SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1805-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

L.F.S.,

Defendant-Appellant.

Submitted February 28, 2017 – Decided March 20, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Indictment No. 11-05-0514.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark H. Friedman, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Sara M. Quigley, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant was tried before a jury and found guilty on two counts of first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(1), and other offenses. He appeals from the judgment of conviction dated June 6, 2013. We affirm.

I.

Defendant was charged by a Morris County grand jury with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(2)(a) (count two); second-degree sexual assault, N.J.S.A. 2C:14-2(b) (counts three and four); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (count five); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(3)(a) (count six); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (counts seven and eight); third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (counts nine and ten); and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (counts eleven and twelve). The victim of the alleged abuse was L.S., one of defendant's three daughters.

At the trial, L.S. testified that defendant had intercourse with her from before she was thirteen years old until after she was sixteen years old. According to L.S., defendant also touched her breasts and vagina with his hands and mouth. She testified that these incidents occurred "at least once or twice a week."

L.S. estimated that she was eleven years old when the first incident occurred. She said defendant told her to take a shower to get ready for a dentist appointment. While she was showering, defendant knocked on the bathroom door and told her that he needed to use the bathroom. After L.S. exited the bathroom, defendant went into L.S.'s room, pulled away her towel, pushed her up against the bed, and began touching her "private areas."

L.S. struggled to get away but defendant held her down and touched her breasts and vagina with his hand. She testified that there was no penetration during this first incident. L.S. said she did not tell anyone at that time because she did not think defendant would ever touch her again.

L.S. further testified that another incident occurred a week or two later. L.S. said she had to return to the dentist for a follow-up visit and defendant told her to get ready. After L.S. was dressed, defendant pushed her onto the bed and removed her clothing. L.S. struggled. She briefly got away and struck defendant in the head with a spray can.

According to L.S., defendant grabbed her and pushed her against the bed. L.S. thought defendant was going to hit her so she stopped resisting. Defendant then penetrated L.S.'s vagina with his penis. During both of these incidents, L.S.'s sisters were out of the house.

L.S. also stated that similar incidents continued to occur. She said defendant would sexually abuse her in the morning, after the other family members left the house. She stated that defendant would leave for work at five in the morning, and then return and have intercourse with her before driving her to school.

L.S. testified that she did not tell anyone about these assaults for a significant period of time. She was frightened that defendant would "do something" to her if she reported the abuse. She also was afraid that if she said anything, her family would be separated.

L.S. stated that on one occasion, she was late to school because of one of the sexual assaults. She was in the seventh grade at the time. One of her friends, V.S., noticed her crying and asked what was wrong. L.S. wrote V.S. a note, stating that her father was raping her. She did not go into detail about the assaults, only stating when the assaults began. She said defendant did not use a condom and the assaults were continuing.

Several months later, L.S. disclosed the sexual abuse to her older sister, C.S. She advised L.S. to report the abuse to their mother, which she did. L.S. testified that her mother was reluctant to believe her. When L.S.'s mother confronted defendant, he denied that he had sexually assaulted L.S. He said they had been "playing around" and L.S. misinterpreted what happened. L.S.'s mother

accepted his denials. Thereafter, defendant continued to sexually assault L.S.

In the spring of 2010, when she was in her sophomore year of high school, L.S. disclosed the sexual abuse to a teacher at school. The teacher reported the abuse to school officials, who then informed the police. During her first interview with detectives, L.S. said the sexual abuse went on for only about a year. She testified that she limited the time of the abuse because she was embarrassed. However, during the second interview, L.S. said the abuse had lasted several years and had continued up until a week before she first spoke with the detectives.

At trial, the State presented the testimony of Doctor Anthony Vincent D'Urso, who was qualified as an expert in behavioral science and child sexual abuse. Dr. D'Urso testified that Child Sexual Abuse Accommodation Syndrome (CSAAS) is a psychological theory that attempts to explain the differences between an adult victim and a child victim of sexual assault. CSAAS also attempts to explain the behavior often seen in children who have been the victims of sexual assault. Dr. D'Urso noted, however, that he had not evaluated L.S., nor was he familiar with the specific allegations against defendant.

Defendant denied sexually assaulting L.S. He testified that he always took all three of his daughters to the dentist together.

Therefore, he was not alone with L.S. on those occasions when she alleged he sexually assaulted her before dentist appointments. Defendant denied that his wife confronted him about sexually assaulting L.S. He stated that the only conversation he had with his wife was about "play[ing] rough." Defendant also testified that on the occasions when L.S. claimed he sexually assaulted her before school, he would have been at work. He stated that he regularly worked Monday through Saturday from 6:00 a.m. until 2:00 p.m.

Defendant's wife testified on his behalf. She admitted that L.S. had disclosed the sexual assaults to her. She stated, however, that when she confronted both L.S. and defendant at the same time, L.S. said that they were "playing around." She further testified that L.S. and defendant were never left alone together, and that she told L.S. to go to the police if the alleged sexual abuse ever happened again.

Defendant also presented evidence that when he was in jail awaiting trial on these charges, L.S. wrote to him about the allegations. The letter stated that L.S. apologized to defendant "for all the things that you have had to [go] through this past month." The letter also stated that, "I didn't know how far my actions were going to go. And little by little I just caught myself in a lie and I guess — and I guess I was just mad, mad at

the fact that I felt like a prisoner in my own house with no way out." L.S. testified, however, that she did not mail the letter. Someone else had mailed the letter. L.S. said the statements in the letter were not true, and that she wrote it because she felt bad for her father.

The jury found defendant guilty on counts one and two (aggravated sexual assault); counts three, four, and five (sexual assault); counts seven and eight (endangering the welfare of a child); count ten (aggravated criminal sexual contact); and count twelve (criminal sexual contact). The jury found defendant not guilty on counts six (sexual assault); nine (aggravated criminal sexual contact); and eleven (criminal sexual contact).

The court sentenced defendant on count one to fifteen years of incarceration with a period of parole ineligibility as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court sentenced defendant on count two to a consecutive term of eleven years, subject to NERA. The court imposed concurrent sentences of five years on count three; six years on count four; five years on counts five, seven, and eight; four years on count ten; and one year on count twelve. The sentences on counts three and four are also subject to NERA. In addition, the court imposed appropriate fines and penalties.

Defendant appeals and raises the following arguments:

POINT I

THE TRIAL COURT ERRED IN ALLOWING [V.S.] TO GIVE CUMULATIVE FRESH[-]COMPLAINT TESTIMONY TO THE JURY.

POINT II

IT WAS PLAIN ERROR TO ADMIT TESTIMONY ABOUT THE CHILD SEXUAL ABUSE ACCOMODATION SYNDROME UNDER THE EXPERT TESTIMONY EXCEPTION TO N.J.R.E. 702 BECAUSE THE SYNDROME IS NOT BASED ON RELIABLE SCIENCE.

POINT III

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

II.

We turn first to defendant's contention that the trial judge erred by allowing V.S. to give fresh-complaint testimony in this case. Defendant contends the court should have barred the testimony as cumulative.

Fresh-complaint evidence is admissible if the victim made the statement to persons she would ordinarily turn to for support, the statements were made within a reasonable time after the alleged assault, and the statements were spontaneous and voluntary. State v. Hill, 121 N.J. 150, 163 (1990) (citations omitted). In a case involving sexual assault, such evidence serves "a narrow purpose." Ibid. "It allows the State to negate the inference that the victim

was not sexually assaulted because of her silence." Ibid. (citing 4 J. Wigmore, Evidence, § 1135 at 297-301 (Chadbourn rev. ed. 1970)).

The determination of whether fresh-complaint evidence is cumulative is committed to the sound discretion of the trial judge. Id. at 169 (citing State v. Mucci, 25 N.J. 423, 433 (1957)). The court must assess whether testimony regarding the victim's complaint is irrelevant or prejudicial to the defendant, in light of the narrow purpose for its admission. Ibid. In some cases, the court may find that defendant is not prejudiced by duplicative fresh-complaint testimony.

> That may occur when the victim complained at various times to different people, or when so much other evidence exists that duplicative testimony is unlikely to tip the scales. Yet, in close cases, in which the victim's complaint has already been once established and it appears that repeated fresh-complaint testimony would leave the jury with the impression that the State has gathered a greater number of witnesses than the defense, the trial court may properly exercise its discretion and exclude the testimony.
>
> [Id. at 169-70.]

Here, the State filed a pretrial motion seeking permission to present fresh-complaint testimony from three witnesses: L.S.'s friend V.S., her sister C.S., and her teacher. The motion judge determined that the testimony of each of those witnesses met the

requirements of the fresh-complaint rule, but the judge did not rule on whether the testimony of the three witnesses would be cumulative.

The case was assigned to another judge for trial. The trial judge advised counsel that he had not yet determined whether the State could present testimony from the three fresh-compliant witnesses. Defense counsel told the judge he objected to V.S.'s testimony, since he did not believe it qualified under the fresh-complaint rule. Defense counsel did not, however, object to L.S.'s teacher testifying as to L.S.'s complaint. The judge stated that he would not rule on whether the testimony was cumulative until he heard the testimony.

At trial, the State presented testimony from V.S. Defendant did not object to the testimony as cumulative. After V.S. testified, the judge instructed the jury on the proper use of fresh-complaint testimony. The State then presented testimony from C.S. Defendant did not object to her testimony as cumulative, and the judge again instructed the jury on the proper use of fresh-complaint testimony. The State elected not to call L.S.'s teacher as a witness.

We are not convinced the judge erred by allowing the fresh-complaint testimony from V.S. and C.S. Here, L.S. reported defendant's sexual assaults to V.S. and C.S., but did so at

different times. Significantly, defendant's alleged sexual assaults began some time before L.S. reported them to V.S., and the assaults continued thereafter in the time before she reported the assaults to C.S. Because the testimony related to different complaints, regarding different assaults at different times, it was not impermissibly duplicative. The testimony also was not likely to tip the scales in the State's favor. We conclude the admission of the fresh-complaint testimony was not a mistaken exercise of the trial judge's discretion.

III.

Next, defendant argues for the first time on appeal that it was plain error for the trial judge to admit Dr. D'Urso's expert testimony under N.J.R.E. 702 because CSAAS allegedly is not a scientifically reliable theory.

In State v. J.Q., the Supreme Court held that expert CSAAS testimony is admissible to "explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred." 130 N.J. 554, 579 (1993) (quoting John E. B. Myers et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1, 67-68 (1989)).

Expert testimony based on CSAAS may, however, be admitted to assist the jury in evaluating "evidence about an alleged victim's post-assault conduct or behaviors when that conduct may be

misperceived by jurors as inconsistent with the truthfulness of the claim of assault." State v. W.B., 205 N.J. 588, 610 (2011) (quoting State v. P.H., 178 N.J. 378, 395 (2004)). Such testimony may be admitted so long as the expert does not attempt to draw a correlation "between the particular child's behavior and the syndrome, or opine whether the particular child was abused." Id. at 611 (citing State v. R.B., 183 N.J. 308, 328 (2005)).

On appeal, defendant argues that in the thirty years after the Supreme Court approved the admission of expert CSAAS testimony in J.Q., the basic premises of the syndrome have not been scientifically established. He contends that studies conducted "in the ensuing decades" show that CSAAS does merit scientific acceptance and therefore does not meet the standard for admission under N.J.R.E. 702. We are bound, however, by the Supreme Court's precedent on this issue. RSB Lab. Servs., Inc. v. BSI, Corp., 368 N.J. Super. 540, 560 (App. Div. 2004).

Defendant, nevertheless, argues that if we do not hold that CSAAS expert testimony is inadmissible under N.J.R.E. 702, we should remand the matter to the trial court so that a record can be established to support his contention that such testimony is not admissible.

In State v. J.R., ___ N.J. ___, ____ (2017) (slip op. at 34-35), the Office of Public Defender, as amicus curiae, argued that

the Court should reject CSAAS expert testimony in its entirety because CSAAS allegedly has been rejected by experts on child sex abuse and should be excluded under N.J.R.E. 702. The Court refused to address the issue. Id. at __ (slip op. at 35).

The Court stated that "the proper procedure is a challenge to the admissibility of the evidence before the trial court in an appropriate case." Ibid. The Court observed that the trial court would then be in the position to hold a pretrial hearing pursuant to N.J.R.E. 104, to consider the scientific evidence presented by both sides, and create an appropriate record for appellate review. Ibid.

Here, defendant did not challenge the admission of CSAAS testimony in the trial court, and consequently the trial court did not conduct an N.J.R.E. 104 hearing on the issue. Defendant therefore failed to establish a record for appellate review in this case. Because defendant did not raise this issue in a timely manner, we are not convinced that it would be appropriate to remand the matter to the trial court for further proceedings on this issue.

IV.

Defendant also argues that his sentence is manifestly excessive and unduly punitive. We disagree.

An appellate court's review of the trial court's "sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). On appeal, the court should not set aside a sentence unless (1) the trial court did not follow the sentencing guidelines; (2) the court's findings of aggravating and mitigating factors were not based upon sufficient credible evidence in the record; or (3) the court's application of the sentencing guidelines to the facts of the case "shock[s] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Here, the trial court found aggravating factors two, N.J.S.A. 2C:44-1(a)(2) (gravity and seriousness of harm inflicted on the victim); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law). The judge also found mitigating factors seven, N.J.S.A. 2C:44-1(b)(7) (no history of prior delinquency or criminal activity); eight, N.J.S.A. 2C:44-1(b)(8) (defendant's conduct was the result of circumstances not likely to recur); and nine, N.J.S.A. 2C:44-1(b)(9) (defendant's character and attitude indicate he is unlikely to commit another offense).

The judge found that the aggravating factors outweighed the mitigating factors, and sentenced defendant to a fifteen-year prison term on count one, and a consecutive eleven-year term on

count two. The sentences on counts one and two are subject to NERA. The judge also sentenced defendant to concurrent sentences on the other counts on which he was found guilty.

On appeal, defendant contends that the judge erred by finding aggravating factor nine. He contends the judge erroneously stated that "[t]he higher the degree of the crime[,] the greater the public need for protection and the more need for deterrence." He contends that the general deterrence in aggravating factor nine is entitled to relatively little weight, and the need for general deterrence is already reflected in the fact that aggravated sexual assault is a first-degree offense.

We are convinced, however, that the judge did not err by finding aggravating factor nine. That factor incorporates two related concepts — the sentence's general deterrent effect upon the public, and the specific personal deterrent effect upon the defendant. State v. Fuentes, 217 N.J. 57, 79 (2014). The judge did not err by commenting that the more serious the offense, the greater the need for general deterrence.

We therefore reject defendant's contention that his sentence is manifestly excessive. The sentence represents an appropriate exercise of the court's sentencing authority.

Affirmed.