenty-six, and thirty-three. Two of those acquitted charges were for providing alcohol to C.C. to the point of intoxication, another was for a specific sexual act allegedly committed against C.C., and the last was for a specific instance of exposing T.J. to nudity. The jury found defendant guilty of the remaining twenty-five counts.

The trial court imposed five consecutive sentences: an extended term of eighteen years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for second-degree sexual assault (count two); an eight-year term subject to NERA for second-degree sexual assault (count eight); an eight-year term for second-degree endangering (count fourteen); an eight-year term subject to NERA for second-degree sexual assault (count sixteen); and an eight-year term subject to NERA for second-degree sexual assault (count eighteen). The remaining counts were either merged or given subsumed concurrent terms. The aggregate sentence was fifty years.

Defendant raises the following contentions for our consideration:

> POINT I
>
> BECAUSE [DEFENDANT] WAS PRECLUDED FROM CROSS-EXAMINING THE COOPERATI[NG]

CODEFENDANT ABOUT HER 125-YEAR SENTENCING EXPOSURE, [DEFENDANT]'S CONFRONTATION RIGHTS WERE VIOLATED, REQUIRING REVERSAL OF HIS CONVICTIONS.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S SEVERANCE MOTION, REQUIRING REVERSAL.

POINT III

THE ADMISSION OF TWO FORMS OF DOUBLE HEARSAY ABOUT THE SEXUAL CONDUCT BETWEEN C.C. AND [DEFENDANT] CONSTITUTED PLAIN ERROR, REQUIRING REVERSAL.

A. Ms. C's Statement that a Non-Testifying Witness Informed Her that C.C. Had Told Her About the Assaults Constituted Inadmissible Doubly Hearsay.

B. Ms. C's Statement that C.C. Told a Non-Testifying Therapist About the Assaults Was Also Inadmissible Double Hearsay.

C. The Admission of the Double Hearsay Evidence Constituted Plain Error.

POINT IV

THE CUMULATIVE EFFECT OF THE IMPROPER ADMISSION OF PREJUDICIAL EVIDENCE REQUIRES REVERSAL.

POINT V

THE ENDANGERING STATUTE IS VAGUE AS APPLIED TO COUNTS [THIRTY-TWO], [THIRTY-FIVE], AND [THIRTY-SEVEN].

POINT VI

THE FOURTH-DEGREE LEWDNESS COUNTS CANNOT STAND BECAUSE THE JURY DID NOT FIND THAT [DEFENDANT] SEXUALLY DESIRED TO BE OBSERVED BY T.J., AND THERE WAS NO EVIDENCE OF THIS ELEMENT.

POINT VII

THE COURT ERRED IN ALLOWING THE STATE TO AMEND THE INDICTMENT THE DAY OF TRIAL, REQUIRING DISMISSAL OF AMENDED CONVICTIONS.

POINT VIII

A RESENTENCING IS REQUIRED BECAUSE THE COURT MISUNDERSTOOD THE EXTENDED-TERM RANGE, RELIED ON ARRESTS AND DISMISSED CHARGES, CONSIDERED ACQUITTED CONDUCT, DOUBLE COUNTED ELEMENTS OF THE CHARGES, AND IMPROPERLY IMPOSED [FIVE] CONSECUTIVE SENTENCES, RESULTING IN AN EXCESSIVE SENTENCE.

II.

We first address defendant's contention the trial court violated his Confrontation Clause rights by imposing restrictions on the scope of the cross-

examination of Soohoo regarding her negotiated plea deal that dramatically reduced her sentencing exposure. The record shows the parties at trial assumed Soohoo had been facing a maximum sentence of 125 years in state prison.[5] As a result of her cooperation agreement, she was sentenced instead to probation, avoiding imprisonment altogether.

The trial judge ruled that the "specific terms of years" Soohoo was exposed to could not be revealed on cross-examination. That ruling was not predicated solely on the concern that the jury would be able to equate Soohoo's sentencing exposure with defendant's and thereby reveal the sentence defendant could receive if convicted on all counts. Rather, the judge reasoned that determining the sentencing range would require "a frolic and detour in cross-examination into . . . kind [of] a labyrinth of New Jersey sentencing guidelines." The judge emphasized the extensive list of serious charges Soohoo was facing and the complexities of the legal considerations involved in rendering a sentence on all those charges.

[5] At oral argument, we requested information concerning the maximum sentence identified in Soohoo's plea form and referred to in the plea colloquy when she entered her guilty plea. A pretrial memorandum signed by Soohoo shows she was told she faced a maximum aggregate sentence of 320 years and six months.

The judge also reasoned that "the defense clearly is going to be permitted to question and cross-examine Ms. Soohoo on the deal that she has." He continued, "[s]he could be cross-examined on her awareness that she was facing a term of incarceration in New Jersey State Prison. . . . I have no objection to the use of the word 'years.'"

Defense counsel expressed concern that using only the term "years" to describe her sentencing exposure "does a disservice to 125 years." Defense counsel suggested "at the very least" including some sort of adjective, such as "significant, extensive, multiple, [or] decades worth."[6] The State suggested the words "significant" and "lengthy," which the judge thought were "perfectly appropriate." The judge left it to defense counsel to select the specific adjective.

During cross-examination, defense counsel elicited from Soohoo that she was "aware that the exposure [she] had was significant." He confirmed she understood that meant "exposure to New Jersey State Prison." He then elicited that she "knew that [her exposure] was lengthy." He then had Soohoo

[6] We do not view defense counsel's suggestion as a waiver of the right to challenge the trial judge's ruling on appeal, since it was made only after the judge ruled that counsel would be precluded on cross-examination from eliciting a specific number.

acknowledge that in exchange for her cooperation with the prosecutor, she would not go to prison and would be able retain custody of T.J.

We begin our analysis by acknowledging the governing legal principles. Criminal defendants are guaranteed the right to confront the witnesses against them by the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution. "In addition, our evidence rules underscore that principle by permitting the accused to cross-examine witnesses about the subject matter of any direct examination and matters affecting the witnesses' credibility." Jackson, 243 N.J. at 65 (citing N.J.R.E. 611(b)). Importantly, a witness's "motivation in testifying" can be explored through cross-examination. Ibid. (citing Delaware v. Van Arsdall, 475 U.S. 673, 678–79 (1986)). "Put plainly, the Confrontation Clause permits a defendant to explore, through cross-examination, the potential bias of a prosecution's witness." Ibid. (citing State v. Bass, 224 N.J. 285, 301 (2016)).

We find guidance, indeed direct instruction, in our Supreme Court's recent decision in Jackson. There, the Court addressed the same question before us in this appeal: "whether a defendant facing the same charges as a cooperating witness should be barred from exploring that adverse witness's sentencing exposure." Id. at 58.

Defense counsel in that case sought to elicit testimony that the cooperating codefendant would have been exposed to a sentencing range of three to five years had he not agreed to cooperate and testify against Jackson. Ibid. Pursuant to a plea agreement, the cooperating codefendant received probation conditioned upon a 180-day jail term. Ibid. The trial court precluded questioning regarding the codefendant's maximum exposure because it believed the jury would infer that Jackson faced the same exposure and be more reluctant to convict him as a result. Id. at 59, 62. The trial court thus only permitted testimony about the length of the sentences contemplated in the initial plea offer and the final agreement, not the maximum exposure. Id. at 59. Conversely, the trial court allowed the prosecutor to discuss the codefendant's minimum possible sentence during summation to argue the plea deal was "not so good." Id. at 72.

Jackson argued that this limitation on the cross-examination of the cooperating witness deprived him of his right to confrontation. Id. at 59. In considering this argument, the Court weighed the defendant's confrontation right against the concern that the jury would find the defendant not guilty if it inferred his sentencing exposure from the elicited testimony. Id. at 69. The Court held "the jury should have had full access to [the cooperating codefendant's] plea agreement history through the defense counsel's unfettered examination of that

history" and found the cross-examination limitations violated Jackson's rights to confrontation and a fair trial. Id. at 59, 74.

Instead of limiting the cross-examination, the Court explained the jury should be instructed "not to speculate about or consider a defendant's potential sentence when deciding whether the State has proven the charges alleged beyond a reasonable doubt." Id. at 71. The Court did "not favor a process in which trial judges perform a generalized gatekeeping function and try to decide whether cross-examination would adequately convey enough information about a witness's credibility without allowing questions about the witness's sentencing range." Id. at 72.

The Court went on to consider whether the error was harmless beyond a reasonable doubt. Id. at 72–74. It rejected the State's argument that other evidence revealed the codefendant's full exposure because the codefendant's own subjective perception of his exposure mattered, and the trial court had barred the defendant from asking the codefendant what he believed his exposure to be. Id. at 73. The Court found that if the jury had known the codefendant was actually facing an extended term of ten[7] years in state prison, the jury might

[7] Though the range sought to be introduced at trial was three to five years, the Court confirmed at oral argument that the codefendant was eligible for an extended term. Id. at 70.

have believed that this key witness for the State was biased. Id. at 73–74. The Court emphasized the defendant had a right to ask the codefendant about his subjective understanding of his exposure and thereby fully demonstrate the codefendant's potential bias. Id. at 73. The Court could not conclude beyond a reasonable doubt that the limitation on the cross-examination was harmless. Id. at 74. Because the Confrontation Clause error denied Jackson a fair trial, his conviction was reversed, and the case was remanded for a new trial. Ibid.

We reject the State's contention that Jackson should not be applied retroactively to the trial in this case. The State argues in its brief, "it is the State's position that Jackson is not retroactively applicable since a 'new rule of law' was not imposed." But the fact the Court was not making a "new rule" requires that its holding and rationale be applied to this case. It is axiomatic that an interpretation of established doctrine is applicable to existing cases. See State v. Colbert, 190 N.J. 14, 22 (2007) (holding a "restatement of a defendant's right of presence during voir dire . . . is not a new rule of law" and so "we have no warrant to consider limiting the retroactive effect of such a decision").

Turning to the substantive question, we are persuaded the deprivation of Confrontation Clause rights is even more compelling here than in Jackson given the actual numbers. Soohoo was told that, but for her cooperation agreement

with the prosecutor, she was facing over 300 years in prison. Unlike in Jackson, no evidence of Soohoo's actual sentencing exposure was ever presented to the jury.

We acknowledge the Court in Jackson noted, "[i]f, for example, cross-examination improperly suggested to the jury that a witness would receive consecutive sentences on multiple counts that would instead merge at sentencing, the judge could properly curtail that line of questioning." 243 N.J. at 72. But in finding harmful error, the Court stressed the defendant's inability to connect the testified-to sentencing range with the cooperating witness's awareness of that range. Id. at 73. So too, in the matter before us, defendant was precluded from cross-examining Soohoo on her awareness of the maximum sentence she would have faced but for her cooperation agreement with the prosecutor—a terms of years she would have been aware of because it was specifically referenced in the pretrial memorandum signed by her and her attorney.

Although the trial judge reasoned that Soohoo "could be cross-examined on her awareness," in practical effect, by precluding the use of actual numbers, the judge's ruling severely restricted that testimony. Defendant was precluded from establishing the enormous difference between the 320 years in prison

Soohoo was told she was facing and the probationary sentence—zero years—she actually received in consideration for her cooperation. That significant discrepancy—reflecting the benefit she received from her cooperation agreement—was relevant to show the extent of her potential bias in terms of her practical incentive to testify against defendant.

In sum, allowing the jury to hear only the terms of the plea agreement and that, but for the cooperation agreement, she would have been facing a "substantial" or "lengthy" prison term violated defendant's right to confrontation. We further conclude that, as in Jackson, the error was not harmless beyond a reasonable doubt. See id. at 74.

III.

We next address defendant's contention that the trial judge erred in denying his motion to sever the charges pertaining to T.J. from the charges pertaining to C.C. That contention is not rendered moot by our determination that defendant must be retried because of the Confrontation Clause violation. See infra note 10. Rule 3:7-6 permits the joinder of two or more offenses "if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan." Even if separate charges are

sufficiently similar to be joined under Rule 3:7-6, "Rule 3:15-2(b) . . . vests a court with discretion to sever charges '[i]f for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation.'" State v. Sterling, 215 N.J. 65, 73 (2013) (alteration in original) (quoting R. 3:15-2(b)).

To assess the prejudice of joining offenses, a court considers "whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges." Ibid. (alteration in original) (quoting State v. Chenique-Puey, 145 N.J. 334, 341 (1996)). N.J.R.E. 404(b)(1) provides, "evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." N.J.R.E. 404(b)(2), however, allows evidence of other crimes to be used "for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute."

The analytical framework established in Cofield is used to determine the admissibility of evidence under N.J.R.E. 404(b). The four prongs of that analysis are: (1) "[t]he evidence of the other crime must be admissible as

relevant to a material issue;" (2) "[i]t must be similar in kind and reasonably close in time to the offense charged;" (3) "[t]he evidence of the other crime must be clear and convincing;" and (4) "[t]he probative value of the evidence must not be outweighed by its apparent prejudice." 127 N.J. at 338 (quoting Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L.J. 135, 160 (1989)). These are not just relevant factors; rather, they are elements, all four of which must be established.[8]

As we have already noted, although the trial judge referred briefly to Cofield and considered a number or relevant circumstances, he did not explicitly and specifically make findings with respect to all four Cofield factors. We therefore instruct that on remand, the trial court shall reconsider the severance issue and make specific and findings under the Cofield analysis in sufficient detail to permit appellate review, if necessary.

We note that because several charges resulted in dismissals or acquittals, the severance analysis may be somewhat easier this time around. We offer no opinion on the application of the Cofield factors except to note that the fourth

[8] In cases where the other-crimes evidence serves a purpose that is unrelated to the similarity of the offenses, such as to prove a defendant's state of mind, the second prong may be omitted. State v. Barden, 195 N.J. 375, 389 (2008) (citing State v. Williams, 190 N.J. 114, 131 (2007)).

prong—whether the probative value of the other-crimes evidence is outweighed by the potential for prejudice—"is typically considered the most difficult to overcome." State v. Rose, 206 N.J. 141, 160 (2011) (citing Barden, 195 N.J. at 389). Unlike N.J.R.E. 403, which requires the probative value to be substantially outweighed by the risk of prejudice, Cofield's fourth prong is violated if the potential for prejudice merely outweighs the probative value. Id. at 160–61.

IV.

To provide guidance at the new trial on the remaining lewdness counts, we address defendant's contention the judge erred in instructing the jury on the elements of lewdness. Under N.J.S.A. 2C:14-4(b)(1), a person commits a fourth-degree crime if:

> He [or she] exposes his [or her] intimate parts for the purpose of arousing or gratifying the sexual desire of the actor or of any other person under circumstances where the actor knows or reasonably expects he [or she] is likely to be observed by a child who is less than [thirteen] years of age where the actor is at least four years older than the child.

In Hackett, our Supreme Court held that "[i]n order to constitute fourth-degree lewdness then, the nudity of the actor must be occasioned by the sexual desire of the actor to be observed by a minor who is less than thirteen. The mens

rea of the actor constitutes an important element of the offense of fourth-degree lewdness." 166 N.J. at 76 (emphasis added) (citation omitted). The relevant model jury charge quotes the emphasized language verbatim but does so only in a footnote; the model charge does not incorporate the Supreme Court's interpretation of the "important" mens rea element into the material elements listed in the main text of the model instruction. Model Jury Charges (Criminal), "Lewdness (Victim less than 13 years of age) (N.J.S.A. 2C:14-4(b)(1))" (approved Feb. 25, 2002).

At the charge conference, the trial judge and both parties agreed to use the model jury charge. While the judge was reading the charge to the jury, he stopped and asked the attorneys to approach, leading to the following exchange at sidebar:

> The Court: Yeah, I'm just going to -- a hanging, some hanging language here --
>
> [Defense Counsel]: Yeah, okay.
>
> The Court: -- that I don't need.
>
> [Defense Counsel]: Okay.
>
> The Court: I just want to make sure we're all on the same page. All right.

Although it is not certain, we suspect the "hanging language" the judge referred to is the footnote in the model charge that repeats the explanatory language in Hackett. The judge then read the rest of the model charge without referencing the language in Hackett that interprets the mens rea element.

We believe that was error. For purposes of instructing a jury, neither we nor a trial court may disregard an explicit Supreme Court ruling that interprets the meaning of a criminal statute, notwithstanding that the interpretation goes beyond the literal text of the statute. Cf. Pannucci v. Edgewood Park Senior Hous. – Phase 1, LLC, 465 N.J. Super. 403, 414 (App. Div. 2020) (noting we have no authority to issue a ruling that departs from Supreme Court precedent). At the remand trial, we direct the court to instruct the injury on the mens rea element of the fourth-degree lewdness crime as interpreted in Hackett.

V.

Defendant asserts for the first time on appeal that the trial judge improperly allowed the State to elicit hearsay evidence on two occasions. We decline to address those contentions, which can be raised to the trial court at the retrial on remand. In view of our decision to vacate defendant's convictions and order a new trial, we likewise decline to address defendant's cumulative error contention, his contention the trial judge erred by allowing the State to amend

the indictment after the jury was empaneled to correct the municipality where certain counts were alleged to occur, and his contention the trial judge erred in imposing his sentence.

Defendant also contends on appeal that the child endangerment statute, N.J.S.A. 2C:24-4(a),[9] is vague as applied to the conduct of engaging in sexual behavior in front of a small child. Defendant acknowledges that this issue was only "partially raised below." In moving to dismiss counts thirty-three through thirty-seven after the State rested, defendant primarily challenged the sufficiency of the evidence proving T.J. had actually seen nudity.

Defense counsel did not frame the argument as an as-applied challenge to the constitutionality of the endangering statute and never used the term "vagueness." Rather, counsel merely suggested it is relatively normal for a very young child to occasionally see a parent naked. We add that no evidence was

[9] N.J.S.A. 2C:24-4(a)(1) provides in pertinent part, "[a]ny person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree." This statute was amended twice in 2013 and again in 2017. L. 2013, c. 51, § 13; L. 2013, c. 136, § 1; L. 2017, c. 141, § 1. The conduct at issue here occurred between 2012 and 2014, so different iterations of the statute apply to different counts. We note that portions of this statute pertaining to "child erotica," which are not at issue in this appeal, were recently held to be unconstitutionally broad and vague by State v. Higginbotham, 475 N.J. Super. 205, 215 (App. Div. 2023).

presented by either party with respect to whether T.J. was too young to be aware of, and thus adversely effected by, his exposure to sexual activity—an issue defendant now argues on appeal.

We do not believe the constitutional issue was adequately raised and preserved for appellate review. See State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below."). On remand, defendant will have an opportunity to properly raise an as-applied challenge to the constitutionality of the endangering statute. In the meantime, we decline to render an opinion on a constitutional question based on this limited record.

Reversed and remanded for a new trial or trials.[10] We do not retain jurisdiction.

[10] We offer no opinion on whether defendant should be tried separately on remand for the offenses that pertain to C.C. and the offenses that pertain to T.J. See supra Section III.