SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2269-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ANGEL VASQUEZ-MERINO,

Defendant-Respondent.

Submitted December 12, 2022 – Decided May 4, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 20-12-0494.

Yolanda Ciccone, Middlesex County Prosecutor, attorney for appellant (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Stefan Van Jura, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

The State appeals from the February 18, 2022 order of the Law Division dismissing a seven-count indictment against defendant Angel Vasquez-Merino with prejudice. We reinstate two counts of the indictment and reverse the February 18, 2022 order to the extent that it dismisses the remaining counts of the indictment with prejudice.

I.

In 2020, an assistant prosecutor called a single witness, a detective employed by the prosecutor's office, to testify before a grand jury with respect to seven proposed charges against defendant. Through a series of leading questions, the detective confirmed statements given to her and other investigators by defendant, then twenty-two years old, the two victims, S.B., then twelve years old, and her sister V.O., then seven years old, and two adult witnesses, Andrazette Ramirez and Kalen O'Donnell.[1] The detective recounted the following.

S.B. reported that on July 1, 2020, defendant followed her and V.O. as they walked along a New Brunswick sidewalk. He asked the girls where they were going and if S.B. "needed company." Defendant stopped the girls by a

[1] We use initials to protect the identity of the minor victims of the alleged offenses. R. 1:38-1(c)(12). The State offered no evidence to the grand jury of defendant's age. He does not dispute that he was an adult on the relevant dates.

supermarket where he told S.B. that "she shouldn't be running" and that she "was too pretty to be running" while looking at her legs. S.B. felt scared and uncomfortable. Defendant then reached over and touched S.B.'s hair with his hand. He asked if S.B. "wanted to go to the store to get water." S.B. said no.

V.O. corroborated S.B.'s account of their interaction with defendant. She added that defendant was on a bicycle and when he started following the girls, they went from walking to running to get away from him. V.O. heard defendant say, "why are you running? You shouldn't be running because you're so pretty" and "do you want to go to the store to get water?"

Ramirez and O'Donnell saw the interaction between defendant and the girls. They reported that they observed the girls run past them followed by "an older male on a bike." They watched defendant talk to the girls and touch S.B.'s head. They then asked the girls if they knew defendant. S.B. responded that they did not know defendant and he had been following them. The witnesses waved to police for assistance and O'Donnell took a photograph of defendant before he fled. S.B. and V.O. confirmed that the witnesses approached them, asked if they knew defendant, and took a photograph of defendant.

S.B. also reported that six days later, on July 7, 2020, she saw defendant in front of her apartment building. According to S.B., defendant said "Hi. Do

you remember me?" S.B. told her mother that defendant was the same man who followed her earlier. S.B.'s mother told her to call the police, which S.B. did. S.B. later identified defendant.

Defendant admitted to the detective that he followed S.B. and V.O. on his bicycle while they walked down the sidewalk on July 1. He said that he asked S.B. "how are you?" and "where are you going?" Defendant initially stated that he touched S.B.'s shoulder, but upon further questioning conceded that he touched her hair. Defendant also admitted being "interested in S.B." and that he thought she was "cute." He said that he was confronted by a woman who yelled at him, which caused him to leave the scene. Defendant also admitted that he saw S.B. on July 7, asked her "are you the same girl as before?" and told her that she "was bad for calling the police on" him.

The grand jury indicted defendant, charging him with: (1) second-degree luring, N.J.S.A. 2C:13-6(a) (S.B. on July 1) (count one); (2) third-degree endangering the welfare of a child by engaging in sexual conduct, N.J.S.A. 2C:24-4(a)(1) (S.B. on July 1) (count two); (3) second-degree luring, N.J.S.A. 2C:13-6(a) (V.O.) (count three); (4) third-degree endangering the welfare of a child by engaging in sexual conduct, N.J.S.A. 2C:24-4(a)(1) (V.O.) (count four); (5) second-degree luring, N.J.S.A. 2C:13-6(a) (S.B. on July 7) (count five); (6)

third-degree endangering the welfare of a child by engaging in sexual conduct, N.J.S.A. 2C:24-4(a)(1) (S.B. on July 7) (count six); and (7) fourth-degree stalking, N.J.S.A. 2C:12-10(b) (S.B. on July 7) (count seven).

Defendant moved to dismiss the indictment with prejudice. He argued the State failed to make a prima facie showing to the grand jury of the following elements of the charged offenses: (1) intent to commit a criminal offense against either S.B. or V.O. for the three luring counts; (2) knowing engagement in sexual conduct with a child for the three child endangerment counts; and (3) purposeful or knowing engagement in a course of conduct directed at a specific person for the stalking count.

The trial court issued a written opinion granting defendant's motion. With respect to the three luring counts, the court noted that one element of luring is that the defendant attempted "to lure or entice a child . . . into a . . . structure or isolated area, or to meet or appear at any other place . . . ." N.J.S.A. 2C:13-6(a). The court concluded that "the State provided no evidence to suggest that the defendant attempted to 'lure' the victims anywhere on either" July 1 or July 7. The court characterized the evidence relating to July 1 as suggesting only that defendant attempted to speak to the victims and followed them in order to ask if they wanted to go into a supermarket to get water. The court found that the

evidence relating to July 7 suggests "the defendant did nothing more than launch a single innocuous inquiry towards the older girl upon seeing her from an unidentified distance in front of her home, and nothing more."

In addition, the court found that the State did not make a prima facie showing of another element of luring, that the attempt to lure was made "with a purpose to commit a criminal offense with or against the child." Ibid. The court reasoned that

> [t]he discovery does provide that the defendant admitted to liking the older of these two sisters, and so the motivation for approaching them seems clear. What the discovery does not provide is any evidence of what the defendant was attempting to do . . . . Without more, it is also clear that the crux of this presentation is premised upon unsupported speculation concerning the defendant's intent based simply on the difference in age and gender between the defendant and these sisters, the older of which he had expressed a liking to.

The court further explained,

> [w]hile likely an interaction a parent would not endeavor to entertain nor tolerate, the State fails to satisfy this second prima facie element as they cannot identify, and are barred from inferring the existence of, an unprotected and non-public space to which the girls were to be drawn away . . . in either instance . . . . The conversation recounted by the State makes clear that only the store they stood in front of was the location referenced and for an expressed non-criminal purpose (i.e., buying them water). How the charge would be deemed applicable in the second instance when no

> invitation was extended and only a simple question was posed to the older sister is even more baffling.

The court found that the State failed to instruct the jury as to the particular crime it alleged defendant intended to commit after luring the victims to a non-public space, invalidating the luring counts of the indictment. "This remains especially true," the court reasoned,

> where the evidence proffered reasonably suggests the possibility of an innocent purpose, as in this case . . . . Without such an instruction, jurors would be allowed unbridled autonomy in determining criminal purpose and to speculate whether the defendant's purpose, which they may have deemed to be wrongful, was not only unlawful but criminal.

Thus, the court concluded, the grand jurors were allowed "to speculate as to a criminal purpose they could impute to defendant's actions . . . based upon their own notions of inappropriate conduct which they could impermissibly equate with criminality . . . ."

With respect to the three endangering counts, the court found that the evidence produced by the State relating to July 1 does not "identify a requisite sexual component to the interaction . . . beyond the age and gender of" defendant and the victims. The court found that the evidence relating to July 7, "fails even further to satisfy the elements of this charge." Absent evidence "of the forbidden prurient interest attached to such actions" the encounter between defendant and

S.B. on that date was insufficient, the court found, to constitute prima facie evidence of sexual conduct.

The trial court did not address the stalking charge. However, the court found that the manner in which the State presented evidence to the grand jury with respect to all of the charges was defective. Although acknowledging that an indictment may be based solely on hearsay testimony, the court concluded that the grand jury could not perform its function to evaluate evidence because the sole witness: (1) did not explain her involvement in the matter, beyond stating that she worked for a unit of the prosecutor's office that investigated sexual assault and child abuse; (2) answered "yes" to leading questions for almost all of her testimony; and (3) provided only hearsay evidence.

The court found that

> [i]n attempting to fulfill their obligation to establish a prima facie case against the accused, the State presented its evidence in a way that was tantamount to telling the grand jury, at a minimum, an incomplete story, an interpretation of a set of facts from the perspective of the assistant prosecutor presenting the case instead of through the words captured within the witness statements, or perhaps, at worst, a "half-truth" by disallowing a full vetting of the storyline behind the defendant's culpability through the limitations they placed both on the form of the questions they asked and the focus of their voir dire. The residual effect of this grand jury presentation was that it marked the process which resulted in the return of this indictment against

> this defendant as fundamentally unfair for the reasons cited within this decision.

The court held that "based on the manner in which the State presented this case," the indictment was dismissed with prejudice.[2] A February 18, 2022 order memorializes the court's decision.

This appeal followed. The State makes the following argument.

> AS SUFFICIENT EVIDENCE WAS PRESENTED TO THE GRAND JURY TO ESTABLISH A PRIMA FACIE CASE THAT DEFENDANT COMMITTED THE CRIMES CHARGED IN COUNTS ONE AND TWO OF THE INDICTMENT, THE TRIAL COURT ERRED IN DISMISSING THOSE TWO COUNTS.

The State does not appeal the trial court's dismissal of the remaining five counts of the indictment. It does, however, argue that the trial court erred when it dismissed those counts with prejudice.

II.

The New Jersey Constitution provides that "[n]o person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand

[2] The court also took issue with the State's "more than slight artistic license . . . in drafting the facts . . . in support of the complaint warrant for defendant's arrest nearly two . . . years" earlier. The court was referring to the affidavit of probable cause leading to defendant's arrest, which stated that he "stroked S.B.'s hair while looking at her body seductively and told her she was pretty." Our review of the transcript of the grand jury proceedings does not reveal any indication that the grand jurors were presented with the affidavit.

jury, except in cases" not applicable here. N.J. Const. art. I, ¶ 8. An indictment "informs[s] the defendant of the offense charged against him, so that he may adequately prepare his defense." State v. Dorn, 233 N.J. 81, 93 (2018) (alteration in original) (quoting State v. LeFurge, 101 N.J. 404, 415 (1986)). The indictment, therefore, must "allege[] all the essential facts of the crime" charged. State v. L.D., 444 N.J. Super. 45, 55 (App. Div. 2016) (quoting State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 19 (1984)). In addition, the State must present proof to the grand jury of every element of an offense and allege those elements in the indictment. State v. Fortin, 178 N.J. 540, 633 (2004).

It is well established that "a dismissal of an indictment is a draconian remedy and should not be exercised except on the clearest and plainest ground." State v. Zembreski, 445 N.J. Super. 412, 424-25 (App. Div. 2016) (quoting State v. Williams, 441 N.J. Super. 266, 271 (App. Div. 2015)). An indictment should stand unless it "is manifestly deficient or palpably defective." State v. Twiggs, 233 N.J. 513, 532 (2018) (quoting State v. Hogan, 144 N.J. 216, 229 (1996)). We review an order determining the sufficiency of an indictment for an abuse of discretion. State v. Tringali, 451 N.J. Super. 18, 27 (App. Div. 2017).

"A trial court deciding a motion to dismiss an indictment determines 'whether, viewing the evidence and the rational inferences drawn from that

evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it.'" State v. Brady, 452 N.J. Super. 143, 158 (App. Div. 2017) (quoting State v. Saavedra, 222 N.J. 39, 56-57 (2015)). "As long as the State presents 'some evidence establishing each element of the crime to make out a prima facie case,' a trial court should not dismiss an indictment." State v. Nicholson, 451 N.J. Super. 534, 541 (App. Div. 2017) (quoting State v. Feliciano, 224 N.J. 351, 380 (2016)). As the Supreme Court has explained,

> [i]n the grand jury setting, our law sharply distinguishes between evidence sufficient to support an indictment and the evidence necessary to establish guilt beyond a reasonable doubt. At the indictment stage, the State need not present evidence necessary to sustain a conviction, but only a showing sufficient for the grand jury to "determine that there is prima facie evidence to establish that a crime has been committed."
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> [State ex rel. A.D., 212 N.J. 200, 219-20 (2012) (quoting N.J. Trade Waste Ass'n, 96 N.J. at 8).]

"[T]he quantum of such evidence 'need not be great.'" State v. Fleishman, 383 N.J. Super. 396, 399 (App. Div. 2006) (quoting State v. Schenkolewski, 301 N.J. Super. 115, 137 (App. Div. 1997)), aff'd, 189 N.J. 539 (2007). A defendant seeking to dismiss an indictment shoulders the "heavy burden" of demonstrating "'that evidence is clearly lacking to support the charge.'" State v. Graham, 284

N.J. Super. 413, 417 (App. Div. 1995) (quoting State v. McCrary, 97 N.J. 132, 142 (1984)).

A.

We begin with count one of the indictment.

> A person commits a crime of the second degree if he attempts, via electronic or any other means, to lure or entice a child or one who he reasonably believes to be a child into a motor vehicle, structure or isolated area, or to meet or appear at any other place, with a purpose to commit a criminal offense with or against the child.
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> [N.J.S.A. 2C:13-6(a).]

This offense consists of "three distinct elements: (1) the accused attempted to lure or entice into a motor vehicle, structure, or isolated area, or to meet or appear at any place, (2) a child under the age of eighteen, (3) with a purpose to commit a criminal offense with or against that child." State v. Perez, 220 N.J. 423, 434-35 (2015).

Defendant contends that the State did not produce some evidence of either element (1) or (3). He argues that his request that S.B. go into the supermarket is not evidence of the first element because a supermarket is not a less public place than the sidewalk and is not an isolated location. We disagree.

According to N.J.S.A. 2C:13-6(b), for purposes of the luring statute, "'[s]tructure' means any building . . . and . . . any place adapted . . . for carrying

on business therein . . . ." The statute does not require that a defendant entice a child into a building that is less public or more isolated than the place at which the enticement is made, nor does the building have to be an isolated location. It was not necessary, therefore, for the State to produce evidence that the supermarket that defendant asked S.B. to enter was less public or more isolated than the sidewalk where he made that request. It was sufficient for the State to produce some evidence that defendant attempted to entice S.B. to enter that structure. We note, however, that the grand jurors could reasonably have inferred that a supermarket would present defendant with more opportunities to shield criminal behavior with a child – bathrooms, storage rooms, behind display cases – than would a public sidewalk.

The closer question is whether the State presented some evidence that defendant attempted to lure S.B. into the supermarket with the purpose to commit a criminal offense with or against her. At best, defendant argues, the State produced some evidence that defendant had the purpose of engaging in undefined "inappropriate, unseemly, reprehensible, or even unlawful" behavior with or against S.B. that "falls below [the] threshold" of a criminal offense. See State v. Olivera, 344 N.J. Super. 583, 590 (App. Div. 2001).

In Olivera, the defendant was driving a van when he saw a thirteen-year-old girl, whom he did not know, walking alone on a sidewalk. Id. at 587. He pulled over and spoke to the girl through an open window, asking if she attended the nearby school and wanted a ride. Ibid. The defendant opened the passenger side door and invited the girl to get into his vehicle. Id. at 587-88. She declined and the defendant drove away. Id. at 588. When interrogated, the defendant falsely stated that he offered the girl a ride because he knew her father. Ibid.

A jury convicted the defendant of luring. Id. at 589. We reversed. Id. at 594. We began our analysis by noting that for purposes of the luring statute,

> [t]he Legislature has chosen to condition a defendant's culpability for luring on a purpose to commit a "criminal offense," a term we equate with "crime," defined as "[a]n offense . . . for which a sentence of imprisonment in excess of 6 months is authorized."
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> [Id. at 589 (quoting N.J.S.A. 2C:1-4(a)).]

The defendant argued that the trial court's jury instructions defining this element of luring were impermissibly broad because they allowed the jury to convict him of luring, even though the jurors may have concluded that he had the purpose to engage in behavior with the child that did not constitute a criminal offense. Id. at 590.

After instructing the jury with respect to the statutory definition of a crime, the trial court instructed them that "the State does not have to prove that the defendant intended to commit a particular offense. Only that it was his purpose to commit some criminal offense with or against the child." Id. at 591. The trial court then surmised that the State was alleging that the defendant intended to commit an endangering offense had he successfully lured the child into the van. Ibid.

We concluded that the trial court's instructions defining the elements of an endangering offense were appropriate and would not have warranted a reversal had they ended there. Id. at 592. However, after a side bar conference with counsel, the trial court added to its instructions:

> One other thing. I talked to you about endangering the welfare of a child as being the State's theory; that I surmised was the State's theory. Obviously, I cannot and I should not limit your discretion in any way. If you find there was another purpose which was a criminal purpose and you find that the evidence is there to support that conclusion, you're free to do that by the way. I don't have the power to limit your power. Your power is absolute.
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> [Ibid. (emphasis omitted).]

We concluded that the instruction was error because the evidence presented to the jury "suggest[ed] the possibility of an innocent purpose, namely

[the] defendant's expressed purpose of giving [the girl] a ride to school." Id. at 594. In addition, because a "myriad of unlawful acts lie between criminal and lawful conduct . . . [g]uidance from the court is required to enable jurors to correctly navigate these distinctions." Ibid. Although that guidance "was initially provided by the trial court," when it defined the elements of endangering, we concluded that it "was eviscerated by the supplemental charge, which allowed the jurors unbridled autonomy in determining criminal purpose." Ibid. We explained that "[t]he jurors were thus allowed to speculate whether defendant's purpose, which they may have deemed to be wrongful, was not only unlawful, but criminal. Without proper judicial guidance, jurors are not qualified to make such a determination." Ibid.

The State relies on the holding in State v. Perez, 177 N.J. 540 (2003), to support its argument that it presented some evidence from which the grand jurors could reasonably infer that defendant's purpose in luring S.B. to the supermarket was to commit a criminal offense. In Perez, the defendant was thirty-four years old when he approached a thirteen-year-old girl with his vehicle as she walked to school. Id. at 544. He pulled alongside the child and offered her a ride. Ibid. When she declined, he repeated his offer. Ibid. After the child again refused to get into his car, the defendant drove away. Ibid.

Three months later, the defendant, while driving, saw the child playing with her siblings. Ibid. After pulling alongside the child, the defendant stopped his car, and asked her "do you remember me?" Id. at 545. After she ignored him, the defendant called out to her, asking her to approach the car. Id. at 544-45. When the child's brother said "what?", the defendant said, "not you, her." Ibid. Once the children left, the defendant drove away. Ibid.

During a subsequent interrogation, the defendant admitted that he was "obsessed" with the child. Ibid. He described her as "cute" and "nice" and said "I don't want to give up anything like my marriage, but what impressed me about her is her looks, she's attractive and her height." Ibid. While claiming that he did not know the child was a minor, the defendant admitted that he thought she was "about 16." Ibid. The defendant stated that he was "trying to take advantage of how I look now while I can" and that he sometimes fantasized about the girl. Ibid. The defendant also admitted that he thought about asking the child "for a date" but that "it's hard to come on to a lady straight" and "[y]ou have to play the game." Id. at 546.

The defendant was charged with luring. Ibid. The victim, her siblings, and other witnesses testified, and the officer who interrogated the defendant read his entire statement to the jury. Ibid. The defendant moved for a judgment of

acquittal, arguing that there was insufficient evidence that he invited the girl into his car for a criminal purpose. Ibid. The trial court allowed the charge to go to the jury, which convicted the defendant. Id. at 546-47. We reversed, finding "that there was no reasonable basis upon which the jury might have convicted defendant for child luring . . . ." Id. at 547 (quoting State v. Perez, 349 N.J. Super. 145, 151 (App. Div. 2002)).

The Supreme Court reversed. The Court held that

> [t]he jury considered evidence that defendant, a thirty-four-year-old individual, was fascinated and, in his word, "obsessed" with the thirteen-year-old [victim]. Moreover, defendant's statement strongly suggests that those feelings were based solely on his physical attraction to the child. He also expressed concerns about jeopardizing his marriage in view of that attraction. He wanted to ask [the child] for a "date," but found it difficult to "come on to a lady straight." Defendant further explained that "[y]ou have to play the game," that he had "fantazise[d]" about [the child], and that he "tr[ied] to take advantage" of his apparent youthful appearance.
>
> The jury was entitled to apply its common sense and experience in evaluating the meaning of defendant's statements. In doing so, it could draw reasonable inferences to conclude that defendant's purpose in attempting to lure [the child] into his car was to engage in sexual conduct.
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> [Id. at 552-53 (citing State v. Covell, 157 N.J. 554, 566-67 (1999) (holding that a defendant "[b]eing sexually attracted to young girls does not . . . prove . . . inten[t]

> to commit a crime, much less a crime of a sexual nature against [a child]. However, it does make it more likely that [a] defendant's purpose in beckoning to [a child] was to commit a sexual crime with or against her."))].

We note that Perez concerns the quantum of evidence necessary to sustain a conviction, which is far more stringent than the "some evidence" standard applicable to an indictment.

In light of the holding in Perez, we agree that the grand jury was presented with some evidence from which it could draw the reasonable inference that defendant's purpose in attempting to lure S.B. into the supermarket was to engage in sexual conduct, which, given S.B.'s age, would have been a criminal offense under any circumstances. Like the defendant in Perez, defendant expressed his attraction to his victim, telling her she was "too pretty to be running" while looking at her legs. In addition, defendant touched her hair when attempting to convince her to go into the supermarket. He admitted that he was "interested" in S.B. and called her "cute." The grand jurors were entitled to infer that these statements, when viewed in a light most favorable to the State, evinced defendant's prurient interest in the child. The trial court, therefore, misapplied its discretion when it dismissed count one of the indictment.

We do not view our holding in Olivera to require a different outcome. Defendant accurately notes that he, like the defendant in Olivera, made a

seemingly innocuous invitation to S.B. – to go into the supermarket to get water. In addition, as was the case in Olivera, the jurors were not given instructions with respect to the elements of the criminal offense the State contended was the defendant's purpose when luring his victim. The crucial distinction, however, is that Olivera concerned a petit jury deciding whether there was sufficient evidence to convict the defendant beyond a reasonable doubt and the present appeal concerns grand jurors who need only be provided some evidence of each element of the charges proffered by the State. While we conclude that the State presented sufficient evidence to support defendant's indictment on count one, we offer no opinion with respect to whether that evidence would support a conviction on that count, whether at trial the State must identify with precision the criminal offense it contends was defendant's purpose in luring S.B., or whether, in light of defendant's superficially innocuous offer to purchase S.B. water, it will be necessary to instruct the petit jurors with respect to the definition of a criminal offense under N.J.S.A. 2C:13-6(b).

B.

We turn to count two. N.J.S.A. 2C:24-4(a)(1) provides:

> [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. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.

A "child" under the statute is any person under eighteen. N.J.S.A. 2C:24-4(b)(1). "[T]hird-degree endangering the welfare of a child requires proof only that the victim is a child and sexual conduct by any person which 'would impair or debauch the morals of the child.'" State in re D.M., 238 N.J. 2, 18 (2019) (quoting N.J.S.A. 2C:24-4(a)(1)).

Sexual conduct is not defined in N.J.S.A. 2C:24-4(a)(1). Ibid. However, the phrase as it is used in the statute "clearly includes sexual assaults and sexual contact . . . ." Perez, 177 N.J. at 553 (quoting Perez, 349 N.J. Super. at 153). In addition, courts have held that N.J.S.A. 2C:24-4(a)(1) permissibly criminalizes a variety of conduct that is neither a sexual assault nor sexual contact, such as a defendant: showing nude photos to a child, State v. White, 105 N.J. Super. 234, 237 (App. Div. 1969); being nude in a window where he could be seen by children, State v. Hackett, 323 N.J. Super. 460, 472 (App. Div. 1999), aff'd as modified, 166 N.J. 66 (2001); engaging in a telephone conversation with children about their private parts, oral sex, and other similar topics, State v. Maxwell, 361 N.J. Super. 502, 517-18 (Law Div. 2001), aff'd o.b., 361 N.J. Super. 401 (App. Div. 2003); offering to pay children to report their sexual

activities, State v. McInerney, 428 N.J. Super. 432, 451 (App. Div. 2012); and asking a child to send a photo of her breasts, State v. Johnson, 460 N.J. Super. 481, 494-95 (Law Div. 2019).

The State argues that defendant's touching S.B.'s hair, when considered in context with his encounter with the victims and subsequent admissions, constitutes sexual conduct under N.J.S.A. 2C:24-4(a)(1). We have carefully considered the record and conclude that the evidence of sexual conduct presented to the grand jury, while thin, was sufficient to sustain count two of the indictment. It was reasonable for the grand jurors to infer that defendant had a sexual purpose when he touched S.B.'s hair. The grand jurors heard some evidence that defendant was interested in S.B. based on a physical attraction. He commented on her physical appearance both during the encounter and in his subsequent interrogation. He described S.B. as "cute" and admitted being "interested" in her. Those comments, in the context of defendant following S.B. and inviting her into a building, can reasonably be interpreted as evidence of his sexual motivation when touching her hair. The trial court, therefore, misapplied its discretion when it dismissed count two of the indictment.

C.

Finally, we address the State's argument that the trial court erred when it dismissed counts three through seven of the indictment with prejudice. We agree that the State presented its evidence to the grand jury almost entirely through leading questions and that the evidence was almost entirely hearsay. We do not, however, see support in the record for the trial court's determination that the method through which the State presented its case to the grand jury constituted a fundamental injustice warranting dismissal with prejudice of all counts of the indictment. See State v. Holsten, 223 N.J. Super. 578 (App. Div. 1988). There is no evidence of prosecutorial misconduct, excessive attempts to indict defendant, vindictiveness, or abuse of prosecutorial discretion. The trial court misapplied its discretion when it prevented the State from attempting to again present to the grand jury proposed charges arising from defendant's conduct on July 1 and July 7.

Counts one and two of the indictment are reinstated. The February 18, 2022 order is reversed to the extent that it dismissed counts three through seven of the indictment with prejudice. The matter is remanded for entry of an order dismissing counts three through seven without prejudice and for further proceedings consistent with this opinion. We do not retain jurisdiction.