SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0458-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

L.O.T.,

Defendant-Appellant.

Submitted June 1, 2017 – Decided December 14, 2017

Before Judges Fuentes, Carroll and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 13-05-0268.

Joseph E. Krakora, Public Defender, attorney for appellant (Stephen P. Hunter, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Jennifer E. Kmieciak, Deputy Attorney General, of counsel and on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Following a four-day jury trial, defendant was convicted of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(b); and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). He was sentenced to an aggregate term of fifteen years' imprisonment, subject to the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and Megan's Law, N.J.S.A. 2C:7-1 to -23, and the special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4. The charges stemmed from defendant digitally penetrating his four-year-old biological daughter, C.T., while they slept in the same bed. Defendant now appeals from his convictions and sentence.

On appeal, defendant raises the following contentions:

> POINT I
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> THE JURY CHARGES RELATIVE TO DEFENDANT'S STATEMENT WERE INSUFFICIENT TO ADVISE THE JURY OF THE NEED TO CRITICALLY AND EFFECTIVELY EVALUATE THE STATEMENT IN LIGHT OF THE REALITY THAT JURORS ARE PRESENTLY INCAPABLE OF DISTINGUISHING BETWEEN FALSE CONFESSIONS AND TRUE CONFESSIONS. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, ¶ 1. (NOT RAISED BELOW).
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> POINT II
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> THE POLICE OFFICER'S OPINION TESTIMONY IMPROPERLY INVADED THE PROVINCE OF THE JURY AND WAS PLAIN ERROR. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, ¶¶ 1, 9, 10. (NOT RAISED BELOW).

POINT III

THE TRIAL COURT'S FAILURE TO EXCLUDE DEFENDANT'S STATEMENTS ABOUT BEING AN ATHEIST WAS PLAIN ERROR. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, ¶ 1. (NOT RAISED BELOW).

POINT IV

THE SENTENCE WAS EXCESSIVE. U.S. CONST. AMEND. VIII; N.J. CONST. ART. I, ¶¶ 1, 12.

After considering the arguments presented in light of the record and applicable law, we affirm.

I.

We summarize the pertinent facts from the trial record. The State's proofs at trial included the victim's testimony that defendant "touched [her] privates and it hurt[][,]" as well as her disclosures to her mother, D.C., a detective, Edward Francis Conway, III, and a child abuse pediatrician, Gladibel Medina.[1] The victim was six-years-old at the time of trial. The State also presented defendant's confession to police during a custodial

[1] After conducting a pre-trial hearing on November 21, 2013 and January 14, 2014, the court ruled that the victim's hearsay statements were admissible at trial under the "tender years" exception to the hearsay rule. See N.J.R.E. 803(c)(27). That ruling is not challenged on appeal.

interrogation,[2] in which he admitted putting his finger in his daughter's "butt." Defendant also testified on his own behalf.

At trial, D.C. testified that in April 2013, she lived with defendant and their daughter, C.T., in a one-bedroom apartment. On the evening of April 5, 2013, C.T. had a sleepover with her four-year-old neighbor, who slept on a futon while C.T. slept in her parent's bed. At about 5:00 a.m. on April 6, 2013, D.C.'s neighbor awakened her to pick up her daughter. Later that morning, after defendant left for work, C.T. told D.C. that defendant had "touched her[,]" and pointed to her vaginal area. When D.C. asked C.T. to repeat what she had said, C.T. repeated her statement but instead pointed to her buttocks area. According to D.C., defendant had put C.T. in their bed at about 8:30 p.m. the night before. D.C. was shocked and upset by C.T.'s disclosure. She promptly took C.T. to the police station to report the incident.

Conway, a detective with the Somerset County Prosecutor's Office, was assigned to conduct a forensic interview of C.T. He described a forensic interview as "a special interview" that is "not leading and not suggestive." According to Conway, he attended a week-long training course on conducting forensic interviews of

[2] Following a December 17, 2013 hearing pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), the court ruled defendant's confession admissible at trial. That ruling is not challenged on appeal.

children of all ages. There, he was taught "[r]apport building" and the use of "open-ended" questions while, if necessary, providing "options" and "choices" to the child in a safe environment.

Conway conducted a videotaped interview of C.T. at 2:19 p.m. on April 6, 2013, in an interview room specially designed for children. The jury viewed the interview during the trial. During the interview, after C.T. identified both the vaginal area and the buttocks area as "butt" on anatomical drawings, she told Conway that "daddy" touched her "butt" "at nighttime" "on [her] bed in [her] home." C.T. told Conway "[she] just said stop to daddy but it[']s not nice to put finger [sic] in there." Subsequently, Dr. Medina evaluated C.T. During the evaluation, C.T. denied any physical symptoms but disclosed to Dr. Medina that "daddy hurt me and . . . touched my pee with his finger." Using a doll, C.T. referred to her vaginal area as "pee[.]"

At 4:26 p.m. on April 6, 2013, Bound Brook Detective John Mazuera and Conway conducted a recorded interrogation[3] of defendant

[3] Detective Mazuera testified that, due to a "glitch in the system[,]" which caused the computer to freeze during the interrogation, the audio recording was captured accurately, but the video recording was inadvertently inverted and was therefore not synchronized with the audio recording. Nonetheless, both recordings were played for the jury.

at police headquarters.[4] Prior to questioning, Mazuera advised defendant of his constitutional rights using a standard Miranda warning form. Defendant acknowledged understanding his rights, both verbally and in writing, and agreed to waive his rights and answer questions. When questioned about the allegations, defendant told the detectives that he was "horny." Defendant explained that C.T. was laying in bed facing away from him but "right next to [him]" because she did not want to sleep in her crib. She was not wearing any "pants" or "underwear" at the time. According to defendant, he stuck "[his] finger" in her "butt" for about twenty-minutes. Defendant explained that "[i]f [he] touched [her] vagina it was more accidental than on purpose" because "[his] main goal was just to stick [his] finger in her butt . . . ." At the time, his girlfriend "was in the living room or kitchen."

At the close of the State's case, the court denied defendant's motion for a judgment of acquittal. See R. 3:18-1. Thereafter, defendant testified and denied that he sexually assaulted his daughter. He explained that he lied to the police to protect her from undergoing any probing examinations, and he attributed her

[4] Defendant was arrested and brought to police headquarters on a child support bench warrant issued in connection with his support obligations for C.T. Although defendant had been living with C.T. and her mother, there were periods of time during which they had been separated.

allegations to her fondness of a "butt" joke they had shared about four months earlier. Following the guilty verdict, defendant was sentenced on August 14, 2015, to fifteen-years of imprisonment subject to NERA on the aggravated sexual assault conviction, a concurrent seven-and-one-half-year term subject to NERA on the sexual assault conviction, and a concurrent seven-and-one-half-year term on the endangering the welfare of a child conviction. All three sentences were subject to Megan's Law and a special sentence of parole supervision for life. A memorializing judgment of conviction was entered on August 18, 2015, and this appeal followed.

II.

On appeal, defendant argues for the first time that the court's charge to the jury on evaluating defendant's confession, gave the jury no guidance "on the dangers of false confessions." According to defendant, similar to the identification charge, "the jury should have been given an explanation of the relevant scientific factors for assessing whether the defendant's statement was a true or false confession[,]" particularly given defendant's limited cognitive ability and "his reaction to perceived threats by the police to subject his daughter to medical testing." Defendant asserts that "his confession was false" and "the

inadequate jury instruction was clearly capable of producing an unjust result."

Where a defendant does not object to a jury charge but challenges the charge on appeal, we review for plain error and determine if the alleged error is "clearly capable of producing an unjust result." State v. Montalvo, 229 N.J. 300, 321 (2017) (quoting R. 2:10-2). Defendant must demonstrate "[l]egal impropriety in the charge prejudicially affecting [his] substantial rights . . . and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed the clear capacity to bring about an unjust result." State v. Camacho, 218 N.J. 533, 554 (2014) (quoting State v. Adams, 194 N.J. 186, 208 (2008)).

Here, there was no error in the court's jury instruction. Consistent with the governing law, the court issued a charge in language that tracked the relevant model jury charge, as amended on June 14, 2010, Model Jury Charge – Criminal, "Statements of Defendant" (2010).[5] A presumption of correctness attaches to jury instructions that follow the model jury charges. See State v.

[5] The only modification to the court's charge was requested by defense counsel. At defense counsel's request, the court removed the reference to the statement being "allegedly" made by defendant because there was no dispute that defendant gave a recorded statement to the police.

R.B., 183 N.J. 308, 325 (2005) (stating trial court's obligation to deliver model charges); see also Mogull v. CB Commer. Real Estate Grp., 162 N.J. 449, 466 (2000) ("It is difficult to find that a charge that follows the Model Charge so closely constitutes plain error.").

Defendant now asserts that factors from selected social-science literature should have been incorporated into the jury charge for jurors to consider in determining the credibility of his confession. While "it is well established that a defendant has the right to present expert psychological testimony bearing on the reliability of his confession[,]" expert evidence consisting "of generalities about false confessions, untethered to any recognized psychological disorder" is inadmissible. State v. Granskie, 433 N.J. Super. 44, 52 (App. Div. 2013). Here, defendant created no record for the trial court or this court to evaluate his belated claim, and failed to even request the instruction now urged. "[T]rial counsel's failure to request an instruction [generally] gives rise to a presumption that [counsel] did not view its absence as prejudicial to his client's case." State v. McGraw, 129 N.J. 68, 80 (1992).

Next, defendant argues that Conway's testimony "that he conducted the interrogation [of the victim] in a non-suggestive and non-leading way[,]" in conjunction with "Conway's credentials

and the training he received in interviewing children[,]" constituted an improper lay opinion that violated State v. McLean, 205 N.J. 438 (2011). Because defendant did not raise an objection before the trial court, we again review his argument under the "plain error" standard, which mandates reversal only for errors "of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2; State v. Maloney, 216 N.J. 91, 104 (2013). The test is whether the possibility of injustice is "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. Macon, 57 N.J. 325, 336 (1971).

Lay opinion testimony is governed by N.J.R.E. 701, which permits a lay witness' "testimony in the form of opinions or inferences . . . if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." The McLean Court stressed that lay opinions may not "intrude on the province of the jury by offering, in the guise of opinions, views on the meaning of facts that the jury is fully able to sort out . . . [or] express a view on the ultimate question of guilt or innocence." Macon, 57 N.J. at 461. Fact testimony on the other hand consists of a description of what the officer "perceived through one or more of the senses." Id. at 460. "Testimony of that type includes no

opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." Ibid. "[S]uch testimony sets forth facts that are not so outside the ken of jurors . . . ." Ibid. (citing State v. Nesbitt, 285 N.J. 504, 514-15 (2006)).

Here, Conway's testimony was permissible fact testimony for which he had first-hand knowledge. His testimony was limited to the manner that he conducted the interview of the victim, which was consistent with his training, and the outcome of that interview. His testimony included no opinion and did not convey information about what he believed, thought or suspected. Indeed, his testimony was similar to the testimony regarding the manner in which defendant's custodial interrogation was conducted. There was no error, much less plain error, in Conway's testimony. We may also infer from the lack of an objection that, even if there was error, defense counsel recognized that the purported error was of no moment or was a tactical decision to let the error go uncorrected at the trial. Macon, 57 N.J. at 337.

Next, relying on N.J.R.E. 610, defendant argues for the first time on appeal that "[t]he failure to exclude [his] statements about being an atheist" during his custodial interrogation was "clearly capable of producing an unjust result." At the end of

the custodial interrogation, the following colloquy ensued between defendant and Mazuera:

> [Mazuera]: [A]s a [n]otary in the State of New Jersey, I'm authorized to swear you into the truthfulness of the statement you provided okay? Do you believe . . . in God or Jesus Christ?
>
> [Defendant]: No, not entirely.
>
> [Mazuera]: Alright, what do you believe in?
>
> [Defendant]: I'm atheist so I don't believe in anything.
>
> . . . .
>
> [Mazuera]: Well, I'll still swear you to the truthfulness do you swear that
>
> [Defendant]: Yes, yes.
>
> [Mazuera]: everything that you've told me is the truth and . . . nothing but the truth?
>
> [Defendant]: Yes.

Because there was no objection, the issue must be reviewed as "plain error." See R. 2:10-2.

Under N.J.R.E. 610, "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." The official comment to N.J.R.E. 610 notes that it "follows Fed. R. Evid. 610 verbatim[,]" and cases interpreting Fed. R. Evid. 610 repeatedly state that it

is the inquiry or introduction of evidence into a witness's religious belief that is prohibited. See e.g. United States v. Teicher, 987 F.2d 112 (2d Cir. 1993) ("The Rule proscribes the impeachment of witnesses based on their religious beliefs").

Thus, defendant's reliance on N.J.R.E. 610 is misplaced. The State never referred to the exchange, introduced evidence of defendant's religious beliefs, or inquired into defendant's religious beliefs during cross-examination. In fact, when defendant was administered the oath prior to testifying, he spontaneously asked the court "[c]an I swear on something that is not religious[,]" to which the court responded that he was not being asked "to swear on something religious." See N.J.R.E. 603 (requiring a witness before testifying "to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law" but expressly prohibiting a witness from being "barred from testifying because of religious belief or lack of such belief"). We are satisfied that the admission of defendant's statement that he was an atheist did not lead the jury to a result it otherwise would not have reached, and we are confident that the error was not clearly capable of producing an unjust result. See R. 2:10-2; Macon, 57 N.J. at 326.

Finally, defendant challenges his sentence as "excessive" and the court's identification and assessment of the aggravating and

mitigating factors as improper and unsupported by the record. We disagree. "Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). We will

> [A]ffirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Here, in finding aggravating factors two, three, and nine, N.J.S.A. 2C:44-1a(2), (3), and (9), the court noted that defendant was thirty-years of age and had one prior indictable conviction for criminal trespass, for which he was terminated from the Pre-Trial Intervention Program and resentenced in 2009 to a three-year probationary term. The court acknowledged the prohibition against impermissible "double counting," but noted that it could consider "the young age of [defendant's] daughter[,]" as well as "the gravity and the seriousness of the harm inflicted on the victim . . . ." The court also pointed out that while defendant maintained his innocence, there was a risk that he would commit another offense and a need to deter defendant and others from violating the law "[c]onsidering [defendant's] unrepentant attitude."

The court found mitigating factor twelve, N.J.S.A. 2C:44-1b(12), given defendant's willingness to cooperate with law enforcement authorities. However, the court rejected defendant's arguments regarding the applicability of mitigating factor nine, N.J.S.A. 2C:44-1b(9), in the absence of any "letters of support from family members or the community" or "indications of other things" defendant "has done to improve himself or better himself." The court found "that the aggravating factors clearly outweighed the mitigating factor."

Contrary to defendant's argument, "[t]he extreme youth of the victim was a proper aggravating factor to have been considered by the court" because "the statutory element would have been present had the victim been a [twelve]-year[-]old with some sophistication." State v. Taylor, 226 N.J. Super. 441, 453 (App. Div. 1988). Likewise, defendant maintaining his innocence "does provide support for the trial court's conclusion" in determining "that defendant is likely to reoffend." State v. Carey, 168 N.J. 413, 427 (2001). "[A]n appellate court should not second-guess a trial court's finding of sufficient facts to support an aggravating or mitigating factor if that finding is supported by substantial evidence in the record." State v. O'Donnell, 117 N.J. 210, 216 (1989). As the court followed the appropriate sentencing guidelines, made findings that are supported by the record, and

did not impose a sentence that shocks the judicial conscience, we decline to disturb it.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION