RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0198-14T3

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

Defendant Curtis A. Franklin was charged in Bergen County Indictment No. 10-05-0857 with second-degree sexual assault of A.M., N.J.S.A. 2C:14-2c(4) (Count One); second-degree sexual

assault of C.M. between June 1, 1995 and June 30, 1995, N.J.S.A. 2C:14-2b (Count Two); second-degree sexual assault of C.M. between November 13, 1995 and November 12, 1998, N.J.S.A. 2C:14-2c(4) (Counts Three, Four, and Five); and second-degree sexual assault of C.M. between November 1, 1996 and November 12, 1998, N.J.S.A. 2C:14-2c(4) (Count Six).[1]

Defendant was tried on Counts Two through Six between June 8, 2011, and July 12, 2011. Defendant's 2011 trial ended in a mistrial due to juror misconduct.

On March 12, 2013, the court denied defendant's motion to change venue due to pre-trial publicity. Defendant was re-tried on Counts Two through Six from March 19, 2013, to April 4, 2013, following which the jury convicted him of Counts Two, Four, and Six. The court dismissed Counts Three and Five.

On October 11, 2013, the court sentenced defendant to ten-year prison terms on Counts Two, Four, and Six, concurrent to each other but consecutive to the eight-year prison term defendant previously received on Count One. 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.

[1] Count One, involving victim A.M., was severed and tried separately. In a companion opinion we release simultaneously with this opinion, we affirm defendant's conviction and sentence on Count One. State v. Franklin, No. A-0196-14 (App. Div. 2017).

2C:7-1 to -19. The judge also imposed appropriate fines, penalties, fees, and assessments. The present appeal followed.

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

> POINT ONE
>
> PREJUDICIAL PRETRIAL AND MID-TRIAL PUBLICITY DENIED DEFENDANT A FAIR TRIAL.
>
> POINT TWO
>
> THE ADMISSION OF EVIDENCE OF UNCHARGED CONDUCT BY DEFENDANT WAS ERROR WHICH DENIED DEFENDANT A FAIR TRIAL.
>
> POINT THREE
>
> THE COMMENTS OF THE PROSECUTOR CONSTITUTED PROSECUTORIAL MISCONDUCT. (NOT RAISED BELOW).
>
> POINT FOUR
>
> DEFENDANT'S TEN[-]YEAR SENTENCE, CONSECUTIVE TO THE EIGHT[-]YEAR SENTENCE PREVIOUSLY IMPOSED ON THE SEVERED COUNT, WAS EXCESSIVE.

We have considered these arguments in light of the record and applicable legal principles. We reject each of the points raised and affirm defendant's convictions and sentence.

I.

We recount the most pertinent facts drawn from the trial testimony. The victim, C.M., was born in November 1982, and is seventeen years younger than defendant. C.M. testified that her family was very close with two other families that lived nearby,

including defendant's family, and they were all active in their local church. The church placed an emphasis on "modesty," and girls who attended it were instructed not to cut their hair and to wear skirts that fell below their knees.

C.M. testified that the first instance of inappropriate conduct occurred before she was twelve years old. While she was riding alone with defendant in his truck, he unsnapped her skirt to "two or three inches above [the] knee" and said "now, that's sexy." C.M. claimed the incident did not alarm her and she "just kind of shrugged it off."

The next incident occurred in June 1995, when C.M. was twelve years old and she was again riding in defendant's truck. After defendant dropped off another passenger, C.M. went to move from the middle to the front passenger seat. Defendant, however, suggested she remain in the middle seat. C.M. found this suggestion unusual and felt "weirded out" by it. Defendant drove C.M. to Speedway 17, an indoor go-kart track located on Route 17 in Upper Saddle River. Along the way, defendant asked C.M. if she had ever seen a dirty movie, and she replied she had not. Defendant asked C.M. whether she wanted to "go parking" and she answered that she did. C.M. testified it was their mutual understanding that to "go parking" was slang, meaning to "kiss or make out."

Defendant drove C.M. to a tractor-trailer parking lot. There, defendant kissed C.M., but she turned away and told him she "didn't know how to do this." Defendant told C.M. she was "doing fine" and kissed her again. C.M. turned away a second time, because "something bother[ed her] about it." She testified that defendant was not being forceful with her and she was not being aggressive toward him.

Later, after returning to Speedway 17, defendant told C.M. he "know[s] something we can't do," which C.M. understood to mean kissing. Defendant drove C.M. to another empty lot. C.M. testified she did not remember all the details of this encounter. However, she did recall lying on her back in the cab of the truck and that her "shirt was up." Defendant rubbed his penis on her stomach and ejaculated.

Defendant then drove C.M. home. Along the way, defendant did not specifically ask her to keep their encounters a secret, but rather, defendant "portrayed that this was our special thing . . . a very special thing." C.M. testified the encounter made her feel as if someone wanted her and considered her attractive. Consequently, she did not tell anyone because she "viewed it as something special." She further indicated that, at the time, she had only positive feelings regarding defendant.

C.M. testified that the sexual relationship continued from June to November 1995, when she turned thirteen. During this period, she and defendant engaged in two or three sexual encounters per month, which involved fondling and oral sex. There were also breaks in their encounters during which defendant told her he was "in the church." C.M. understood there would be no sexual contact between them while he was "in the church."

C.M. testified that the sexual encounters took place in defendant's truck, in the office trailers where defendant worked, and in his home. During the sexual relationship, C.M. was still attending church and their families still interacted as usual.

During the summer of 1997, when C.M. was fourteen, defendant moved to Oregon, where he was soon joined by his wife and daughter. C.M. visited defendant and his family in Oregon, but did not testify as to any sexual encounters that may have occurred there.

In fall 1997, defendant and his family moved back to New Jersey. He and C.M. resumed their sexual relationship, which progressed to include sexual intercourse two or three times a month, "as long as he wasn't in the church." C.M. testified she and defendant often engaged in sexual intercourse at his house after she slept over and his wife left for work, and that defendant was not always the one who initiated the sexual contact. C.M. confirmed that defendant never threatened her or forced her to

have sex with him, and she was a willing participant because she thought she was in love and there was something "special" between them. Defendant never told C.M. he loved her, but on multiple occasions he promised to run away with her when she turned sixteen.

When C.M. turned sixteen, she asked defendant about his promise to run away with her. Defendant responded by asking C.M. if she wanted to go to heaven, which she understood to mean he would not run away with her. C.M. was heartbroken, but the sexual relationship nevertheless continued. However, C.M.'s feelings about the relationship began to change, and she started to question her belief that her relationship with defendant was a normal one.

When C.M. was seventeen, she moved to Pennsylvania to attend the Free Gospel Bible Institute (the "Institute"). C.M. had sexual intercourse with defendant the night before she left, which was their final sexual encounter. C.M. testified that, as she left Mahwah to attend college, she cried because she felt as if she was no longer "trapped in something." She described this as "release crying." She further testified that, in her mind, her relationship with defendant was over at that point.

During her first semester at the Institute, defendant called C.M. and told her he was proud of her and that he was sorry. Defendant did not indicate why he was apologizing, but C.M. understood it to relate to their inappropriate sexual

relationship. During C.M.'s third year at school, defendant visited with his family, and he told C.M. he had gotten back in the church and wanted to "start over" by going to the Institute with his family. C.M. testified she was never alone with defendant during this visit and no sexual activity occurred. Defendant and his family stayed at the Institute for four months, after which they returned to Mahwah.

In 2003, C.M. graduated from the Institute and returned home to Mahwah. Later that year, she moved to Georgia. By that time, defendant had become more active in the local church and attained the position of assistant pastor. C.M. confirmed that her relocation was due, in part, to her desire to get away from defendant. She testified that due to the relationship she felt "dirty," "disgusting," "nasty," and "like trash." Upon moving to Georgia, C.M. got a job working at a Christian school and became involved in youth activities.

C.M. continued to question her relationship with defendant. Eventually, in December 2009, she drove from Georgia to Mahwah to inform her parents about the past relationship. The Bergen County Prosecutor's Office was contacted, and on December 4, 2009, defendant was arrested on charges that formed the basis of Counts Two through Six of the indictment.

II.

We first address defendant's argument that prejudicial pretrial and mid-trial publicity violated his right to a fair trial. For the reasons that follow, we find no merit in these contentions.

A.

On March 12, 2013, Defendant moved to change venue, arguing it was impossible to obtain a fair and impartial jury in Bergen County due to pretrial publicity. The court acknowledged there had been media coverage of defendant's arrest, his previous mistrial, and his conviction for the sexual assault of C.M.'s sister, A.M. However, the court concluded that the amount of publicity the case garnered was not unusual for a criminal trial in Bergen County, and there was no reason to believe the jury pool was tainted. The court noted that a 1999 death penalty case in Mercer County received far more media coverage than defendant's case, citing State v. Timmendequas, 161 N.J. 515 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001), and there the New Jersey Supreme Court did not find an inference of prejudice due to pretrial publicity. On the contrary, the media coverage in this case was "quite benign" and "quite some time ago" and the jury panel "really had no knowledge of [it]" when interviewed during voir dire. Accordingly, the court declined to

change venue, which defendant now challenges as reversible error.

A trial court shall grant a criminal defendant's motion for change of venue or for a foreign jury "if the court finds that a fair and impartial jury cannot otherwise be had." R. 3:14-2. Our Supreme Court has held that R. 3:14-2 confers upon trial courts the discretion to transfer venue when it is "necessary to overcome the realistic likelihood of prejudice from pretrial publicity." State v. Williams, 93 N.J. 39, 67 (1983). We review a trial court's decision not to change venue for abuse of discretion and will only reverse when that decision is "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

Here, the trial court provided a well-reasoned analysis supporting its denial of defendant's motion to change venue. The court correctly noted there was "no indication" that the jury pool was tainted in any way by the pretrial publicity. It cited Timmendequas as an example of a case that garnered far more press coverage, yet the Supreme Court still found the surrounding publicity inadequate to warrant a change of venue. In Timmendequas, the Court noted that The Trentonian, a Mercer County newspaper, referred to the defendant in that matter as "scum," a "predator," a "piece of trash," an "animal," a "pervert," a "dirtball," a "sicko," and a "monster." Timmendequas, supra, 161

N.J. at 551. In contrast, the publicity in the present case was "benign" and "routine," a description defendant does not challenge on appeal. Nor does defendant demonstrate any actual prejudice resulting from the routine press coverage of this case. Accordingly, we discern no abuse of discretion in the trial court's denial of defendant's motion to change venue based on prejudicial pretrial publicity.

B.

As trial was set to begin on March 19, 2013, the prosecutor informed the court of an article that appeared about the case that referred to defendant's conviction for sexually assaulting A.M., which the court had ruled inadmissible in this case. The prosecutor noted the court had admonished the jurors not to conduct any outside research, and he wished to include the article's existence in the record "in case any other party wants to make inquiry." Defense counsel suggested that the court remind the jury of the prohibition on conducting outside research, and that it also question the jurors whether they had violated this prohibition. Defense counsel conceded he had "no evidence" any jurors violated the court's instructions, but rather he "just [had] a feeling" that a juror may have learned of the prior conviction by viewing the article. The court denied the defense request to voir dire the jury, stating,

> All right. Well, I've continuously admonished the jury throughout the proceedings. I will do so again this morning. I will direct them not to read the paper, . . . that's why we give the instructions and I'm confident the jury can abide by it. I expect there to be articles just about probably everything during this trial. Also, on line reporting, so I'm certainly not going to question them specifically unless there's any indication that somebody read it. So, at this point, I'm going to continue my general admonishments.

Defendant argues the court erred in failing to take further remedial action, beyond the "ordinary instructions," once the prosecutor advised of the media publication of defendant's conviction for the sexual assault of A.M. Defendant contends that the information contained in the article — that defendant had been convicted of the sexual assault of another minor in the same church — was "[inherently] prejudicial" and it was thereby incumbent on the court to conduct a further voir dire to ensure the jury panel had not been tainted by this prejudicial information. We do not find this argument persuasive.

The Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to trial by an impartial jury. State v. R.D., 169 N.J. 551, 557 (2001). Thus, a criminal defendant "is entitled to a jury that is free of outside influences and [that] will decide the case according to the evidence and arguments

presented in court in the course of the criminal trial itself." Williams, supra, 93 N.J. at 60. "The securing and preservation of an impartial jury goes to the very essence of a fair trial." Ibid.

"[I]f during the course of the trial it becomes apparent that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." R.D., supra, 169 N.J. at 557-58. See also State v. Maisonet, 166 N.J. 9 (2001) (holding that "'the court has an independent duty to act swiftly and decisively to overcome the potential bias of a jury from outside influences'" (quoting Williams, supra, 93 N.J. at 63)). Where it becomes apparent at trial that a juror may have been exposed to extraneous information or outside influences, the trial court "is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted thereby." R.D., supra, 169 N.J. at 558.

In State v. Bey, 112 N.J. 45, 83-86, the Court held that when a trial court is presented with a post-impanelment motion to question the jury about exposure to trial publicity, it should analyze the merits of counsel's proffer through a two-part inquiry. The court should first determine whether the information

disseminated has the capacity to prejudice the defendant. Ibid. If so, it must next determine if there is a realistic possibility that such information reached the jurors. Ibid.

Here, although the first prong of the Bey analysis was met, the second prong clearly was not. The media coverage complained of consists of a single article that appeared in NorthJersey.com. Defense counsel conceded he had "no evidence" that any jurors read the article. Rather, he simply had "a feeling" there was juror impropriety. Instead of conducting a voir dire of the jury, the trial court took appropriate measures to ensure the jury was not exposed to this or any other extraneous material. Throughout the trial, the judge repeatedly cautioned the jurors they were not to read media accounts of the case. "We presume that the jury faithfully followed [the court's] instruction[s.]" State v. Miller, 205 N.J. 109, 126 (2011).

In sum, there is a complete absence of evidence that any juror conducted outside research or viewed extraneous material. The court took repeated, careful measures to ensure compliance with its directives. Defendant has failed to demonstrate the court abused its discretion in declining to question the jury about its exposure to the isolated media article. See State v. Tindell, 417 N.J. Super. 530, 564 (App. Div. 2011) (finding that "the court acted reasonably and well within its discretionary

authority when it declined to conduct [an] individualized voir dire of the jurors" after a newspaper article was found in the jury room).

III.

Defendant next argues that the trial court erred in admitting testimony that (1) prior to the date of the indictment, defendant unbuttoned C.M.'s skirt and said, "now that's sexy," and (2) after the dates charged in the indictment, defendant and C.M. continued to engage in consensual sex. Defendant contends that testimony about this uncharged conduct does not qualify as "intrinsic" evidence as defined in State v. Rose, 206 N.J. 141, 180 (2011), and that the testimony was otherwise inadmissible under N.J.R.E. 404(b).

Evidence of prior bad acts is not admissible to prove a criminal defendant has a propensity to engage in criminal activity or acted in conformity with prior criminal activity. N.J.R.E. 404(b). The concern in admitting evidence of prior bad acts is that "the jury may convict the defendant because he is a bad person in general." State v. Cofield, 127 N.J. 328, 336 (1992) (internal citations omitted). If evidence is admitted pursuant to N.J.R.E. 404(b), then the court must give a limiting instruction specifically directing the jury on the limited use of the evidence. State v. Nance, 148 N.J. 376, 391 (1997). Where inadmissible

evidence is erroneously admitted, courts look to whether the error was "clearly capable of producing an unjust result[.]" R. 2:10-2.

In Rose, supra, 206 N.J. at 179, the Court instructed that whenever other wrongs or acts are sought to be admitted, the trial court must make a threshold determination as to whether the acts or other crimes are subject to a N.J.R.E. 404(b) analysis or evidence that is intrinsic to the charged crime not subject to the Rule. The Court held that "evidence that is intrinsic to the charged crime is exempt from the strictures of [N.J.R.E.] 404(b) even if it constitutes evidence of uncharged misconduct that would normally fall under [N.J.R.E.] 404(b) because it is not evidence of other crimes, wrongs, or acts." Id. at 177. To determine what is intrinsic, the Court adopted the test established in United States v. Green, 617 F.3d 233, 248-49 (3d Cir.), cert. denied, 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234 (2010), and held that evidence is considered intrinsic if it "directly proves" the crime charged or if the acts in question are performed contemporaneously with, and facilitate, the commission of the crime charged. Id. at 180 (quoting Green, supra, 617 F.3d at 248-49). Courts have utilized a case-by-case approach in making this determination. Id. at 179.

In addition, the Court appeared to broaden the intrinsic evidence exception by noting "'that other crimes evidence may be

admissible if offered for any non-propensity purpose, [including] the need "to provide necessary background information" about the relationship among the players as a proper purpose.'" Id. at 180-81 (quoting Green, supra, 617 F.3d at 249). The Court held that such background evidence is admissible "outside the framework of [N.J.R.E.] 404(b)," and when admissible for this purpose, the evidence is subject to the probative value/prejudice balancing test under N.J.R.E. 403, not prong four of [N.J.R.E.] 404(b). Id. at 177-78, 181 (quoting Green, supra, 617 F.3d at 249). The Court added:

> There is no need to regard [N.J.R.E.] 404(b) as containing an exhaustive list of non-propensity purposes permitted of other crime evidence. . . . [T]here is no reason that our courts cannot allow, under [N.J.R.E.] 404(b), evidence to be admitted for . . . "necessary background" or, as otherwise stated, "the need to avoid confusing the jury," non-propensity purpose.
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> [Id. at 181 (quoting Green, supra, 617 F.3d at 249).]

Here, we agree with the State that the testimony regarding the unbuttoning incident that occurred prior to the first date charged in the indictment was "intrinsic" to the charged crimes. The trial court properly recognized that this evidence "add[ed] to the background of the relationship that led to the sexual assault that continued thereafter." Specifically included within

the definition of intrinsic acts are those that are "inseparable elements of the deed" or "concomitant parts of the criminal act." Rose, supra, 206 N.J. at 177. It is logical to conclude that a flirtatious act designed to entice or seduce the victim is inseparable from the criminal conduct that followed. Accordingly, we conclude the testimony was properly admitted.

With respect to the testimony that C.M. and defendant continued to engage in consensual sexual relations after the last date charged in the indictment, the State submits this evidence was not "intrinsic" since it neither directly proved nor facilitated the charged crimes. Nonetheless, the State contends the admission of this testimony as intrinsic "is entirely harmless as defendant was afforded all of the protections of admission under N.J.R.E. 404(b)."

Unlike the State, and contrary to the defense argument, we find the challenged testimony was background evidence "outside the framework of [N.J.R.E.] 404(b)," and admissible to "complete[] the story." Rose, supra, 206 N.J. at 180-181. Importantly, also, the trial judge gave a proper limiting instruction to ensure the jury only considered the evidence for its appropriate purpose. The judge instructed:

> Our rules permit evidence of this nature to be admitted when the evidence is used for specific narrow purposes. In this case I have

> allowed the limited testimony by C.M. regarding these acts that happened prior to and after the time period in the indictment. The limited purpose of this testimony is to provide you with . . . background information on the relationship between C.M. and [defendant] and to give you a complete picture of the events both before and after the period of the alleged acts in the indictment to have occurred in Mahwah, New Jersey.
>
> The limited purpose of this testimony is to provide you with background information on the relationship with C.M.
>
> . . . .
>
> You may decide if the evidence is not helpful to you at all and in that case you must disregard the evidence. On the other hand, you may decide that this testimony is helpful in providing background information as it relates to the case and use the information for the specific purposes I have described.

We are satisfied from our review that a harmful error did not occur here because the court's thorough limiting instruction to the jury mitigated any potential prejudice. Under the harmless error standard, an erroneous decision at the trial court will not lead to reversal unless it is "clearly capable of producing an unjust result." R. 2:10-2. In any event, there was ample evidence in the record, aside from the disputed uncharged acts, from which a reasonable jury could conclude that defendant sexually assaulted C.M. Specifically, there was critical testimony from C.M. herself that described multiple instances of sexual assault beginning when

she was only twelve years old and continuing throughout the time frames charged in the indictment.

IV.

For the first time on appeal, defendant argues that the prosecutor made inappropriate comments during his opening and closing statements that improperly bolstered the credibility of the victim. Specifically, defendant takes issue with a portion of the prosecutor's opening statement, in which he remarked,

> Another important thing I want you to remember when you're evaluating [C.M.'s] credibility is going to be the very first thing that happens when she comes into this courtroom, when she's going to walk through that door into this public forum to tell her story about how she had sex with a grown man when she was a child and a teenager. She'll walk through that door and get on this witness stand and she'll take an oath. And don't overlook or minimize that, don't overlook or minimize that. That oath, that's her promise to the law and I think more importantly, it's her promise to you that she's going to tell the truth.

In his summation, the prosecutor further stated:

> And the final thing I submit to you makes [C.M.] credible and believable is something that I talked to you [] about back in the opening statement. Did she look like someone who was going to come here and take an affirmation to tell the truth and then turn around and lie? Did she seem like that kind of person? Did anything in her testimony, in her background of what you know about her lead you to think that? That she would take the promise to the law of the State of New Jersey

> to tell the truth in this courtroom and just throw it out the window? And even more important than that, would she look you all in the eyes having made that promise to you knowing that you had to make such an important decision in this case and then turn around and ignore that promise and lie to you?
>
> . . . .
>
> Did she come here to lie to you? Did she take that oath to tell the truth and throw it out the window? Did she ignore the law to tell the truth when she testified? Did she ignore her responsibilities to you as jurors when she testified because that's what this comes down to. This case doesn't hinge on where the parking lot was or how many times in the bedroom at the house. The case doesn't hinge on any of those things because it's not a misunderstanding or a gray area, she's either lying or she's telling the truth. And I would submit to you that the only conclusion that you can come to base on the evidence in this case, it's not based on speculation or guessing or stereotyping or any of these things, it's based on the evidence.

Defendant argues that the prosecutor's bolstering of C.M.'s credibility was plain error that led the jury to a result it might otherwise not have reached. The State counters that defense counsel in his summation attacked C.M.'s credibility, describing her testimony as a "pattern of inconsistencies" and "gap filling under oath," and noting her long delay in disclosing the alleged abuse. The State submits that, in his response, the prosecutor did not tell the jury C.M. was honest. Instead, he restricted his remarks to evidence in the record, and encouraged the jury to

recall C.M.'s testimony, demeanor, and oath, and to assess her credibility with those considerations in mind.

"Prosecutors 'are afforded considerable leeway in making opening statements and summations.'" State v. Echols, 199 N.J. 344, 359-60 (2009) (quoting State v. Williams, 113 N.J. 393, 447 (1988)). A prosecutor is "entitled to argue the merits of the State's case 'graphically and forcefully.'" State v. Smith, 212 N.J. 365, 403 (2012) (citations omitted), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). For prosecutorial comments "[t]o justify reversal, the prosecutor's conduct must have been clearly and unmistakably improper," and "so egregious as to deprive defendant of a fair trial." State v. Wakefield, 190 N.J. 397, 437-38 (2007) (quotation marks omitted), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

Additionally, "an appellate court will consider whether the offending remarks were prompted by comments in the summation of defense counsel." Smith, supra, 212 N.J. at 404; see United States v. Young, 470 U.S. 1, 12-13, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). "A prosecutor's otherwise prejudicial arguments may be deemed harmless if made in response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div.), certif. denied, 208 N.J. 335 (2011).

A prosecutor may not express a personal belief or opinion as to the truthfulness of a witness's testimony, or personally vouch for a witness or refer to evidence beyond the record to support a witness's credibility. State v. R.B., 183 N.J. 308, 337 (2005). However, a prosecutor may argue that a witness is credible, based on the evidence. State v. Walden, 370 N.J. Super. 549, 560-61 (App. Div.), certif. denied, 182 N.J. 148 (2004). When defense counsel fails to object to the allegedly improper remarks, the remarks will not be deemed prejudicial, as "[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." Timmendequas, supra, 161 N.J. at 576.

Because defendant failed to object during the State's opening or summation, a showing of plain error must be made when the defendant claims error on appeal. R. 1:7-2; R. 2:10-2. Under that standard, a conviction will be reversed only if the error was "clearly capable of producing an unjust result[,]" that is, if it was "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached[.]" State v. Taffaro, 195 N.J. 442, 454 (2008). Defendant must prove that a plain error was clear and obvious and that it affected his substantial rights. State v. Chew, 150 N.J. 30, 82 (1997), cert. denied, 528 U.S. 1052, 120 S. Ct. 593, 145 L. Ed.

2d 493 (1999), overruled in part on other grounds, State v. Boretsky, 186 N.J. 271, 284 (2006).

Here, the prosecutor's comments could reasonably be understood as responding to defense counsel's arguments, which largely questioned C.M.'s credibility. Defense counsel did not object to these comments during trial, and in any event we are satisfied they were not so egregious that they substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense.

V.

Finally, we address defendant's sentencing arguments. Defendant argues that his ten-year sentence is excessive. He further contends the trial court improperly recognized aggravating factors one and two, N.J.S.A. 2C:44-1(a)(1) and (2), and erred in ordering his sentence to run consecutively rather than concurrently to the sentence previously imposed on the severed Count One. 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 imposed which is not manifestly excessive or unduly 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.

A.

Defendant first argues that the court improperly considered the fact that he did not admit his guilt as an aggravating factor in calculating the sentence. We have previously expressed "the view that a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision." State v. Marks, 201 N.J. Super. 514, 540 (App. Div. 1985), certif. denied, 102 N.J. 393 (1986). However, "the trial judge's brief allusion to defendant's failure to admit his guilt does not require a reversal." Ibid. Further, we have noted that "[d]efendant's consistent denial of involvement and his lack of remorse indicate that a prison sentence is necessary to deter

defendant from similar conduct in the future, and therefore, the trial court properly found aggravating factor N.J.S.A. 2C:44-1a(9)." State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991).

In considering the aggravating and mitigating factors, the judge stated,

> [w]hen we look to . . . Rivers [, supra], the continued denials and out of court — the whole procedures that we've been through, having two of these victims and I think there is a risk you'll commit another offense because I really don't think you understand what — there's a strong need to deter you and others from this type of conduct.

Upon a close reading of the transcript, it is clear the court's isolated reference to defendant's "denials" was proper given its context, that is, in finding there was a need to deter defendant from similar conduct in the future.

B.

We find defendant's argument about aggravating factor one to be without merit. Aggravating factor one requires consideration of "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]" N.J.S.A. 2C:44-1(a)(1). When assessing whether this factor applies, "the sentencing court reviews the severity of the defendant's crime,

'the single most important factor in the sentencing process,' assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." State v. Lawless, 214 N.J. 594, 609 (2013) (quoting State v. Hodge, 95 N.J. 369, 378-79 (1984)). The court may also consider "'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" State v. Fuentes, 217 N.J. 57, 75 (2014) (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)). In determining whether a defendant's conduct was "'heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Id. at 74-75; see also State v. Yarbough, 100 N.J. 627, 645 (1985).

Here, the record supports the court's finding of aggravating factor one based on the multitude of assaults committed by defendant over a number of years. Defendant began grooming C.M. before she was twelve years old, and the trial judge found that C.M. "trusted" and "cared about" defendant, yet he manipulated their relationship. Under these circumstances, we are satisfied that the court's application of aggravating factor one was appropriate, as it did not double-count an element of the charged crime, and was supported by the court's express findings as placed on the record. See Fuentes, supra, 217 N.J. at 73.

The court considered aggravating factor one in conjunction with aggravating factor two, N.J.S.A. 2C:44-1a(2)), which serves an equally important but different purpose. Aggravating factor two focuses on the gravity of the harm and its impact on the victim of the crime, "with particular attention to any factors that rendered the victim vulnerable[.]" Lawless, supra, 214 N.J. at 611. Here, C.M.'s father spoke during the sentencing hearing and described the devastation and heartbreak that befell his family as a result of defendant's crimes. The prosecutor also read a letter from C.M., who lamented it was an "impossible task" to describe the impact the crimes had on her life. C.M. informed the court she continues to suffer from "emotional scars, spiritual scars, [and] physical scars" and will do so for the rest of her life. Finally, C.M., who is considerably younger than defendant and a close family friend, succinctly stated "[her life is not okay] and never will be." Accordingly, the court's recognition of factor two is adequately grounded in the record and we have no basis to disturb it.

C.

We likewise reject defendant's contention that a remand is required because the court did not adequately explain its reasons for imposing a sentence that was consecutive, rather than

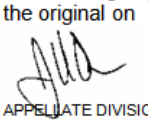
concurrent, to the eight-year sentence previously imposed following defendant's conviction on Count One.

In Yarbough, supra, 100 N.J. at 643-44, the Court set forth the factors to be considered when deciding whether to impose consecutive or concurrent sentences. These factors essentially focus upon "the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and whether they involve numerous or separate victims." State v. Carey, 168 N.J. 413, 423 (2001) (quoting State v. Baylass, 114 N.J. 169, 180 (1989)). Although a statement of reasons necessarily assists our review, where appropriate, consecutive sentences may be affirmed if the "facts and circumstances leave little doubt as to the propriety of the sentence imposed." State v. Jang, 359 N.J. Super. 85, 98 (App. Div.), certif. denied, 177 N.J. 492 (2003).

Here, the court imposed concurrent ten-year sentences for defendant's multiple assaults on C.M. However, defendant's conviction on Count One involved assaults he committed on a separate victim, A.M., at different times and places than the crimes committed here. These Yarbough factors adequately supported consecutive sentences. In sum, the sentence imposed was manifestly appropriate and by no means shocks our judicial conscience.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION