RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0464-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.Z.,

Defendant-Appellant.

Submitted February 2, 2017 – Decided May 8, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 14-06-1032.

Joseph E. Krakora, Public Defender, attorney for appellant (Jaime B. Herrera, Assistant Deputy Public Defender, of counsel and on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Frances Tapia Mateo, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant M.Z. appeals from a September 9, 2015 judgment of conviction for fourth-degree abuse and neglect of a child, N.J.S.A. 9:6-1 and 9:6-3. We affirm.

These facts are taken from the trial record. At 12:55 a.m. on December 27, 2013, the Jersey City Police Department (JCPD) received a 9-1-1 call. The caller told the 9-1-1 operator a violent domestic dispute just occurred between her baby, her husband, and herself. When a JCPD officer responded to the specified address, the officer found "Maysa" standing on the street, without shoes or a coat, cradling an infant in her arms.[1] The baby's left eye was swollen and red. The officer entered the residence and recovered a shoe from the premises. Police transported Maysa and the baby to Jersey City Medical Center, where medical professionals diagnosed the baby as suffering a head contusion.

On May 28, 2014, a Hudson County grand jury issued a five-count indictment charging defendant with: third-degree aggravated assault of the baby, contrary to N.J.S.A. 2C:12-1(b)(7) (count one), second-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a)(2) (count two); fourth-degree abuse and neglect of a child, contrary to N.J.S.A. 9:6-1 and N.J.S.A. 9:6-3

[1] To preserve confidentiality, we refer to the victim using a pseudonym.

(count three); third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(b) (count four); and fourth-degree possession of a weapon (a shoe) for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(d) (count five). Prior to trial, the State dismissed count four.

The State presented testimony from five witnesses: the 9-1-1 operator; the responding JCPD officer; the crime scene photographer, who took pictures of the baby's injuries; a Division of Child Protection and Permanency (Division) caseworker, who arranged for the baby's medical care and retained the medical records, which were introduced into evidence; and a Hudson County detective.

Maysa was not called to testify because it was believed she fled to a shelter and her whereabouts remained unknown. The Hudson County Detective testified regarding her extensive, but unsuccessful efforts to locate Maysa. The State's evidence also included the transcript of Maysa's 9-1-1 call, admitted over defendant's objection.

The jury had difficulty reaching a verdict on all charges. Following an Allen[2] charge, a partial verdict was rendered. The jury convicted defendant of abuse and neglect of a child (count

[2] See Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

three), acquitted him of unlawful possession of a weapon (count five), but failed to reach a verdict on counts one and two, aggravated assault and endangering the welfare of a child.

On August 7, 2015, defendant was sentenced to time served. This appeal followed.

On appeal, defendant urges reversal, asserting prosecutorial misconduct and evidential errors denied him a fair trial. Defendant requests we vacate his conviction, arguing:

> POINT I.
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> THE STATE'S INTRODUCTION INTO EVIDENCE OF INADMISSIBLE, UNDULY PREJUDICIAL EVIDENCE VIOLATED N.J.R.E. 404(B) AND DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL.
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> A. Throughout the course of the trial, the prosecutor engaged in a series of inappropriate remarks designed to suggest that [defendant] beat [Maysa] and that she did not appear at trial because she is hiding.
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> B. Witness statements at trial that [Maysa] was pregnant, had been beaten by [defendant], and had fled to a women's shelter, prejudiced [defendant] and deprived him of his right to a fair trial.
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> C. The prosecutor's use of inadmissible evidence in opening and summation was improper and deprived [defendant] of his right to a fair trial.

POINT II.

HEARSAY TESTIMONY OF [THE OFFICER] WITH RESPECT TO A CONVERSATION WITH [MAYSA] WAS ERRONEOUSLY ADMITTED INTO EVIDENCE AND RESULTED IN THE INTRODUCTION OF A SHOE ALLEGEDLY USED IN THE ASSAULT.

For the reasons set forth in our opinion, we are not persuaded trial errors require a new trial. Defendant's conviction will not be disturbed.

Defendant highlights improper statements suggesting he assaulted Maysa, a crime, which was not charged. In our discussion, we have not listed the statements in the order they occurred, but grouped those with similar content.

First, in her opening, the prosecutor repeated Maysa's words from the 9-1-1 call, stating "protect me[,] protect me" and commenting Maysa was "begging for protection from her assailant," who was alleged to be defendant. Defendant objected and moved for a mistrial, which was denied, but the judge issued this comprehensive curative instruction:

> As I indicated previously in my instructions . . . what the attorneys say is only argument, it's not evidence. You may have heard the Prosecutor address certain statements . . . alleged to have been made by [a] particular witness. Until you hear those statements come from the witness stand they are not evidence. They do not exist. So you are to disregard any statements . . . alleged to have been made

> until and unless you hear . . . them as evidence . . . .

Second, in response to a question on cross-examination, the 9-1-1 operator repeated Maysa's statements regarding being beaten. Defendant immediately requested a sidebar and the State did not object to the testimony being stricken. The judge issued a similar curative instruction, stating:

> Ladies and gentleman, with regards to the last statement . . . made by the witness, as I've indicated previously[,] testimony that you hear from a person has to come from that person unless I otherwise instruct. The information that was just provided by the 911 operator is not evidence until it's been established in evidence. So you are not to consider the last statement with regard[] to a statement made by someone who has not testified specifically in this case that the caller indicated that she was being beaten by [defendant]. You're not to consider that in your deliberations unless and until it's admitted in evidence by other form.

The next cited comment was uttered during direct examination of the arresting JCPD officer, who stated she called emergency medical services (EMS) for the baby and Maysa, because "at the time, [Maysa] mentioned she was pregnant." The statement prompted defendant's objection, which was sustained. Following sidebar, the judge told the jury:

> Ladies and gentleman, as you've heard the objection is sustained. The fact that [Maysa] may or may not have been pregnant has nothing to do with whether a child was abused,

> endangered or a weapon was used, therefore, you are not to consider that in your deliberations. You're to strike it from the record.

Afterward, the arresting officer made another comment, which did not draw objection, but is cited as inappropriate on appeal. The officer explained after calling EMS, she "advised [Maysa] of her domestic violence rights. That she had a right to a restraining order." The officer continued relating information about available resources including calling the Division and a battered women's shelter.

Defendant's related challenge highlights the judge's admission of testimony from the JCPD detective, who discussed efforts to find Maysa after defendant's arrest. The detective stated she served a subpoena for Maysa to testify at "an undisclosed housing facility for women and children." The judge immediately told the jurors "defendant is . . . charged with crimes against the child in this case. The nature of the residence . . . being discussed . . . is completely irrelevant for the purpose of this trial. You are not to consider that in your deliberations." In response to another question, the detective stated this was a secure facility. Defendant did not object.

Finally, defendant isolates the prosecutor's statement in her closing that Maysa and the baby were taken to the Jersey City

Medical Center, from which reports were generated. Also, the prosecutor explained Maysa went to a secure facility and mentioned she was protecting herself. Upon objection, the judge again reminded the jurors attorney statements were "simply arguments with hopes to persuade you with regard[] to their positions. That is all it is . . . argument."

In identifying each of these instances, defendant asserts the court erred by denying his requests for a mistrial, arguing the "unduly prejudicial testimony" referencing violence against Maysa prejudiced the jury against him, making his trial unfair. We are not persuaded.

A defendant's right to an impartial jury "is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007). That right "includes the right to have the jury decide the case based solely on the evidence presented at trial free from the taint of . . . extraneous matters." State v. R.D., 169 N.J. 551, 557 (2001). That said, a mistrial should only be granted "to prevent an obvious failure of justice." State v. Harvey, 151 N.J. 117, 205 (1997) (citing State v. Rechtschaffer, 70 N.J. 395, 406 (1976)).

We review the disposition of a motion for a mistrial for an abuse of discretion. R.D., supra, 169 N.J. at 559. "Application of that standard respects the trial court's unique perspective.

We traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." Id. at 559.

Likewise, our review of the interjection of inadmissible testimony must examine whether errors, individually, or together, deprived defendant of a fair trial and resulted in a failure of justice. Ibid. The test to determine whether a new trial is necessary "is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs." State v. Jenkins, 182 N.J. 112, 131 (2004) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61-62 (1951)). The standard is, therefore, not whether it "actually influenced the result, but whether it had the capacity of doing so." Loftin, supra, 191 N.J. at 190 (quoting Panko, supra, 7 N.J. at 61).

Our Supreme Court has also addressed the effect of curative instructions, when inappropriate evidence seeps into a trial, stating:

> The decision on whether inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a

> prejudicial comment on the jury in the overall setting.
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> [State v. Winter, 96 N.J. 640, 646-47 (1984).]

Applying these principles to the facts presented, we conclude the trial judge did not abuse her discretion in denying defendant's motion for a mistrial. Defendant's timely objections to inadmissible witness statements were met with the trial judge's strong and prompt curative instructions to the jury. Defendant's suggestion the curative instructions were not effective is rejected.

Also, we conclude the alleged errors were the sort that could be cured by a prompt instruction. "Even in the context of a constitutional error, a curative instruction will not be deemed inadequate unless there is a real possibility that the error led the jury to a result it otherwise might not have reached." State v. Scherzer, 301 N.J. Super. 363, 441 (App. Div. 1997) (citing Winter, supra, 96 N.J. at 647). We presume juries understand and will follow a trial judge's instructions. State v. Burns, 192 N.J. 312, 335 (2007).

Here, defendant did not challenge the curative instructions or seek additional relief at trial. Moreover, the jury's deliberations showed it carefully sifted through the facts and listened to what it was told. Defendant was acquitted of some

charges, and importantly, the jury could not reach unanimity on the most serious charges. Following our review of the record, we cannot conclude a miscarriage of justice occurred. See Brenman v. Demello, 191 N.J. 18, 33-34 (2007) (citing Bender v. Adelson, 187 N.J. 411, 431 (2006)).

Specifically, addressing the prosecutor's comments in opening and summation, we note prosecutors, acting with the weight and authority of the State, "may fight hard, but they must also fight fair." State v. Pennington, 119 N.J. 547, 577 (1990). In evaluating the severity of alleged prosecutorial "misconduct," it is clear "'prosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct was so egregious as to deprive defendant of a fair trial.'" State v. Papasavvas, 163 N.J. 565, 625 (2000) (quoting State v. Timmendequas, 161 N.J. 515, 575-76 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001) (citations omitted)). Reversal is required only when the prosecutor's conduct was "'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Wakefield, 190 N.J. 397, 438 (2007) (quoting Papasavvas, supra, 163 N.J. at 625), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). "In sum, 'to warrant a new trial the prosecutor's conduct must have been clearly and

unmistakably improper, and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense.'" Ibid. (quoting State v. Smith, 167 N.J. at 181-82 (2001) (citations omitted)).

The prosecutor's inappropriate opening comment, repeating possible evidence, was swiftly and effectively addressed by the trial judge. She repeatedly reminded jurors of their role in determining the facts from the evidence and emphasized counsel's statements were mere argument, not evidence.

Regarding the unchallenged statements in closing, we cannot agree these represent plain error, "clearly capable of producing an unjust result." State v. Antuna, 446 N.J. Super. 595, 603 n.6 (App. Div. 2016) (quoting R. 2:10-2).

> "[W]hile a prosecutor's summation is not without bounds, '[s]o long as he stays within the evidence and the legitimate inferences therefrom the Prosecutor is entitled to wide latitude in his summation.'" State v. R.B., 183 N.J. 308, 330 (2005) (quoting State v. Mayberry, 52 N.J. 413, 437 (1968), cert. denied, 393 U.S. 1043, 89 S. Ct. 673, 21 L. Ed. 2d 593 (1969)). We underscored that "'[a] prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence. There is no error so long as he confines himself in that fashion. Ultimately it was for the jury to decide whether to draw the inferences the prosecutor urged.'" Ibid. (quoting State v. Carter, 91 N.J. 86, 125 (1982) (citations omitted)).
>
> [Wakefield, supra, 190 N.J. at 457.]

The summation generally summarized the facts in evidence. Later, when a sidebar was requested by defendant because a comment presumed to state what Maysa thought, the judge stated she would, and in fact did, provide an instruction addressing counsel's summation, clearly describing the nature of the statements as "mere argument."

"[N]ot every suspected deviation from perfection on the part of a prosecutor will justify a reversal of a conviction." State v. Bozeyowski, 77 N.J. Super. 49, 63 (App. Div. 1962) (quoting State v. Bucanis, 26 N.J. 45, 56, cert. denied, 357 U.S. 910, 78 S. Ct. 1157, 2 L. Ed. 2d 1160 (1958)). "[The] infraction must be clear and unmistakable and must substantially prejudice the defendant's fundamental right to have the jury fairly evaluate the merits of his defense." Ibid.

Even when considering the aggregate effect of unacceptable comments or inadmissible statement, we cannot agree a new trial is warranted. The jury had the 9-1-1 transcript, which set forth the basis for the initial police response. Further, medical records of the baby, along with photographs taken of the unmistakable injuries the baby suffered during the altercation, were introduced.

In light of all the unrefuted evidence the State presented, we conclude defendant's challenges are unavailing; they do not lead us to conclude his trial was unfair. State v. Marshall, 123 N.J. 1, 170 (1991) ("A defendant is entitled to a fair trial, not a perfect one.") (quoting Lutwak v. United States, 344 U.S. 604, 619, 73 S. Ct. 481, 490, 97 L. Ed. 593, 605 (1953)), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993).

The remaining arguments set forth, which were not discussed, were found lacking in sufficient merit to warrant discussion. R. 2-11(e)(2). Succinctly, the State's proofs on count three were strong, and defendant was acquitted of possession of a weapon for an unlawful purpose.

Affirmed.