RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0482-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD A. GAJDEROWICZ,

Defendant-Appellant.

Submitted April 4, 2017 – Decided August 15, 2017

Before Judges Messano and Espinosa.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 14-03-0163.

Joseph E. Krakora, Public Defender, attorney for appellant (Tamar Y. Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Scott A. Coffina, Burlington County Prosecutor, attorney for respondent (Alexis R. Agre, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his conviction for second-degree attempted luring, N.J.S.A. 2C:13-6, of fourteen-year-old S.D. We affirm.

I.

The facts underlying the offense begin in February 2013, when defendant, then twenty-one-years old, had contact with fourteen-year-old S.D. through a web game called Ruzzle. This was not the first interaction between defendant and S.D. They became friends on Facebook approximately two months earlier. S.D.[1] did not know defendant personally but knew his brother, a fellow freshman in her high school class. S.D.'s mother, A.R., testified she sent defendant a message from her own Facebook account in December 2012, instructing him to delete her daughter as a friend and not to communicate with S.D. again or she would go to the police.

Ruzzle has a chat function that permits players to chat while playing the game. In February 2013, she began to chat with defendant through this chat function. At her mother's request, S.D. asked defendant how old he was. This exchange followed:

Defendant:	I'm 21. U
S.D.:	14
Defendant:	Oh. You don’t look 14

[1] S.D. was called as a witness for the defense and added little to the evidence.

S.D.:	LOL. Do you know Paul [E].
Defendant:	I don't think so. You wanna just text, LOL
S.D.:	What's your number
Defendant:	856-535-XXXX, just make sure you put your name so [I know] who it is
S.D.:	LOL again, I'm only 14, you don't care?

Defendant responded, "Not unless you try to get me in trouble and you don't care that I'm 21." After this exchange, S.D. had no further contact with defendant. She did not play Ruzzle with him again and did not text him.

A.R., S.D.'s mother, testified that S.D. came to her on the evening of February 5, 2013, and told her that a man was trying to contact her through Ruzzle. S.D. said, "I don't want to deal with it. I told him I'm 14 years old and he still wants me to contact him."

A.R. reviewed the chat exchanges and then used her cell phone to text defendant at the number he had provided. She did not identify herself, only opening the exchange with "Hey." A.R. testified defendant believed she was S.D. and began "communicating as a friendly chat at first." The issue of age came up again, with defendant stating he was twenty-one and "S.D." (A.R.) stating

she was fourteen. Defendant did not give his name but sent her three or four pictures of himself.

Defendant started texting A.R.'s phone the following morning. There was an exchange of text messages that day that included defendant's question, "Do you have a problem with my age." Posing as S.D., A.R. replied, "no, but my mom would. LOL." In text messages that followed, defendant cautioned, "Like never say to anyone how old I am . . . and . . . make sure nobody would find out who would tell," "people who can get me in trouble." A.R. responded, "Told you I was 14. You're 21. Why would you get in trouble." Defendant answered, "under age," and then, "never mind. Just don't let your mom or hardly anyone know, LOL."

The continuing text messages include:

Defendant:	What's the oldest guy you dated?
A.R.:	16
Defendant:	How many guys have you slept with?
A.R.:	One, Y?
Defendant:	Just asking questions.
A.R.:	How many younger girls have you been with?
Defendant:	Send me some pix

Defendant eventually answered, "two" younger girls and gave their ages as 16 and 17. He asked again for pictures and A.R. responded, "You know what I look like," referring to the fact that defendant had "friended" S.D. on Facebook two months earlier.

Later in the afternoon, at a time when S.D. would be home from school, defendant sent a text suggesting, "maybe we can meet up or something." At that point, A.R. decided to go to the police. She was concerned because she had told defendant several times that she was underage. She texted to defendant, "I have to wait till my mom leaves." He asked, "where's a good spot," and when A.R. asked him to pick, he selected a restaurant within walking distance of her house. He followed that with texts, "how long we have to hang out," and "or should I say how long can you stay out."

On the following day, A.R. kept S.D. home from school and returned to the police department. She continued to exchange text messages with defendant.

In the text exchanges, defendant asked why "S.D." had cut school. A.R. replied, "you wanted to meet up and I couldn't last night. I thought we were gonna have fun." When defendant asked, "what kind of fun do you want," she said, "you asked me how many people I slept with, I thought that's what you meant by fun-ness." Defendant asked, "well do you want to?" "S.D." suggested meeting

at the benches across from the library and that they could go to her house because her mother was at work. Defendant asked her, "prove to me that you want it." When she asked how she could prove it, he said, "send me a pic." She asked what he wanted to see. He replied, "everything." When she replied "LOL, in person," he asked for "Pic of your pussy then." She answered that he would "see it soon enough."

Defendant was arrested at the designated meeting spot and returned to the Medford Police Department. After receiving Miranda[2] warnings from Detective William Knecht, he agreed to speak with police. Defendant maintained he intended to meet with S.D. to warn her of the dangers of communicating and meeting with persons she met online and that he had no intention to have sex with her. He stated he brought his dog to the meeting, knowing she was allergic to dogs, because he did not plan to be alone with her. The videotaped interview was played for the jurors.

Defendant elected not to testify at trial. His girlfriend, with whom he has a child, testified and gave her opinion that he is a truthful person.

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

Defendant presents the following arguments for our consideration in his appeal:

> POINT I
>
> THE TRIAL COURT'S FAILURE TO ISSUE ANY PRELIMINARY CHARGE TO THE JURY ON FUNDAMENTAL LEGAL PRINCIPLES, COMBINED WITH THE STATE'S MISSTATEMENT OF THE LAW LESSENING ITS OWN BURDEN OF PROOF, DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL AND NECESSITATES REVERSAL OF HIS CONVICTION. (NOT RAISED BELOW).
>
> POINT II
>
> THE POLICE OFFICER'S LAY OPINION TESTIMONY THAT HE BELIEVED THAT THE DEFENDANT HAD THE INTENT NECESSARY TO COMMIT THE CHARGED OFFENSE AND HAD IN FACT COMMITTED THE OFFENSE WAS INADMISSIBLE AND NECESSITATES REVERSAL OF DEFENDANT'S CONVICTION. (NOT RAISED BELOW).

"The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." State v. Robinson, 200 N.J. 1, 19 (2009). Because both arguments are raised for the first time on appeal, our review is limited to "a search for plain error," State v. Nesbitt, 185 N.J. 504, 516 (2006), that is, an error that is "clearly capable of producing an unjust result," R. 2:10-2. After reviewing defendant's arguments in light of the

record and applicable legal principles, we conclude neither alleged error was clearly capable of producing an unjust result.

II.

After the jury was sworn, the trial judge provided them with preliminary instructions that did not cover all the topics included in the Model Criminal Jury Charge, "Instructions After Jury is Sworn" (2012). Defendant argues the trial judge committed plain error in failing to instruct the jury on the presumption of innocence and the burden of proof and that this error was exacerbated by alleged misstatements by the State in its opening statement.

In his opening statement, the prosecutor discussed the presumption of innocence, describing it as "vital to our system" and that he expected the jurors to adhere to their oath. He also said there was a "flip side," that the jurors had "promised to give the State a fair shake" and were required to give "a fair shake" to both the defendant and the State. There was no objection to this statement and no argument is presented on appeal that defendant was prejudiced by this comment. Still, defendant contends the prosecutor's comment left the erroneous impression that the jury had to apply the same burden to both the State and the defendant.

There was no objection to the preliminary instructions given and defendant concedes the trial court's final charge included appropriate instructions regarding the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt.

> [M]odel jury charges should be followed and read in their entirety to the jury. The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers.
>
> [State v. R.B., 183 N.J. 308, 325 (2005).]

We do not condone the trial court's failure to give the jury the entire preliminary instruction before commencing the trial. But, we note the failures to object to either the preliminary charge or the prosecutor's opening statement strongly suggest that defense counsel did not perceive any prejudice at the time. State v. Docaj, 407 N.J. Super. 352, 370 (App. Div.), certif. denied, 200 N.J. 370 (2009).

When a jury instruction is challenged on appeal, we do not look at the challenged portion in isolation; rather, we examine the charge "as a whole to determine its overall effect," and "whether the challenged language was misleading or ambiguous." State v. McKinney, 223 N.J. 475, 494 (2015) (citations omitted). When, as here, there has been no objection, the error must be

"clearly capable of producing an unjust result," R. 2:10-2, to warrant reversal.

> In the context of jury instructions, plain error is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."
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> [State v. Camacho, 218 N.J. 533, 554 (2014) (quoting State v. Adams, 194 N.J. 186, 207 (2008)).]

In light of the fact that appropriate instructions were given to the jury before they began their deliberations and the compelling evidence of defendant's guilt, the omissions in the preliminary charge were not clearly capable of producing an unjust result. R. 2:10-2.

III.

Defendant next argues his conviction must be reversed because Detective Knecht gave impermissible opinion testimony regarding defendant's state of mind and guilt. We disagree.

Knecht testified about his role in the investigation and, during the course of his testimony, read the text messages exchanged between defendant and "S.D." As we have described, those messages included statements that S.D. was fourteen-years-old; that they were meeting to have "fun" at her mother's house;

that "fun" was having sex and defendant's request that "S.D." prove she intended to do so by sending him a photo of her, naked, or of her genital area.

The prosecutor questioned Knecht about the "plan" that culminated in defendant's arrest in relevant part as follows:

> Q. Okay. You start talking about this, about a potential meeting, right. Why don't you explain . . . what your plan is, how this is going to be set up and what steps you and the other officers take.
>
> A. Yes, sir. Basically he believes he's meeting with a 14 year old girl in a park to then go back to her house for the purpose of engaging in sexual activity based on the text messages.

Knecht then proceeded to explain why the location was chosen and where the officers were located to conduct surveillance and effect the arrest. There was no objection to this testimony.

The second portion of Knecht's testimony challenged on appeal relates to questioning about defendant's repeated offers to "partner up" with the police to assist them in investigating matters like the one he was charged with. When asked on re-direct examination if defendant had ever reached out to the police to report suspicious activity, Knecht said he had never done so. Defense counsel followed up on this on re-cross-examination, asking Knecht about defendant's offer to partner up with the police: "That was a very simple-minded childlike account of a view

of life on his part, don't you think?" The assistant prosecutor objected to the question as an effort to ask the detective "to give an opinion about the defendant's either mental state or understanding or learning." Defense counsel stated,

> I'm just asking him how he felt. He was the one who conducted the interview for two hours and spoke with [defendant] for two hours.

The trial judge overruled the objection and re-cross-examination continued:

> A. My opinion of [defendant] in that interview is that he was articulate. He was, you know, he was able to understand the questions and come up with some form of answer. I believe that partnering —
>
> Q. Excuse me one minute. My question as very specific. Do you believe in your opinion in that two hour conversation the account about what [the assistant prosecutor] calls partnering up with your police force was a simple-minded childlike account of life?
>
> A. No, I do not believe that.
>
> [(Emphasis added).]

This colloquy was immediately followed by further direct examination:

> Q. What do you believe when we talk about or the defendant talked about this partnering up? What do you believe that to be?

A. What I believe that to be was a person who was caught committing a crime, failed attempt to explain it away.

[(Emphasis added).]

There was no objection to this testimony, either.

It is a well-established principle that a witness, whether expert or lay, may not offer an opinion as to the defendant's guilt or state of mind. See, e.g., State v. Sowell, 213 N.J. 89, 103-104 (2013); State v. McLean, 205 N.J. 438, 443, 463 (2011) (reversing the defendant's possession-with-intent-to-distribute convictions because a police officer, based on his surveillance observations of the defendant handing an item to an individual in exchange for money, gave opinion testimony that a narcotics transaction had occurred); cf. State v. Cain, 224 N.J. 410, 429 (2016) ("[A]n expert witness may not opine on the defendant's state of mind.") However, even if improper expert testimony is elicited, a reversal of defendant's conviction is warranted only if that testimony was sufficiently prejudicial to have the capacity to bring about an unjust result. State v. Nesbitt, 185 N.J. 504, 518-19 (2006); State v. Thompson, 405 N.J. Super. 76, 81 (App. Div. 2009).

Although both challenged sections of Detective Knecht's testimony include his opinion of what defendant believed, we find no grounds for reversal. The first segment of challenged testimony

followed a review of the incriminating statements defendant admitted making in his text messages. It is certainly true that the detective should not have prefaced his description of the police plan with the remark, "Basically he believes he's meeting with a 14 year old girl . . . ." But the damage from this is negligible since defendant's admitted statements in the text messages so strongly support that conclusion and there is no suggestion that the detective had superior knowledge based on his employment to decipher the import of those statements.

Turning to the second challenged segment of testimony, again, we agree the prosecutor should not have asked the detective what he believed regarding the defendant's proffers of assistance. The prosecutor was well aware, based on his own objection, that it was improper to delve into opinion testimony about defendant's state of mind.

But, we must add, this is a case for application of the invited error doctrine. "Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal. . . .'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987) (alteration in original)). "In other words, if a party has 'invited' the error, he is barred from raising an objection for

the first time on appeal." Ibid. (citing N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010)).

Defendant explicitly asked Detective Knecht for his opinion regarding defendant's offer to partner up with the police, asking him to affirm her characterization that it was a simple-minded, childlike statement. When the prosecutor objected, she explained that she was "asking him how he felt" because Knecht "was the one who conducted the interview for two hours and spoke with [defendant] for two hours." The trial judge then ruled in her favor, overruling the objection. The challenged testimony was elicited immediately thereafter, an error that was plainly "invited" by defense counsel's successful effort to elicit the detective's opinion about defendant's state of mind.

In addition, as we have noted, the evidence of defendant's guilt, most of which emanated from his own admitted statements, was compelling. We discern no reason to disturb his conviction.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION