RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0196-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CURTIS A. FRANKLIN,

Defendant-Appellant.

Submitted February 1, 2017 – Decided February 23, 2017

Before Judges Fuentes, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 10-05-0857.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Elizabeth R. Rebein, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Curtis A. Franklin of the second-degree sexual assault of A.M., N.J.S.A. 2C:14-2c(4).[1] The acts of sexual assault occurred on diverse dates between December 2002 and February 2003, when C.M. was less than sixteen years old and twenty-one years younger than defendant. In this appeal, defendant challenges the denial of his motion to suppress his statement to police, the court's evidence ruling admitting testimony about certain acts that occurred prior to the dates charged in the indictment, and the length of his sentence. For the reasons that follow, we affirm.

I.

A.M. has known defendant since she was four years old. A.M.'s family and defendant's family enjoyed a close relationship, and both families were active in their local church, where defendant served as associate pastor at the time of his arrest.

The accusations came to light on November 30, 2009, when A.M. reported her past sexual relationship with defendant to the Mahwah Police Department (MPD). A.M. described incidents of sexual

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[1] Counts Two through Six of the indictment charged defendant with sexually assaulting A.M.'s sister, C.M. Tried separately, defendant was convicted of Counts Two, Four, and Six, and sentenced to a consecutive ten-year prison term. In a companion opinion we release simultaneously with this opinion, we affirm defendant's conviction and sentence on those counts. State v. Franklin, No. A-0198-14 (App. Div. 2017).

contact that occurred when she was fourteen years old and sexual intercourse at age fifteen.

The next day, MPD Detective Guido Businelli and Detective Dan O'Brien of the Bergen County Prosecutor's Office (BCPO) went to defendant's home to investigate A.M.'s allegations. Upon arriving, they were met by defendant's wife, who said he was sleeping. When defendant came downstairs, the detectives "informed him that his name had been brought up" in their investigation and they requested he accompany them to the BCPO. Defendant agreed to do so. According to O'Brien, defendant said he was getting over a cold, and "seemed a [] little groggy from just waking up, but he was fine." Defendant did not appear disoriented, and was able to walk, stand, and communicate normally.

Defendant was transported without handcuffs in the officers' car to the BCPO. At that time, he was not under arrest or charged with any crime. Once there, defendant was placed in an interview room, provided with Miranda[2] warnings, and signed a Miranda waiver. While alone in the room, before the interview began, defendant received a call on his cell phone. Defendant answered and said, "Hello. No, I'm hurting pretty bad."

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

During the course of the interview, defendant admitted having an extra-marital affair with A.M. He stated he had moved to Oregon for three years to repair his marriage, and that his sexual relationship with A.M. began about six months earlier. Defendant subsequently stated the relationship started "right before her eighteenth birthday." At the time, defendant worked repossessing cars, and he explained that he had sex with A.M. in hotels, in his truck, in vehicles he repossessed, and in A.M's bedroom.

Other than some pedigree information the police later obtained, Detective O'Brien's questioning of defendant concluded with the following exchange:

> DETECTIVE: All right. Now, what she has reported to us is that, she's fifteen and I've met her, she's an intelligent, attractive girl, there's no reason I can find to disbelieve her, especially since you guys haven't had any contact in two and a half years. She's very upset about what has gone on with you and her. She's very upset to the point of like, she's trying to put her life back together at this point and she feels that you had [] manipulated her and done something to her at a young age to the point where she feels terrible. She can't put things together in a . . . proper way for herself right now because she feels that she's been violated. She's been - - you know, mislead by you ever since she was a child. And I believe her. There's no reason for her to lie about this. I believe that you started coming to her house . . . at a young age, fifteen years old, sixteen years old, knocking on the window and coming in. And there's no doubt about it okay?

> DEFENDANT: Okay.
>
> DETECTIVE: I need you to come clean and come out in front of this now. [Because] the more you lie to me about this, the more you stretch this out, the worse it's [going to] get. Because we're [going to] conduct our investigation and we're [going to get] cell phone records, . . . interview other people, people she was speaking to about what was going on. All right?
>
> DEFENDANT: Uh-huh.
>
> DETECTIVE: And when [] she spoke to them and what she told them. All right? So I need you to be honest with me about what's happening. [Because] I don't want this to get worse than it has to be for you.
>
> DEFENDANT: I think I need to talk to an attorney because - - well, I think I need to talk to an attorney.
>
> DETECTIVE: Okay, that's your right. All right. We'll be back in a few minutes.

Defendant was arrested and charged with sexually assaulting A.M. He moved prior to trial to suppress the incriminating statements he made during his recorded interview. He argued he was too ill when he gave the statement for it to be voluntary. At the motion hearing, O'Brien testified to the events described above, and further indicated that no promises were made or threats or coercion used to secure defendant's statement. Defendant's daughter testified that defendant "had flu-like symptoms. He had chills, a fever, and he was very sluggish, so November 30th he was

in bed all night and all afternoon." When the police arrived on December 1, 2009, she heard her mother ask them to "come back later, because my father was still in bed, and he had been sick all night." She also stated she was unaware if her father was taking any medication. Defendant's videotaped statement was introduced in evidence and viewed by the court.

The trial court denied the motion to suppress. The court acknowledged that defendant "had some type of flu-like condition, that he wasn't feeling [well]." However, "[t]here was no[] testimony as to any medication that would in any way affect [defendant's] cognitive abilities." The court concluded that defendant's Miranda rights were scrupulously safeguarded, no threats or coercion were used, defendant understood the questions posed to him, and he answered those questions "voluntarily, intelligently, and knowingly."

As a separate pretrial matter, the trial court conducted a N.J.R.E. 104 hearing on the State's request to admit evidence of uncharged conduct by defendant. Specifically, the State sought to elicit testimony by A.M. at trial that, prior to the dates charged in the indictment, defendant (1) told A.M. she was pretty; (2) massaged A.M.'s back; and (3) knocked on A.M.'s window late at night. Over defendant's objection, the court admitted the testimony as intrinsic evidence pursuant to State v. Rose, 206

N.J. 141 (2011), and United States v. Green, 617 F.3d 233 (3d Cir.), cert. denied, 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234 (2010). The court found the evidence was necessary as background to "complete the story" and "it would be unnatural[] for the jury to hear about the alleged sexual intercourse between December 1[,] 2002 and February 4[,] 2003[,] without hearing [as] background . . . how the alleged conduct came to be." The court also found the testimony's probative value outweighed any prejudice to defendant. Finally, the court stated it would provide the jury with a limiting instruction about the proper use of the testimony both when it was admitted and again at the end of the case.

At trial, A.M. testified to the above uncharged acts. She also stated that, on occasion, defendant "would try his best to rub his leg against my leg, or if I walked by he would just casually touch me[.]" The judge again allowed the testimony as background information over defendant's objection, and gave a limiting instruction to the jury.

With respect to the window incidents, A.M. testified that, on the first occasion, defendant knocked on her window around midnight. Nothing transpired, and she viewed the incident as a joke. On a second occasion, defendant again knocked on her window. This time A.M. let defendant in, and he followed her to her room

where he began kissing her and attempting to touch her breasts and place his hands in her pants. A.M. did not reciprocate but instead pushed defendant away.

When A.M. was fifteen years old, defendant called her and said he was thinking of coming to her window again. A.M. agreed, and after defendant arrived they began kissing. Defendant asked if he could have sex with A.M., and she consented.

A.M. testified she and defendant engaged in sexual intercourse three times before her sixteenth birthday. They continued their relationship thereafter and the frequency of their sexual activity increased as A.M. got older. Defendant told A.M. he was unhappy in his marriage and wanted to be with her and that she would be a good mother to his children. In turn, A.M. told defendant she loved him. However, as time went on, their relationship cooled and defendant moved to Oregon. A.M. characterized their relationship as "on again/off again." Their final sexual encounter occurred in April 2007.

Eventually, A.M. went off to college where she met M.S.M., whom she would later marry. At M.S.M.'s urging, A.M. reported her sexual relationship with defendant to the police on November 30, 2009. As noted, defendant was arrested and charged the next day. Defendant did not testify at the May 2012 trial. He called two witnesses in support of his defense that A.M. filed false charges

in retaliation for the firing of A.M.'s mother, who worked as church secretary and was suspected of having stolen money from the church where defendant served as associate pastor.

The jury found defendant guilty of the sexual assault charge. On November 15, 2012, the court sentenced defendant to an eight-year prison term. Defendant was placed on parole supervision for life, N.J.S.A. 2C:43-6.4, and ordered to comply with the restrictions and supervision of Megan's Law, N.J.S.A. 2C:7-1 to -19. The judge also imposed appropriate fines, penalties, and assessments. The present appeal followed.

II.

On appeal, defendant raises the following issues for our consideration:

> POINT ONE
>
> DEFENDANT'S STATEMENT WAS NOT THE PRODUCT OF A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER OF HIS RIGHT TO REMAIN SILENT AND, THEREFORE, SHOULD HAVE BEEN SUPPRESSED BY THE TRIAL COURT.
>
> POINT TWO
>
> THE ADMISSION OF EVIDENCE OF CONDUCT BY DEFENDANT PRIOR TO THE DATES SET FORTH IN THE INDICMENT WAS ERROR WHICH DENIED DEFENDANT A FAIR TRIAL.

POINT THREE

DEFENDANT'S EIGHT[-]YEAR SENTENCE WAS EXCESSIVE.

For the reasons that follow, we reject each of the points raised and affirm defendant's conviction and sentence.

A.

We review the trial court's factual findings from the suppression hearing on defendant's self-incrimination claims under "a deferential standard." State v. Stas, 212 N.J. 37, 48 (2012). Our appellate function, as it relates to the facts, is simply to consider "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964); see also State v. Locurto, 157 N.J. 463, 471 (1999). We owe "deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161; see also Stas, supra, 212 N.J. at 49. By comparison, "with respect to legal determinations or conclusions reached on the basis of the facts," our review is plenary. Stas, supra, 212 N.J. at 49.

Well-settled legal principles guide our analysis of the admissibility of defendant's statements to the police. In Miranda,

the United States Supreme Court held that in order to protect a defendant's constitutional rights against self-incrimination, a person may not be subjected to custodial interrogation by the police unless he or she is apprised of certain rights. Supra, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719; accord Stas, supra, 212 N.J. at 50-53. In particular, the police must inform such a person that: he has the right to remain silent, anything he says can be used against him in a court of law, he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Miranda, supra, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

The Court in Miranda further required that statements made to the police during a custodial interrogation be excluded at trial, unless it is shown that the defendant "knowingly and intelligently waive[d] these rights" in responding to the officers' questions. Ibid. See also J.D.B. v. North Carolina, 564 U.S. 261, 268, 131 S. Ct. 2394, 2401, 180 L. Ed. 2d 310, 321 (2011) (reiterating the significance of waiver) (citation omitted).

A prosecutor bears the burden of proving a defendant's voluntary waiver beyond a reasonable doubt. State v. Presha, 163 N.J. 304, 313 (2000). In making that assessment, our courts must

look at the "totality of circumstances" involved. Ibid.; see also State v. Nyhammer, 197 N.J. 383, 402 (2009), cert. denied, 558 U.S. 831, 130 S. Ct. 65, 175 L. Ed. 2d 48 (2009). We consider in the waiver analysis such factors as defendant's age, education and intelligence; the advice given about his constitutional rights; the length of the detention; whether the questioning was repeated or prolonged; and whether physical punishment or mental exhaustion was involved. Presha, supra, 163 N.J. at 313; see also State v. Dispoto, 189 N.J. 108, 124-25 (2007) (noting that "fact-based assessments" are appropriate in considering the totality of circumstances and deciding whether a defendant voluntarily waived his rights).

Here, we agree with the trial court's conclusion denying suppression of defendant's statements to the police. Contrary to defendant's argument, the record amply supports the court's finding that although defendant was not feeling well, there was no evidence he was on medication, his cognitive functioning was impaired, or his resulting statement was involuntary. Defendant clearly understood the questions asked of him and gave responsive answers. There is also no showing that defendant's will was overborne, especially in view of the fact that he recognized his right to have an attorney present and during the interview requested one. Consequently, Detective O'Brien properly stopped

asking defendant questions about the crime. Thus, defendant's Miranda rights were not violated, nor was his resulting statement involuntary. Accordingly, the trial court properly denied defendant's motion to suppress his statement.

B.

Defendant next contends the trial court erred in admitting testimony about certain acts that occurred prior to the dates charged in the indictment. As noted, these include defendant telling A.M. she was pretty; giving A.M. a massage; knocking on her bedroom window; and rubbing his leg against her and caressing her. Defendant argues: (1) the testimony was prior "bad act" evidence that failed to meet the criteria for admissibility set forth in N.J.R.E. 404(b); (2) it did not qualify as "intrinsic evidence;" and (3) the prejudicial effect of the testimony outweighed its probative value. We find these arguments unpersuasive.

Our standard of review on evidentiary rulings is abuse of discretion. We only reverse those that "undermine confidence in the validity of the conviction or misapply the law[.]" State v. Weaver, 219 N.J. 131, 149 (2014); State v. J.A.C., 210 N.J. 281, 295 (2012). Simply stated, we do "not substitute [our] own judgment for that of the trial court, unless the trial court's

ruling is so wide of the mark that a manifest denial of justice resulted." J.A.C., supra, 210 N.J. at 295.

N.J.R.E. 404(b) provides, in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

In general, other-crime evidence is not admissible to prove guilt by criminal predisposition. N.J.R.E. 404(b). See also State v. Weeks, 107 N.J. 396, 406 (1987) ("[I]t is not competent to prove one crime by proving another.") (citation omitted). The rationale for this is that a jury, aware of such evidence, may be tempted to convict, not by reason of proof, but by reason of perception. State v. Gibbons, 105 N.J. 67, 77 (1987).

"The threshold determination under Rule 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under Rule 404(b), or whether it is evidence intrinsic to the charged crime, and thus need only satisfy the evidence rules relating to relevancy, most importantly Rule 403." Rose, supra, 206 N.J. at 179. An uncharged offense is intrinsic evidence of a charged crime if: (1) "it 'directly proves' the

charged offense," or (2) the uncharged act was "performed contemporaneously with the charged crime" and it "facilitate[d] the commission of the charged crime." Id. at 180 (quoting Green, supra, 617 F.3d at 248-49).

Here, the trial court correctly determined that the evidence of events occurring prior to the first date charged in the indictment was "intrinsic" to the charged crimes. A.M.'s testimony about these events was necessary background information that set the stage for the criminal conduct that followed. Moreover, the judge gave a detailed limiting instruction, describing the limited purpose for which the jury should consider the testimony. Accordingly, we discern no error in the admission of the challenged testimony.

C.

Finally, defendant argues that his eight-year sentence is excessive, and that the trial court improperly relied on his denial of involvement, and erred in failing to find that mitigating factor eleven[3] applied. We disagree.

Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We will not ordinarily disturb a sentence that is not manifestly excessive or unduly

[3] N.J.S.A. 2C:44-1(b)(11) ("The imprisonment of the defendant would result in excessive hardship to himself or his dependents.").

punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16, 220 (1989). In sentencing, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, supra, 117 N.J. at 215. We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that [were] supported by competent credible evidence in the record." Ibid.

Here, the judge provided an adequate factual basis for finding aggravating factors three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3), and nine, the need to deter, N.J.S.A. 2C:44-1(a)(9). See Case, supra, 220 N.J. at 66 (citing State v. Fuentes, 217 N.J. 57, 73 (2014) (noting that a sentencing court must state a factual basis supporting a finding of particular aggravating or mitigating factors affecting the sentence)). The court properly viewed defendant's denial of involvement not as a separate aggravating factor but as a relevant

consideration in finding aggravating factors three and nine. See State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991).

The court also found mitigating factor seven, no prior criminal history, N.J.S.A. 2C:44-1(b)(7), but no other mitigating factors. Defendant argues the court erred in failing to find mitigating factor eleven based on the hardship to his wife and children resulting from his incarceration. We recognize that factor eleven applies where a defendant demonstrates that his or her dependents will suffer an excessive hardship by virtue of the defendant's incarceration. State v. Dalziel, 182 N.J. 494, 505 (2005). Although defendant arguably established this mitigating factor here, we agree with the State that ultimately it does not change the sentencing calculus. Defendant's eight-year sentence is only slightly above the mid-range for a second-degree crime, and by no means "shocks [our] judicial conscience." Roth, supra, 95 N.J. at 364.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION