

# RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2930-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARIO BUITRAGO-SANCHEZ,

Defendant-Appellant.

---

Argued May 2, 2023 – Decided August 8, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No. 20-02-  
0172.

Timothy J. Foley argued the cause for appellant (Foley  
& Foley, attorneys; Timothy J. Foley and Sherry L.  
Foley, of counsel and on the briefs).

Colleen Kristan Signorelli, Assistant Prosecutor,  
argued the cause for respondent (Esther Suarez,  
Hudson County Prosecutor, attorney; Colleen Kristan  
Signorelli, on the brief).

PER CURIAM

Defendant Mario Buitrago-Sanchez appeals from his guilty plea conviction for first-degree aggravated sexual assault of a victim less than thirteen-years-old, N.J.S.A. 2C:14-2(a)(1). The then-six-year-old victim N.M.<sup>1</sup> made unrecorded statements to her mother and a nurse practitioner, as well as a video-recorded statement to a Hudson County Prosecutor's Office detective. The State sought to admit into evidence the victim's statements to the nurse practitioner and the recorded interview with the detective, relying on the tender-years exception to the hearsay rule, N.J.R.E. 803(c)(27).<sup>2</sup> Defendant argued that the statement given to the detective should be suppressed under State v. Michaels, 136 N.J. 299 (1994), and that N.M.'s statements were unreliable.

After a testimonial hearing, the motion court denied defendant's motions, ruling the detective did not employ any of the unreliable interview practices at issue in Michaels and concluding each statement was admissible. Defendant appeals the admissibility and suppression motion orders, seeking to withdraw his guilty plea.

---

<sup>1</sup> We use initials to protect the identities of child victims of sexual assault. R. 1:38-3(c)(9). We also use a fictitious name, Nora, to identify N.M.'s mother and distinguish her from N.M., who has the same initials as her mother.

<sup>2</sup> The State ultimately decided not to seek to introduce the statement N.M. made to her mother.

After carefully reviewing the record in light of the governing legal principles, we conclude the law enforcement interview was properly conducted in accordance with Michaels and affirm that portion of the motion court's decision. However, we deem it necessary to remand for the motion court to revisit its analysis of the tender-years hearsay exception because the court did not make adequate findings with respect to the impact of the mother's conversation with her child. N.M. and her mother spoke privately for three hours the night before N.M. made her statements to the nurse practitioner and detective. We remand for the motion court to make more specific findings with respect to the impact that conversation may have had on the child's memory.

I.

In February 2020, defendant was charged by superseding indictment with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (counts one and two); second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count three); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count four); and fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1) (count five).

In November 2019, defendant moved to suppress N.M.'s statements to: (1) her mother, Nora; (2) Nurse Marisa Daly of Riverside Medical Group; and (3) Detective Ashley Rubel of the Hudson County Prosecutor's Office Special

Victim's Unit. The motion court held hearings and took testimony over three nonconsecutive days between February 2020 and February 2021. Prior to the court's decision, the State clarified that it was no longer seeking to introduce N.M.'s statements to Nora. See supra note 2. Defendant nonetheless requested that the motion court determine whether the statements to Nora would be admissible at trial in the event that either party sought to introduce them. On May 21, 2021, the motion court ruled that all three statements were admissible.

On October 22, 2021, defendant pled guilty to one count of first-degree aggravated sexual assault. The remaining counts were dismissed pursuant to the plea agreement. The court sentenced defendant to a fifteen-year term of imprisonment with a fifteen-year period of parole ineligibility, Megan's Law requirements, N.J.S.A. 2C:7-2, parole supervision for life, and fines and penalties totaling \$3,105.

## II.

### A.

We discern the following facts from the motion hearing record. Defendant was arrested on June 14, 2019, following the series of statements N.M. made to Nora, Nurse Daly, and Detective Rubel. At the time, N.M. was six years old. Defendant and his wife lived in a neighboring apartment unit and would

regularly babysit N.M when Nora was at work. Sometime after 10:00 p.m. on June 13, 2019, Nora picked up N.M. from defendant's apartment. Nora testified that N.M. had been up since 7:00 a.m. because it was a school day. According to Nora, N.M. was eager to get ready for bed, which was unusual as she normally tried to procrastinate.

Nora testified that she tried to ask N.M. what was wrong and why she was "trying to ignore" her. Nora could not recall the exact words N.M. used, but testified that "in general, I knew something was wrong. I just remember it taking a long time to get her to talk to me at all other than trying to go to bed." Nora said that she "allowed N.M. to continue getting ready for bed while attempting to see what was wrong and asking her, you know, did something bad happen? Did you get in trouble, or did you get hurt today?" Nora testified that she did not ask questions about a specific subject but whether "something was going on that shouldn't be going on."

Eventually, N.M. responded that "nothing was wrong" but that she had a "secret." Nora testified she "tried to explain to [N.M.] that she doesn't have to keep secrets from me, and . . . continued . . . to try to get what the secret was." Nora reiterated that she should not recall the exact words N.M. used, but testified that she "ask[ed] general questions, like, is somebody seeing you where they

shouldn't be seeing you?" Nora said she did not mention defendant when asking these questions. When asked if N.M. told her anything else that evening, Nora responded, "[s]he did. . . . I don't know her words, but it came to the point where I -- I needed to take her to the doctor because I wasn't sure." She explained that she "wasn't sure" whether N.M. "had mistaken that . . . things were being done to her that might not [have occurred]."

Nora did not remember if N.M. provided specific details that evening concerning where or how she was touched. When asked if N.M. identified who touched her, Nora responded that N.M. "point[ed] at [defendant's apartment]" and "direct[ed] that . . . the secret was between them." Nora explained that N.M. "was trying to say it without saying it." She further stated that "it was a whole three-hour period before I could get, really, anything out of her."

Nora was sure, however, that she did not mention any specific body parts to N.M., nor did she mention any specific type of touching. Nora made an appointment with N.M.'s pediatrician, thinking that "maybe they . . . would know if it was true." She explained that she "didn't want to make a big deal if it wasn't a big deal." Nora testified that she did not speak further to N.M. about their conversation the night before.

Marisa Daly, a nurse practitioner at Riverside Medical Group, testified that on June 14, 2019, she had an appointment with N.M. She testified that N.M. "came out and said . . . [defendant] licks her down there and told her it's a secret." Nurse Daly asked N.M. if defendant touched her with his private part, and N.M. responded, "yes." When she asked N.M. where defendant touched her with his private part, N.M. "pointed to her buttock, and she called it her cushy." These specific statements were captured in Nurse Daly's notes in N.M.'s patient record.

After Nurse Daly reported N.M.'s allegations, the police responded to the pediatrician's office and transported Nora and N.M. to the Special Victims Unit (SVU) of Hudson County. When N.M. and Nora arrived at the SVU office, they were separately interviewed by Detective Rubel.

Detective Rubel began her testimony at the suppression hearing by recounting her experience and training. She testified that she had conducted over one hundred child interviews in the six years she had been in the SVU. Detective Rubel detailed a forty-hour training course she completed called "Child First/Finding Words," where she learned how to conduct a forensic interview of a child. Detective Rubel explained that the technique "allows a child to disclose in a non-leading fashion, not using leading questions." She

described the interview technique as "semi-structured" and specified that it does not involve a checklist of requirements.

Detective Rubel's interview with N.M. was recorded, and the video was considered by the motion court. First, Detective Rubel introduced herself to N.M. and explained that she was there to ask N.M. some questions. After she asked N.M. some initial pedigree questions, Detective Rubel told her, "I have one rule in this room, and that rule is that you promise to tell me the truth. And the truth is something that really happened. Do you promise to tell me the truth today?" N.M. responded by nodding her head "yes," and then immediately stated, "I told my mommy the truth that someone called [defendant], he always touches me everywhere."

Detective Rubel asked N.M. who defendant was, and N.M. responded that he was one of her babysitters. Detective Rubel asked N.M. where defendant touched her, and N.M. stated, "[e]verywhere, even my cushy, . . . with his tongue . . . and his finger." As N.M. said "everywhere," she gestured towards her chest, and when she said "cushy," she gestured towards her buttocks. Detective Rubel told N.M. that she used a word she did not recognize. The detective asked N.M. to identify body parts on drawings of a girl and boy to help her understand. On the female drawing, N.M. identified both the vagina and



buttocks as "cushy," the mouth as "mouth," and nipples/upper chest area as "nipples." On the male drawing, she identified mouth as "mouth," nipples/upper chest area as "nipples," penis as "cushy," buttock as "butt," and hand as "hand."

Detective Rubel asked N.M. to tell her about N.M.'s "cushy" and defendant. N.M. said that defendant wanted to have a secret with her and that he started licking her after school when his wife was not home. Detective Rubel asked N.M. what parts of her body defendant licked, and N.M. indicated that he licked her "cushy"—pointing to both to her vagina and buttocks—as well as her mouth and chest.

When asked what part of defendant's body touched her body and vice versa, N.M. pointed to the drawings to indicate her vagina and defendant's penis touched. N.M. explained that this incident occurred after defendant removed her pants and underwear but left her shirt on. She additionally explained that defendant's shirt was on, but his pants were pulled down. She stated she felt his "cushy" on her. N.M. further stated defendant used his tongue on her "cushy"—pointing to the front of the drawing—and "butt"—pointing to the back. Detective Rubel then clarified that N.M. wanted to call the buttocks portion of the drawing "cushy and butt."

N.M. also described an incident when defendant showed his penis to her. She told Detective Rubel, "when I was looking at it, he just, he just turned my head to it." N.M. demonstrated how defendant used his hand to move her head towards his penis and said that this occurred while his pants were off. She also told the detective that defendant "always" wanted her to lick his "cushy." When Detective Rubel asked N.M. what defendant's "cushy" looks like, N.M. pointed to the groin area of the male drawing. Detective Rubel clarified, "[s]o I know that you said it doesn't touch your tongue, but does it touch here?" When Detective Rubel said "here," she pointed to her lips. N.M. then identified a specific area around her lip. Detective Rubel asked N.M. to demonstrate "how his cushy touche[d]" her lip using her fingers, and N.M. showed the detective.

N.M. further advised Detective Rubel that she had seen "juice" come out of defendant's "cushy" that was "light" and "white." N.M. told Detective Rubel that that "white juice" came out of defendant's "cushy" and got on her hands. N.M. said that when this happened, she cleaned it off her using a shirt. N.M. confirmed that the "white juice" also went in her mouth and said that defendant "made her do it." N.M. later detailed, "he told me to lick it. So I laid down, and then I put it in my mouth, but I really didn't lick it." She expanded, "I just put

it in my mouth, and he, he said, good job." N.M. said that the "white juice" came out inside her mouth and that she went to the sink to spit it out.

After the State presented its evidence, defendant called Dr. Gerald Cooke, Ph.D, an expert in forensic psychology and forensic interview. Dr. Cooke testified that generally, the younger a child is, the more suggestible he or she is. He then identified factors that could influence a child and techniques an interviewer could employ to avoid asking suggestive questions.

When asked about Detective Rubel's interview with N.M., Dr. Cooke opined the interview was not suggestible, but that it was "tainted" because the detective failed to follow protocols that "distinguish whether the child knows the truth from a lie and also the child understands the other rules." He concluded that the reliability of the interview was tainted. He expressed concern about N.M.'s ability to understand the differences between truth and fantasy based in part on the fact that N.M. stated during the interview that she bumped her head but there is no medical evidence of that occurring.

During his testimony, Dr. Cooke noted instances of possible suggestibility with regards to N.M.'s interview, although he admitted he could not say these instances were suggestible to N.M. to a degree of psychological probability. Dr. Cooke further opined that N.M.'s discussion with Nora the night before

influenced N.M.'s statements to Nurse Daly and Detective Rubel. He testified that because these "pre-interviews" occurred, Detective Rubel should have discussed them with N.M. to ensure N.M. did not have any preconceived notions of what she was supposed to say when the detective interviewed her. Dr. Cooke concluded that N.M.'s interview was tainted and thus not reliable, referencing the "Michaels criteria."

On cross-examination, Dr. Cooke asserted that he was "an expert on the Michaels criteria," but was unable to identify a specific violation of the criteria that led him to believe the interview was tainted. He explained that the Michaels case instructed "that an interview is tainted if the information obtained is not reliable. And so, that's how I'm applying . . . that criteria."

Dr. Cooke admitted that "[ninety-nine] percent of [Detective Rubel's] questions were asked in an appropriate way," with the exception being one yes-or-no question. He also acknowledged that Detective Rubel built appropriate rapport with N.M., was not suggestive during her interview, and that N.M.'s initial disclosure to the detective was spontaneous.

## B.

Based on the foregoing testimony, the motion court issued a ten-page written opinion, ruling N.M.'s statements to Nurse Daly and Detective Rubel

admissible under N.J.R.E. 803(c)(27). The court also denied defendant's Michaels motion. In reaching these conclusions, the court explicitly found Nurse Daly and Detective Rubel to be credible and Dr. Cooke to not be credible or convincing. The court explained that it did not find Dr. Cooke's testimony persuasive because his Michaels analysis "was limited to the idea that N.M.'s statement was not reliable without much more."

The motion court initially noted that because the State was no longer seeking to introduce N.M.'s statements to her mother, it would not make a ruling on the admissibility of those statement under the tender-years hearsay exception. Defendant, however, requested that the court determine whether N.M.'s statements to Nora would be admissible in the event that either party sought to introduce them. The court found N.M.'s statements to Nora would be admissible because they were "probably trustworthy." The court further ruled that the circumstances in Michaels that would render a child's statement inadmissible did not exist in this case.

The motion court then analyzed N.M.'s statements to Nurse Daly and Detective Rubel, identifying seven factors of trustworthiness:

- (1) whether the statement was made spontaneously or in response to prompting or suggestive questioning,
- (2) whether the account is consistently repeated,
- (3) the mental state of the declarant,
- (4) use of terminology

unexpected of a child of similar age, (5) lack of a motive to fabricate, (6) partisanship of the questioner, and (7) the ability of the questioner to observe and recall statement.

The court determined that there was a "strong probability" that N.M.'s statements to Nurse Daly were "trustworthy and reliable" and ruled them admissible under N.J.R.E. 803(c)(27). It noted N.M.'s disclosure to Nurse Daly was in response to her question about why she was at the doctor's office. The court also observed that N.M. consistently repeated the same allegations.

Regarding terminology, the court found that Nurse Daly did not introduce the concept of oral sex or the word "cushy" to N.M. prior to her disclosure. Additionally, the court determined there was no evidence that suggested N.M.'s mental state affected the trustworthiness of her statement, no compelling evidence presented that indicated N.M. had a motivation to lie, and no evidence that Nurse Daly had a relationship with N.M. that would influence her actions. Finally, the court found that Nurse Daly compiled contemporaneous notes during the interview and memorialized N.M.'s statements in a final report. The court acknowledged that Nurse Daly rewrote her notes for the purpose of organizing them and found her explanation credible. Based on the totality of the circumstances, the court ruled the State met its burden to show that N.M.'s statements to Nurse Daly bore a probability of trustworthiness.

The court similarly found N.M.'s statements to Detective Rubel to be admissible, conducting the same seven-factor analysis. It noted that N.M. spontaneously disclosed that defendant was touching her after N.M. agreed to Detective Rubel's rule that she must tell the truth. Regarding consistency, the court referred to the fact that N.M. gave a detailed disclosure of multiple types of abuse, including oral sex and the "licking" she disclosed to Nurse Daly. In terms of mental state, the court found that there was no evidence that N.M.'s mental state affected the probability of her statement's trustworthiness. It observed that "N.M. appeared to be fairly articulate for a child her age. She was able to answer questions directly and appropriately." Further, "[s]he was able to speak at length[] as to what allegedly happened" and "was quick to correct [Detective] Rubel when she misunderstood or misheard." As to terminology, the court found that N.M. "described explicit and graphic abuse . . . in language that is age appropriate for her age." It noted that N.M.'s language, such as "cushy" to describe genitalia and "juice" to describe semen, was appropriate for a child her age. The court opined that "[t]he lack of formal language to describe genitalia and bodily functions suggests N.M.'s statement was unrehearsed and not coached."

The court further found that "[n]o compelling evidence or reason has been presented to suggest N.M. had a motivation to lie or make up allegations in this case." N.M. agreed to tell the truth to Detective Rubel and corrected the detective when she made mistakes or misunderstood N.M. It determined that Detective Rubel, who had never met N.M. or her family prior to the interview, was acting in her professional capacity during the interview. Lastly, the court noted that there were no issues with the ability of the questioner to observe and recall the statement as it was video recorded. Accordingly, the court ruled the State met its burden to show that N.M.'s statements to Detective Rubel bore a probability of trustworthiness under the totality of the circumstances and were thus admissible under N.J.R.E. 803(c)(27).

The motion court also rejected defendant's argument that N.M.'s statements were inadmissible under Michaels. In reaching this conclusion, it discussed the suggestive interviewing techniques at issue in Michaels and found that no such practices were employed in this case. The court also found there was no evidence that Detective Rubel coerced any of N.M.'s statements. Moreover, it afforded "great weight" to the fact that N.M.'s statement to Detective Rubel was video-recorded and that there was no evidence of improper questioning on the detective's part during the interview. The court commented



that it was "able to view and assess the techniques used by [Detective] Rubel when she interviewed N.M. and can only conclude that [Detective] Rubel did not irredeemably compromise the reliability of N.M.'s statements through improper questioning."

### III.

Defendant raises the following contentions for our consideration:

#### POINT I

THE TRIAL COURT ERRED IN FINDING N.M.'s STATEMENTS TRUSTWORTHY.

#### POINT II

BECAUSE IT INFRINGES ON THE CONFRONTATION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS, HEARSAY IS THE EXCEPTION AND MUST BE NARROWLY TAILORED WITH THE BURDEN ON THE PROPONENT.

### IV.

We begin our analysis by acknowledging that "[w]e defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "We will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Ibid. (quoting State v. Medina, 242 N.J. 397, 412 (2020)). "However, we accord no

deference to the trial court's legal conclusions." State v. Nantambu, 221 N.J. 390, 402 (2015).

V.

We first address the propriety of the interview techniques used by the State. In Michaels, our Supreme Court recognized that

sufficient consensus exists within the academic, professional, and law enforcement communities . . . to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

[136 N.J. at 312–13.]

The Court established a standard and procedure for determining whether a trial court should exclude an alleged child victim's out-of-court statement and in-court testimony due to the suggestiveness of "investigatory interviews and interrogations." Id. at 320. The defendant bears the initial burden to trigger a Michaels hearing by showing "'some evidence' that the victim's statements were the product of suggestive or coercive interview techniques." Ibid. (citation omitted). The proffered evidence must be sufficient "to support a finding that the interrogations created a substantial risk that the statements and anticipated testimony are unreliable, and therefore justify a taint hearing." Id. at 321.

Only after the defendant "establishes that sufficient evidence of unreliability exists" does the burden shift to the State to prove reliability by clear and convincing evidence. Ibid. The issue then becomes whether, "despite the presence of some suggestive or coercive interview techniques, when considering the totality of the circumstances surrounding the interviews, the statements or testimony retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques." Ibid.

The Court explained that "[t]he question of whether the interviews of the child victims of alleged sexual[ ]abuse were unduly suggestive and coercive requires a highly nuanced inquiry into the totality of circumstances surrounding those interviews." Id. at 306. The Court identified circumstances having the potential to undermine the neutrality of an interview and create undue suggestiveness: (1) "a lack of investigatory independence"; (2) "the pursuit by the interviewer of a preconceived notion of what has happened to the child"; (3) "the use of leading questions"; (4) "a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers"; (5) "[t]he use of incessantly repeated questions"; (6) "[t]he explicit vilification or criticism of the person charged with wrongdoing"; and (7) and the use of threats to force a reluctant child to speak. Id. at 309–10.

While the Court did not identify specific conditions that automatically triggered a taint hearing, it concluded that the investigatory practices employed by the prosecution in Michaels "constitute[d] more than sufficient evidence to support a finding that the interrogations created a substantial risk that the statements and anticipated testimony [were] unreliable, and therefore justif[ied] a taint hearing." Id. at 321. The array of coercive or suggestive practices included: asking the children "blatantly leading questions that furnished information the children themselves had not mentioned"; encouraging the children to keep the defendant in jail; applying positive reinforcement when children made inculpatory statements and negative reinforcement when they denied abuse; using threats, bribes, and cajoling; failing to videotape or otherwise document the initial interview sessions; and re-interviewing the children multiple times leading up to trial. Id. at 314–16, 321. Few of the children made spontaneous statements regarding alleged abuse, and the children had ongoing contact with peers and references to their peers' statements. Id. at 321.

In the matter before us, the motion court correctly concluded that "N.M.'s mother is not a law enforcement officer or an agent of the State, which indicates to this court the level of coercion exerted in Michaels that would render N.M.'s

statement inadmissible does not exist under the circumstances in this case." Likewise, the motion court reasoned that Nurse Daly is not a law enforcement officer or agent of the State, and thus her questioning of N.M. is also not subjected to the Michaels analytical framework.

Detective Rubel's interview techniques, however, are subject to review under the Michaels "taint" framework. The motion court found that Detective Rubel's interview techniques were appropriate and did not involve leading questions. It additionally found that there was no evidence of coercion or any of the improper interview techniques employed in Michaels. Those findings are well supported by the record. As defendant did not establish sufficient evidence undermining the reliability of the statements, the court was well within its discretion to deny defendant's Michaels motion. See Garcia, 245 N.J. at 430.

## VI.

Our determination that the Michaels analytical framework applies only to the State's investigatory procedures and interrogations does not foreclose the possibility that a child's memory can be influenced by sources outside law enforcement. To be sure, the test for determining reliability of a child's out-of-court statement and in-court testimony under Michaels overlaps with the test for determining whether a child's out-of-court statement is admissible under the

tender-year hearsay exception, N.J.R.E. 803(c)(27). Given this overlap, trial courts may consider a defendant's Michaels motion and the State's motion to introduce a statement under N.J.R.E. 803(c)(27) in a single proceeding—as the court did here—so long as the respective burdens<sup>3</sup> are clearly assigned. We thus turn to defendant's contention that N.M.'s statements are not admissible under the tender-years exception because they are untrustworthy and unreliable.

Hearsay is an out-of-court statement "a party offers in evidence to prove the truth of the matter asserted in the statement," N.J.R.E. 801(c), and is inadmissible unless specifically exempted by an evidence rule or other law, N.J.R.E. 802. One such exception is codified in N.J.R.E. 803(c)(27), which allows for the admission of a statement made by a child under the age of twelve relating to sexual misconduct on a finding of three conditions. The first requirement is that the proponent give notice of an intention to use the statement.

---

<sup>3</sup> Under Michaels, the defendant bears the burden to make an initial showing of taint. 136 N.J. at 321. In contrast, under N.J.R.E. 803(c)(27), the State—as the proponent of the hearsay statement—bears the burden to establish the prerequisites of admissibility. See State v. James, 346 N.J. Super. 441, 457 (App. Div. 2002) (stating that the proponent of hearsay must establish prerequisites of admissibility). The standards of proof also differ. Under Michaels, the defendant needs to make a threshold showing of suggestiveness or coercion, and then the burden shifts to the State to prove the reliability of the statement by clear and convincing evidence. 136 N.J. at 321. The proponent of hearsay, however, must satisfy the prerequisites of admissibility by a preponderance of the evidence. James, 346 N.J. Super. at 457.

N.J.R.E. 803(c)(27)(a). The second requires the court to conduct a hearing pursuant to N.J.R.E. 104(a) and determine "that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy." N.J.R.E. 803(c)(27)(b). The proponent of a hearsay statement—in this case, the State—must prove the statement bears a probability of trustworthiness by a preponderance of the evidence. James, 346 N.J. Super. at 457. The third requirement is that the child testify at trial. N.J.R.E. 803(c)(27)(c).

In this case, we focus on the second requirement and whether the motion court properly concluded the statements bore a probability of trustworthiness. When determining whether a statement is sufficiently trustworthy to warrant its admission under the tender-years exception, a court must consider "the totality of the circumstances." State v. P.S., 202 N.J. 232, 249 (2010). Our Supreme Court identified the following "non-exclusive list of factors relevant to evaluating the reliability of out-of-court statements made by child victims of sexual abuse": (1) the spontaneity of the statement, whether it was made without prompting or suggestive questioning; (2) whether the account provided by the declarant is consistently repeated; (3) the mental state of the declarant; (4) the use of terminology unexpected of a child of a similar age; and (5) the declarant's

motive to fabricate. Ibid. (citing Idaho v. Wright, 497 U.S. 805, 821–22 (1990)); see also State in Int. of A.R., 234 N.J. 82, 103 (2018).

The Court has further recognized that the spontaneity of a child's statement can be impacted by "prior interrogation, prompting, or manipulation by adults." State v. D.G., 157 N.J. 112, 133 (1999) (quoting Wright, 497 U.S. at 826–27) (concerning the involvement of actors outside law enforcement, such as family members). Other factors include the partisanship of the questioner and the questioner's ability to observe and recall the statement. State v. R.M., 245 N.J. Super. 504, 516–17 (App. Div. 1991). A trial court's analysis may additionally be informed by the Michaels factors when considering "whether an interview technique has the requisite indicia of reliability." P.S., 202 N.J. at 250 (citing Michaels, 136 N.J. at 309). Lastly, our Supreme Court has emphasized "the importance of videotaping child interviews and [has] held that such videotapes should be considered in any trustworthiness analysis." Ibid. It has further instructed that "[c]ourts have considerable leeway in their consideration of appropriate factors" so long as the factors relate to "whether the child declarant was particularly likely to be telling the truth when the statement was made." D.G., 157 N.J. at 125 (quoting Wright, 497 U.S. at 822).



We are satisfied the motion court conducted the requisite hearing and analyzed each of the factors discussed in P.S. and R.M. with respect to N.M.'s statements to Nurse Daly and Detective Rubel. The motion court failed, however, to adequately account for the impact of Nora's three-hour conversation with N.M. on the statements to Nurse Daly and Detective Rubel. The motion court's analysis of the spontaneity factor under the tender-years analytical framework needed to consider the impact of "prior interrogation, prompting, or manipulation by adults" with respect to Nora's questioning. See D.G., 157 N.J. at 133 (quoting Wright, 497 U.S. at 826–27).

The motion court made a finding concerning that impact, but only a conclusory one. It determined that "[a]ny harm caused by [Nora]'s questioning technique is minimal." But the court made no specific findings to support that conclusion. The record shows that Nora testified at the suppression hearing—which occurred over a year after the disclosure—that she could not remember the specific words she used during her conversation with N.M. Nora also testified that she better remembered the details of the conversation when she was interviewed by detectives the day after it occurred.<sup>4</sup> Notably, the court did

---

<sup>4</sup> Nora's statement to detectives was used by defense counsel to refresh Detective Rubel's recollection, but apparently was not entered into evidence or used to refresh Nora's recollection during her testimony.

not make a credibility finding with respect to Nora's testimony, nor did it make factual findings as to what transpired during the three-hour conversation.

Given these circumstances, we deem it necessary and prudent for the motion court to make additional findings: (1) as to what transpired during the three-hour conversation between N.M. and her mother; and (2) as to the impact of that conversation on the reliability of N.M.'s statements to Nurse Daly and Detective Rubel. The motion court shall convene a new hearing, if needed, to present supplemental testimony or documents to support those findings. We offer no opinion on whether the three-hour conversation tainted N.M.'s recollection as to render her subsequent statements to the nurse practitioner and detective unreliable and thus inadmissible under the tender-years exception.

We do not retain jurisdiction. If the court finds upon reconsideration of the spontaneity element that either statement is unreliable, then defendant shall be afforded the opportunity to withdraw his guilty plea and proceed to trial.

Otherwise, the decision is affirmed. To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION