SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2057-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEANGELO GONZALEZ,

Defendant-Appellant.

Submitted March 28, 2023 – Decided May 16, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 18-05-0488.

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

Mark Musella, Bergen County Prosecutor, attorney for respondent (William P. Miller, Assistant Prosecutor, of counsel and on the brief; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

A Bergen County grand jury returned an indictment charging defendant Deangelo Gonzalez with first-degree aggravated sexual assault of R.N. on August 18, 2017, N.J.S.A. 2C:14-2(a)(2)(c) (count one); second-degree sexual assault of R.N. on the same date, N.J.S.A. 2C:14-2(c)(4) (count two); third-degree aggravated criminal sexual contact of R.N. between July 1 and August 18, 2017, N.J.S.A. 2C:14-3(a) (counts three and four); and second-degree endangering the welfare of R.N. between July 1 and August 18, 2017, N.J.S.A. 2C:24-4(a)(1) (count five).[1] A jury found defendant guilty of counts one, two, and five, and acquitted him of counts three and four.

Defendant moved for a judgment of acquittal notwithstanding the verdict (JNOV) or a new trial. The judge denied the motion and immediately thereafter sentenced defendant. After merging count two into count one, the judge imposed a fourteen-year term of imprisonment with an eighty-five percent parole disqualifier pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and a concurrent five-year sentence on count five.

Defendant raises the following points for our consideration on appeal:

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[1] Because this case involves a child victim of an alleged sexual assault, we use initials and pseudonyms to protect her identity and the identities of her family members, because disclosure of their names might effectively disclose the victim's identity. N.J.S.A. 2A:82-46; R. 1:38-3(c)(9).

POINT I

THE STATE'S CASE IN CHIEF WAS REPLETE WITH INADMISSIBLE HEARSAY STATEMENTS RELAYED BY THE NURSES WHO EXAMINED R.N. IN WHICH THEY REGURGITATED IN DETAIL R.N.'S VERSION OF EVENTS. SUCH HEARSAY SIGNIFICANTLY BOLSTERED R.N.'S TESTIMONY, WAS UNDULY PREJUDICIAL AND CUMULATIVE, AND ITS IMPROPER ADMISSION REQUIRES THE REVERSAL OF [DEFENDANT'S] CONVICTIONS AND A REMAND FOR A NEW TRIAL. (Not Raised Below)

POINT II

[DEFENDANT'S] TRIAL WAS SUBSTANTIALLY AND IRREDEEMABLY PREJUDICED BY THE FAILURE TO SEVER THE CHARGES RELATING TO THE AUGUST 18, 2017, INCIDENT FROM THE OTHER, MORE MINOR INCIDENTS ALLEGED IN THE INDICTMENT. (Not Raised Below)

POINT III

EVEN IF THE FAILURE TO SEVER THE CHARGES FOR TRIAL DOES NOT CONSTITUTE REVERSIBLE ERROR, THE FAILURE TO PROVIDE ANY LIMITING INSTRUCTION ON THE FOUR EARLIER ALLEGATIONS OF SEXUAL MISCONDUCT REQUIRES REVERSAL OF [DEFENDANT'S] CONVICTIONS. (Not Raised Below)

POINT IV

THE CUMULATIVE IMPACT OF THE TRIAL ERRORS DENIED [DEFENDANT] DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

POINT V

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE SUBSTANTIALLY LONGER THAN THE MINIMUM TERM FOR A FIRST-TIME OFFENDER DUE TO THE INAPPROPRIATE WEIGHING OF AGGRAVATING FACTOR TWO.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

Thirteen-year-old R.N. (Rose) lived with her mother J.Z. (Jane), her sixteen-year-old sister E.Z. (Ellen), her six-year-old sister D.Z. (Dawn), and defendant in an apartment in Bergenfield. Defendant and Jane were not married, but they had been dating for approximately ten years, and defendant was Dawn's biological father. Although Ellen testified that the children had a good relationship with defendant, Rose said sometimes they got along and other times they argued. Rose referred to defendant as her stepfather.

On Friday, August 18, 2017, Jane dropped her daughters off at their grandmother's apartment in nearby Dumont. At approximately 1:25 p.m., Ellen

received a call from defendant on her cell phone. Defendant told Ellen he was coming by to drop off something for Rose, and she should come downstairs to meet him. Ellen testified that defendant, who worked at a car dealership in Paramus, had never before come to her grandmother's home while the girls were spending the day there. When defendant arrived, he handed Rose a box containing a hamster. Rose had desperately wanted the pet, but Jane said she would not get one for her daughter until she did her chores and was more respectful. Defendant told Rose they had to go home to get some food for the hamster.

Rose testified that while at home, defendant ordered her to lie on the bed, pulled down her shorts and panties, and vaginally penetrated her, causing Rose great pain. He then told Rose to get dressed and drove her back to her grandmother's house, calling Rose later to tell her to take a shower. When she showered, Rose said "there[wa]s blood everywhere and [she] broke down crying." Rose also noticed blood on her shorts and panties as well as the towel she used to dry herself. Frightened, Rose called her mother and asked her to pick her up. She told Jane that she could not talk about what had happened over the phone.

Shortly after 3:00 p.m., defendant again called Ellen and said he wanted to speak to Rose. Ellen called to Rose, who seemed upset; her face was red, and it looked like she had been crying. Rose refused to take the phone, but Ellen insisted. Defendant told Rose that if she did not tell her mother what happened, he would take her and her sisters to the pet store to get whatever she wanted for the hamster. Rose put the phone on speaker setting, and Ellen heard defendant tell Rose not to tell her mother, and he would do something to make up for what had happened.

Defendant and Jane both arrived separately at the grandmother's home. Rose reacted negatively upon seeing defendant but eventually, while alone with her mother, told her what had happened. Jane drove Rose to Hackensack University Medical Center (HUMC) without defendant.

Shortly after 6:00 p.m., Detective Michael Perez of the Bergen County Prosecutor's Office, Special Victims Unit, received a telephone call from HUMC advising that Rose was in the hospital alleging that she had been sexually assaulted. Perez contacted Beryl Skog, a Bergen County sexual assault nurse examiner.

Skog obtained consent from Jane and began her examination of Rose. When she asked Rose for an account of what had brought her to HUMC, Rose

said, among other things, that defendant "came into me," which she explained meant defendant put his penis in her vagina for what felt like five minutes. Rose did not know if defendant had ejaculated and, according to Skog, may not have understood the term.

Rose told Skog what had happened that day "had never happened before," but she said that defendant "had touched her breasts and grabbed her butt . . . multiple times" in the past. Rose testified before the jury that defendant had sexually touched her breasts and buttocks four times during the month or so before the August 18 assault, but she had not told her mother because her mother "loved" defendant.

Skog's examination of Rose's vaginal area revealed an abrasion, "a large amount of bright red blood coming from the vaginal opening," and a laceration from the hymen to the right vaginal wall. Because of the severity of the injuries, Skog asked a physician to examine Rose. Skog determined the injuries to Rose occurred within twenty-four hours of the examination, which was completed at 11:55 p.m. Rose was referred to Audrey Hepburn Children's House (AHCH) for further medical evaluation.[2]

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[2] On Monday, August 21, 2021, Jane and Rose gave formal statements to Perez. Jane did not testify at trial.

Rose saw Mary Beth Mariano, an advanced practice nurse at AHCH, the next day as a follow-up to Skog's examination. Mariano was qualified at trial as an expert in medical evaluations of suspected child abuse victims. After examining Rose, Mariano concluded there was a laceration of Rose's hymen and sub-mucosal hemorrhaging, findings that were consistent with a penetrating hymenal injury.[3]

Detective Perez went to the car dealership where defendant worked and reviewed video surveillance footage and other records from August 18. He confirmed that defendant may have left the dealership at 12:49 p.m. and returned at 2:14 p.m., times that were consistent with Rose's account of when defendant assaulted her. Perez also obtained a store receipt indicating that defendant had purchased a hamster on August 18 at 1:05 p.m.

The State introduced significant evidence from two of defendant's co-workers. Michael Barahona Portillo said that on August 18, defendant called and asked Portillo to say that he (Portillo) had given defendant a pet hamster for Rose. Defendant called later and suggested Portillo tell Jane that he had found

[3] Forensic analysis was done on Rose's clothing and other items taken from her home and her grandmother's home, but no semen was found.

the hamster in a field if she asked. Defendant called again and told Portillo to forget about his earlier calls.

On the following Monday, Portillo noticed defendant's truck parked in the back of the dealership lot near the new car stock; defendant usually parked by the front entrance where there was shade. Portillo asked what had happened, and defendant answered, "when you hurt somebody's kid, they try to hurt your stuff. If they can't . . . hurt . . . you, they hurt your stuff."

That same Monday, Ronlee Christopher Harman, another co-worker, asked defendant what was wrong because he seemed nervous. Defendant answered that he did not want to talk about it, but when Harman pressed him, defendant said he "fucked up" and was "facing [twenty] years." When Harman asked for particulars, defendant said he could not get Harman involved and went inside the building.

Defendant elected not to testify but called several witnesses who testified to his good and truthful character.

II.

Defendant contends the testimony of Skog and Mariano that recounted Rose's description of the August 18 sexual assault was inadmissible hearsay. Defendant argues the testimony was not admissible under N.J.R.E. 803(c)(4), an

exception to the hearsay rule that permits the admission of out-of-court statements "made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment[] and . . . describes medical history; past or present symptoms or sensations; their inception; or their general cause." Defendant argues Skog's purpose was to collect evidence, and although Mariano arguably was rendering medical treatment to Rose, defendant contends "extraneous details about the factual background leading up to an injury do not fall within the hearsay exception."

As we have said, "There is no doubt that if the examination . . . was conducted for evidence gathering purposes, the hearsay statements contained in the medical history would be inadmissible as not falling within [N.J.R.E. 804(c)(3)]." State v. Pillar, 359 N.J. Super. 249, 289 (App. Div. 2003) (citing State in Interest of C.A., 201 N.J. Super. 28, 33–34 (App. Div. 1985)). And "statements to physicians concerning the cause of an injury, when the cause is irrelevant to diagnosis or treatment, are inadmissible." R.S. v. Knighton, 125 N.J. 79, 88 (1991) (citing Cestero v. Ferrara, 57 N.J. 497 (1971)).

We think the argument as to Mariano lacks sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2). Mariano's testimony generally centered on her review of Rose's medical records, her personal

examination of Rose, including blood testing and urine testing, and her findings, which were consistent with a "penetrating hymenal injury." To the extent the nurse testified about Rose's statements regarding the assault, those statements were directly related to the child's "medical history; past or present symptoms or sensations; their inception; [and] their general cause." N.J.R.E. 803(c)(3) (emphasis added); see R.S., 125 N.J. at 88 ("[W]hen the cause of a symptom, pain, or physical sensation is relevant to diagnosis and treatment, courts will admit the statement." (citing Bober v. Indep. Plating Corp., 28 N.J. 160, 171–72 (1958)).

We reach a different conclusion regarding Skog's testimony. Early in her testimony, Skog stated: "[O]ur protocol dictates that no one does a complete exam of patients before we see them because we [do not] want to lose evidence. But it is also our protocol that the patient be medically cleared or medically screened for a forensic exam." (Emphasis added). Skog also testified regarding her conversations with Rose about defendant's prior sexual touching, events which were obviously unrelated to any medical treatment or diagnosis.

> Q. While [Rose] was explaining the history of the incident, did she explain to you anything that happened previously?
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> A. She did mention that what had happened that day had never happened before, but that inappropriate

> touching had occurred. Specifically, she said that he had touched her breasts and grabbed her butt. Her words.
>
> Q. And did she give you any further information relating to those incidents?
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> A. She said that it had happened multiple times. She said that she had told her grandmother. But she said her grandmother probably forgot.

In short, we agree with defendant that much of Skog's testimony regarding Rose's statements was inadmissible hearsay.

Because there was no objection to the evidence at trial, we review the argument under the plain error standard. "We consider whether [the] testimony was 'clearly capable of producing an unjust result.'" State v. Trinidad, 241 N.J. 425, 445 (2020) (quoting R. 2:10-2). "This is a 'high bar,' requiring reversal only where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (first quoting State v. Santamaria, 236 N.J. 390, 404 (2019); and then quoting State v. Macon, 57 N.J. 325, 336 (1971)). 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.'" State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)).

Rose testified to the events that caused her injuries before the jury, which had a first-hand opportunity to evaluate her credibility. Her description of what occurred was consistent with the likely cause of injuries observed by both Skog and Mariano. The statement Ellen overheard defendant make shortly after the assault, as well as the testimony of defendant's co-workers, provided damning evidence demonstrating defendant's consciousness of guilt. To the extent Skog's testimony was inadmissible hearsay, we are convinced its admission did not lead the jury to a result it otherwise would not have reached, and any error does not require reversal.

III.

Defendant argues it was prejudicial error not to sever the charges alleging crimes on August 18, 2017, from the other counts alleging crimes committed weeks prior to the sexual assault. In a separate point, defendant contends the judge erred because "no limiting instruction was provided to the jury instructing it to not consider the multiple allegations as evidence of [defendant's] propensity to commit such offenses." We reject both points.

Rule 3:7-6 permits the joinder of offenses in a single indictment for trial if they are of a "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." "'Charges need not be identical to qualify as "similar" for purposes of joinder under Rule 3:7-6,' but they must be 'connected together,' or be 'parts of a common scheme or plan.'" State v. Smith, 471 N.J. Super. 548, 575 (App. Div. 2022) (first quoting State v. Sterling, 215 N.J. 65, 91 (2013); then quoting ibid.; and then quoting id. at 72)). "The preference is for joinder of the offenses in a single trial unless the defendant demonstrates prejudice." Ibid. (citing State v. Chenique-Puey, 145 N.J. 334, 341 (1996)).

"Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would prejudice unfairly a defendant." Chenique-Puey, 145 N.J. at 341 (citing State v. Oliver, 133 N.J. 141, 150 (1993)).

> To avoid prejudicial joinder, the court must conclude the proffered evidence for each set of charges would be admissible in a separate trial on the other set of charges because the "N.J.R.E. 404(b) requirements [are] met, and the evidence of other crimes or bad acts [is] 'relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.'"
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> [Smith, 471 N.J. Super. at 567 (alterations in original) (quoting Sterling, 215 N.J. at 73).]

Generally, a defendant is required to make any motion to sever the charges before trial. R. 3:15-2(c); R. 3:10-2. "[A]fter a trial of several charges without

objection, it takes a strong showing of probable prejudice in fact to warrant a finding of 'plain error.'" State v. Baker, 49 N.J. 103, 105 (1967).

Because defendant never moved for severance, the judge was not required to conduct an analysis using State v. Cofield's four-part test to decide whether evidence regarding the two sets of charges would be admissible under N.J.R.E. 404(b) if tried separately. 127 N.J. 328, 338 (1992). Conducting our review de novo, State v. Lykes, 192 N.J. 519, 534 (2007), we have no doubt that had defendant moved for severance, the motion would have been denied, because "the proffered evidence for each set of charges would be admissible in a separate trial on the other set of charges." Smith, 471 N.J. Super. at 567. Defendant's contention requires no further discussion in a written opinion. R. 2:11-3(e)(2).

We also reject defendant's argument that the judge was required sua sponte to give a limiting "non-propensity" instruction to the jurors, advising them that they should not conclude that defendant had a propensity to commit sexual crimes because charges involving different dates were included in the same indictment. Defendant cites State v. Krivacska, 341 N.J. Super. 1 (App. Div. 2001), for support.

There, in a single trial involving charges of sexual crimes committed against two child victims, we said: "The trial court 'should state specifically the

purposes for which the evidence may be considered and, to the extent necessary for the jury's understanding, the issues on which such evidence is not to be considered.'" Id. at 42 (quoting State v. Stevens, 115 N.J. 289, 309 (1989)); see also State v. Pitts, 116 N.J. 580, 603 (1989) (noting "it would have been preferable, . . . when multiple counts are joined in a single indictment, . . . to have emphasized to the jury its duty to avoid any negative or prejudicial impressions that might . . . be created by the joinder of several criminal charges in a single indictment").

However, unlike Krivacska, there was only one victim in this case, defendant's stepdaughter, so it was unlikely that the joinder of different offenses in a single indictment led the jury to conclude defendant had a propensity to commit sexual crimes against children in general. More importantly, in Krivacska, we found the lack of a "non-propensity" charge was not plain error particularly because the "charge given by the judge clearly conveyed the principle that the jury was prohibited from considering the cumulative impact of the evidence of all the offenses in determining whether a particular charge had been proven. That was the thrust of the instruction to consider each charge separately." Id. at 43. The judge here gave the jury similar instructions. See also Pitts, 116 N.J. at 603 (finding such instruction "adequate" in a capital

murder case). We reject defendant's argument that the failure to sua sponte provide special non-propensity instructions was plain error.

Given our disposition of these arguments, we reject defendant's separate claim that an accumulation of errors compels reversal of his conviction.

IV.

At sentencing, the judge found aggravating factors two (gravity and seriousness of harm), three (risk of re-offense), and nine (need to deter), see N.J.S.A. 2C:44-1(a) (2), (3), and (9), as well as mitigating factors seven (lack of prior criminal record), nine (defendant's character indicated he was unlikely to reoffend), and eleven (imprisonment would entail excessive hardship). N.J.S.A. 2C:44-1(b) (7), (9), (11). Defendant argues "[o]f the three aggravating factors found, the judge acknowledged that factor three . . . was entitled to little weight and was outweighed by the finding of mitigating factor nine, . . . and [aggravating] factor nine . . . is . . . found in every case and not entitled to significant weight." From this premise, defendant contends "the decision to impose a mid-range sentence of fourteen years rested entirely on the trial court giving heavy weight to aggravating factor two," and "the judge improperly double-counted in finding and weighing aggravating factor two when it did not apply." We disagree.

We review the judge's sentence under an abuse of discretion standard, mindful of the Court's "caution[] not to substitute [our] judgment for th[at] of [the] sentencing court[]." State v. Miller, 237 N.J. 15, 28 (2019) (quoting State v. Case, 220 N.J. 49, 65 (2014)). We must affirm the sentence unless "(1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent credible evidence in the record'; or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Rivera, 249 N.J. 285, 297–98 (2021) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).

Aggravating factor two requires the sentencing judge to consider

> [t]he gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance[.]
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> [N.J.S.A. 2C:44-1(a)(2).]

Aggravating factor two "focuses on the setting of the offense itself with particular attention to any factors that rendered the victim vulnerable or incapable of resistance at the time of the crime." State v. Lawless, 214 N.J. 594,

611 (2013) (citing N.J.S.A. 2C:44-1(a)(2)). Indeed, the Court has made clear that "psychological harm, which may be a material factor in sentencing for violent crimes, has been considered relevant under [aggravating factor two]." State v. Kromphold, 162 N.J. 345, 357 (2000) (citing State v. Logan, 262 N.J. Super. 128, 132 (App. Div. 1993)).

Count one of the indictment charged defendant with aggravated sexual assault pursuant to N.J.S.A. 2C:14-2(a)(2)(c). An actor is guilty of that crime if he "commits an act of sexual penetration with" a "victim . . . at least [thirteen] but less than [sixteen] years old," and "[t]he actor is a resource family parent, a guardian, or stands in loco parentis within the household." Ibid. Defendant's essential complaint is that aggravating factor two did not apply because the judge double counted Rose's age and defendant's status in making that finding. See Kromphold, 162 N.J. at 353 ("[F]acts that establish[ ] elements of a crime for which a defendant is being sentenced should not be considered as aggravating circumstances in determining that sentence."); State v. C.H., 264 N.J. Super. 112, 140 (App. Div. 1993) (finding error in applying aggravating factor two where the victim's age was what raised the sexual assault conviction to a first-degree offense (citing State v. Hodge, 207 N.J. Super. 363, 504 (App. Div. 1986))).

However, "[a] sentencing court may consider 'aggravating facts showing that [the] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" State v. Fuentes, 217 N.J. 57, 75 (2014) (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)). Specifically, as to aggravating factor two, the judge stated:

> I find [a]ggravating [f]actor [two], the seriousness of the harm caused to the child. Obviously, there was physical harm as presented at the hospital, but more seriously is the psychological harm. . . . I heard from the victim, . . . I read the victim's statement[,] and I heard from her family as to how this [incident] has changed her . . . . And in a sense it[ha]s taken away her childhood, taken away her innocence. And it[i]s going to last with her probably much, much longer than I sentence the defendant. It probably will be a life sentence for her. Hopefully with therapy she can deal with it and cope with it and live . . . a happy life. But she has this on her which no child, no child should ever have to deal with. And I take that strongly and weigh heavily . . . [a]ggravating [f]actor [two].
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> [(Emphasis added).]

Although the judge obviously mentioned Rose's age, his findings were firmly tethered to the "gravity and seriousness" of the harm defendant's criminal conduct had inflicted on her. Rose was not only physically injured in defendant's brutal attack, but she was also scarred psychologically from the

assault. We cannot conclude the judge mistakenly exercised his broad discretion in imposing the sentence that he did.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION