

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0753-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALEXANDER J. ULIKOWSKI,

Defendant-Appellant.

Submitted December 11, 2024 – Decided January 3, 2025

Before Judges Rose and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 20-02-0113.

Jennifer N. Sellitti, Public Defender, attorney for appellant (Zachary G. Markarian, Assistant Deputy Public Defender, of counsel and on the brief).

John P. McDonald, Somerset County Prosecutor, attorney for respondent (Gerard J. Tyrrell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Alexander Ulikowski of third-degree attempted endangering the welfare of a child, N.J.S.A. 2C:5-1(a)(1) and :24-4(a)(1), charged in a three-count Somerset County indictment, for taking steps to engage in sexual conduct with an undercover detective posing as a fourteen-year-old girl. The jury found defendant not guilty of second-degree attempted sexual assault, N.J.S.A. 2C:5-1(a)(1) and :14-2(c)(4), and failed to reach a verdict on second-degree luring a child, N.J.S.A. 2C:13-6(a), or the lesser-included charge, third-degree attempted criminal sexual contact, N.J.S.A. 2C:5-1 and :14-3(b).

Thereafter, defendant pled guilty to luring as amended to fourth-degree attempted criminal sexual contact. Defendant was sentenced to an aggregate jail term of ninety days, subject to parole supervision for life, on the attempted endangerment conviction, and registration under Megan's Law on the attempted sexual contact conviction.

Defendant now appeals, arguing:

POINT I

THE COURT FAILED TO CHARGE THE JURY THAT IT COULD ONLY CONVICT [DEFENDANT] OF ATTEMPTED ENDANGERING UNDER A SUBSTANTIAL STEP THEORY IF HE "PURPOSELY" DID OR OMITTED TO DO AN ACTION THAT CONSTITUTED A SUBSTANTIAL

STEP TOWARD COMMISSION OF THE CRIME.
(Not raised below)

POINT II

THE COURT'S FAILURE TO SPECIFY THE "SEXUAL CONDUCT" AT ISSUE AND "EITHER/OR" INSTRUCTION IN THE ATTEMPTED ENDANGERING CHARGE IMPERMISSIBLY ALLOWED THE JURY TO CONVICT EVEN IF JURORS DID NOT UNANIMOUSLY AGREE AS TO WHAT CONDUCT WAS AN ATTEMPT AT ENDANGERING THE IMAGINARY VICTIM.
(Not raised below)

POINT III

[DEFENDANT] SHOULD BE ALLOWED TO WITHDRAW THE GUILTY PLEA ENTERED AFTER HIS ENDANGERING CONVICTION.
(Not raised below)

We reject these newly-minted arguments and affirm.

I.

In October 2019, the New Jersey State Police (NJSP) and Somerset County Prosecutor's Office conducted an undercover investigation of individuals targeting children for sexual exploitation via online communications. NJSP Detective Katelyn Feehan created a profile of an eighteen-year-old woman, whose pseudonym was "Annie."

On October 25, 2019 defendant, age twenty, messaged "Annie" and requested her photographs. The following conversation ensued:

[FEEHAN]: I need to tell you something though first.
[Unspecified emojis]

[DEFENDANT]: What's that?

[FEEHAN]: I'm younger than what my profile said.
Please don't be mad.

[DEFENDANT]: IDC, LOL.^[1] How old are you? I kind of figured you were younger.

[FEEHAN]: Haha, why? I'm fourteen. [Unspecified emoji].

[DEFENDANT]: Oh, LOL, could I still [see] more pictures of you?

Defendant and Feehan engaged in flirtatious message exchanges that day. At one point, defendant asked whether "any older guys try and hit on [her]."

The next day, defendant told "Annie" he was going to shower and sent her a photo depicting part of his genitals. Defendant continued to send "Annie" messages of a sexual nature.

¹ Feehan testified at trial IDC means "I don't care" and LOL means "laughing out loud."

On October 27, 2019, defendant planned to meet "Annie" at her house, stating he was "excited to explore [her] body and help [her]." Defendant was arrested when he arrived at the meet location.

Defendant's post-arrest, Mirandized² statement was admitted in evidence at trial. In his statement, defendant admitted "Annie" told him she was fourteen, years old, but he "breezed right past it." He also acknowledged sending her sexually explicit messages.

II.

For the first time on appeal, defendant challenges the jury instruction on attempted endangering the welfare of a child. Because defendant did not object or otherwise raise before the trial court the issues he now challenges on appeal, we review his argument under the plain-error standard, reversing the conviction only if the error is "clearly capable of producing an unjust result." R. 2:10-2; see also State v. Cooper, 256 N.J. 593, 608 (2024). Further, "an 'alleged error is viewed in the totality of the entire charge, not in isolation,' and 'any finding of plain error depends on an evaluation of the overall strength of the State's case.'" State v. Cotto, 471 N.J. Super. 489, 545 (App. Div. 2022) (quoting State v. Nero, 195 N.J. 397, 407 (2008)).

² See Miranda v. Arizona, 384 U.S. 436 (1966).

When instructing a jury, "[t]he trial court must give 'a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "[B]ecause correct jury charges are especially critical in guiding deliberations in criminal matters, improper instructions on material issues are presumed to constitute reversible error." State v. Jenkins, 178 N.J. 347, 361 (2004). "The test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." Baum, 224 N.J. at 159 (quoting State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997)). Jury charges must be read as a whole. State v. Marshall, 173 N.J. 343, 355 (2002) (finding the "reviewing court must evaluate any alleged error in a portion of a jury charge in the context of the entire charge").

A.

In his first point, defendant argues the trial judge's final instruction on attempted endangering the welfare of a child failed to define the requisite mental state for commission of the offense. Defendant's challenge is limited to the omission of the term "purposely" in the substantial-step portion of the third element of the offense:

Third, the State must prove either that defendant purposely engaged in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be, or that defendant did or omitted to do anything that is a substantial step in the course of conduct planned to culminate in the commission of the crime.

[(Emphasis added).]

Defendant argues this instruction improperly allowed the jury to convict him for unintentional acts or omissions that were a substantial step toward criminal conduct. Defendant's myopic focus ignores the judge's comprehensive instructions on the attempted endangering the welfare of a child charge, issued prior to the judge's summary of the elements of the offense. As to purposeful conduct and the substantial-step theory the judge explained:

A person is guilty of an attempt to commit a crime if acting with the kind of culpability otherwise required for the commission of the crime, he purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be.

Purposely does or omits to do anything under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in the course of conduct planned to culminate in the commission of the offense.

In order to find the defendant guilty of criminal attempt, the State must prove the following beyond a reasonable doubt:

First, that the defendant had the purpose to commit the crime of endangering the welfare of the child, the so called object offense which I will describe in greater depths shortly.

A defendant acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.

A person acts purposely with respect to attendant circumstances if he's aware of the existence of such circumstances or believes or hopes they exist.

Second, in order to prove criminal intent[,] the State must prove beyond a reasonable doubt either of the following:

(1) The defendant purposely engaged in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be; or

(2) The defendant purposely did or omitted to do anything which under the circumstances as a reasonable person would believe them to be, was an act or omission that is a substantial step in the course of conduct planned to culminate in the commission of a crime.

However, the step taken must strongly show the defendant's criminal purpose. That is, the step taken must be substantial and not just a very remote preparatory act and must show that the accused has a firmness of criminal purpose.

[(Emphasis added).]

Considering the jury charge given "in the context of the entire charge," see Marshall, 173 N.J. at 355, the jury was sufficiently instructed it must find defendant's substantial step was undertaken purposely, i.e., that he "ha[d] a firmness of criminal purpose." We discern no "significant risk" the jury misunderstood the criminal intent required to find defendant guilty of attempted endangering the welfare of a child. See State v. Rhett, 127 N.J. 3, 8 (1992).

B.

In his second point, defendant belatedly claims the trial judge failed to issue a specific unanimity instruction as to the attempted endangering charge. Defendant submits the jury could have found he completed an attempt when he sent "Annie" an explicit photo and "sexually suggestive text messages," or when he drove to meet "Annie" in person to engage in sexual conduct. He contends these acts are two separate theories and without a specific unanimity charge, the jury could have convicted him even if it did not agree on his conduct. He further argues the jurors indicated they were confused about what conduct constituted "debauching the morals of a child" because they asked for a definition of "debauch" during deliberations.

Typically, "a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds

to be the predicate of a guilty verdict." State v. Parker, 124 N.J. 628, 641 (1991). "[W]here there is an allegation on appeal that a specific unanimity charge should have been given, '[t]he core question is, in light of the allegations made and the statute charged, whether the instructions as a whole [posed] a genuine risk that the jury [would be] confused.'" State v. Gandhi, 201 N.J. 161, 193 (2010) (quoting Parker, 124 N.J. at 638) (alterations in original). To determine whether a specific unanimity charge is required, courts analyze two factors: (1) "whether the alleged acts are conceptually similar or are 'contradictory or only marginally related to each other'"; and (2) "whether there is a 'tangible indication of jury confusion.'" State v. Macchia, 253 N.J. 232, 257 (2023) (quoting Gandhi, 201 N.J. at 193).

In the present matter, defendant sent an explicit photo and other sexual messages to "Annie," and drove to her house. Taken together, those actions are "conceptually similar." The State did not "rely on contradictory theories" and "did not try to prove that defendant committed the crime by presenting different theories based on different acts or different evidence." See id. at 258. Instead, the State presented one theory of ongoing conduct which consisted of multiple conceptually similar acts committed by defendant over the course of several

days. See Parker, 124 N.J. at 634 (finding unanimity of facts is not required for "cases involving continuing courses of criminal conduct").

Moreover, there was no "tangible indication of jury confusion," necessitating a specific unanimity charge. See Macchia, 253 N.J. at 257. Defendant did not challenge the underlying facts of the case. Rather, his defense focused on his lack of intent to sexually engage with a fourteen-year-old child. "When the facts are neither complex nor confusing, a court does not have to provide an intricate discussion of the facts in the jury charge." See Cotto, 471 N.J. Super. at 544.

Nor does the jury's request for the legal definition of the term "debauch" indicate confusion regarding unanimity. Neither the endangering statute, N.J.S.A. 2C:24-4(a)(1), nor the model jury charge, Model Jury Charges (Criminal), "Endangering the Welfare of a Child (N.J.S.A. 2C:24-4(a)(1))" (rev. Apr. 7, 2014), define "debauch." Accordingly, the judge provided the definition, "to corrupt, to pervert." The question posed by the jury does not reflect a "tangible indication of juror confusion" as to unanimity of the facts.

The trial judge properly instructed the jury that its verdict "must be unanimous as to each charge." Defendant did not request a specific unanimity instruction at trial and the absence of one does not give rise to an unjust result.

A specific unanimity instruction on the endangering charge was not required because defendant's actions were "conceptually similar" and there was "no indication of jury confusion." Macchia, 253 N.J. at 257.

III.

In his third point, defendant argues he should be permitted to withdraw his guilty plea to fourth-degree luring because it was based upon an improper conviction. Having affirmed defendant's conviction for endangering the welfare of a child, we reject his contentions without further elaboration. See R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION