SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2397-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAJON G. LESTER,

Defendant-Appellant.

Submitted January 25, 2017 – Decided February 17, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 12-01-0015.

Joseph E. Krakora, Public Defender, attorney for appellant (Jennifer L. Gottschalk, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Lila B. Leonard, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Dajon G. Lester was convicted of second-degree sexual assault, N.J.S.A. 2C:14-2c(1) (Count One),

and fourth-degree criminal trespass, N.J.S.A. 2C:18-3, as a lesser-included offense of second-degree burglary, N.J.S.A. 2C:18-2a(1) (Count Two). On December 22, 2014, defendant was sentenced on Count One to a five-year prison term with an eighty-five percent parole ineligibility period pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant was placed on parole supervision for life and ordered to comply with the restrictions and supervision of Megan's Law. A concurrent eighteen-month prison term was imposed on Count Two. The present appeal followed.

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

> POINT ONE
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> THE TRIAL COURT ERRED BY ADMITTING EVIDENCE EXTRACTED FROM THE VICTIM'S CELL PHONE.
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> A. The chain of custody for the victim's cell phone was not sufficiently established to warrant the admissibility of the text messages downloaded from it.
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> B. The State failed to qualify Perticari as an expert before eliciting his testimony as an expert and failed to provide defendant with adequate and timely information of the methodology and equipment he used to extract data from the victim's cell phone (Raised in part below).
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> C. The court's erroneous decision to admit the text messages from S.G.'s cell phone was unduly prejudicial to defendant.

POINT TWO

THE TRIAL COURT'S CUMULATIVE ERRORS CAUSED DEFENDANT'S UNJUST CONVICTIONS FOR SECOND-DEGREE SEXUAL ASSAULT AND FOURTH-DEGREE CRIMINAL TRESPASS.

A. The trial court erred when it questioned S.G. then allowed the State further direct examination before permitting cross-examination by defendant.

B. The trial court erroneously permitted the State to elicit hearsay testimony from the S.A.N.E. nurse.

C. The trial court erred when it determined to include "attempt to inflict bodily injury" in its charge to the jury on "burglary."

POINT THREE

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT PROPERLY WEIGHING THE HARDSHIP TO DEFENDANT'S FAMILY AND GIVING INSUFFICIENT WEIGHT TO THE UNLIKELIHOOD OF RECURRENCE OF THE CIRCUMSTANCES WHEN IT SENTENCED HIM TO THE FIVE-YEAR N.E.R.A. TERM.

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

I.

We recount the most pertinent portions of the evidence adduced at the October 2014 trial. Defendant and S.G. began a dating relationship around February 2009, when S.G. was a high school sophomore. Several times during the course of their relationship

they broke up but later reconciled. During the week prior to the February 7, 2011 incident that led to the criminal charges, defendant broke up with S.G., and she did not wish to reunite with him.

On February 7, 2011, at approximately 7:10 a.m., S.G. was leaving her house to go to the bus stop for school when she encountered defendant standing at her door. Defendant asked S.G. why she was not responding or speaking to him, and she told him she did not want to talk to him. Defendant walked toward S.G., forcing her to step backwards into her house. S.G. told defendant to leave because she needed to go to school and was going to miss the bus, but defendant continued to step toward her and ask why she was ignoring him.

When they reached S.G.'s living room, defendant physically pushed S.G. onto the couch and removed her boots and jeans. S.G. told defendant she did not "want to do this" and to "please get out of my house." Defendant nonetheless attempted to perform oral sex on S.G., but she pushed his head away. S.G. cried and told defendant she "did not want to do this, over and over again." Next, defendant climbed on S.G., who attempted to push him off while she cried and "made it very clear to him that [she] did not want to have sex." Defendant then put his hand over S.G's mouth and pushed his penis into her vagina. This continued for

approximately two minutes, with defendant's hand over S.G.'s mouth the entire time. S.G. could not recall whether defendant ejaculated.

When defendant finally stopped, S.G. picked up her clothes and ran to the bathroom. Defendant followed her and apologized. He then called one of his friends to pick S.G. up and drive her to school since she had missed the bus.

At school, S.G. attended her first two classes. During her second class, she reported the incident to her best friend, who in turn reported it to the Guidance Department. The guidance counselor contacted S.G.'s mother, who transported her to the hospital to undergo a gynecological examination and to take samples for a rape kit.

Gretchen Raimondo, RN, a forensic nurse certified in sexual assault, examined S.G. Raimondo identified a "five-day window" within which a forensic physical examination should be performed before evidence begins to deteriorate. Thus, "hypothetically, if a victim has had intercourse, sexual intercourse with another individual, let's say, [thirty-six] to [forty] hours before [examination]," evidence of that intercourse would likely still be present. Raimondo specifically explained what S.G.'s examination entailed. Additionally, over defense counsel's objection, Raimondo was permitted to testify about what S.G. told

her regarding the February 7, 2011 incident. She further testified that S.G. had no physical injuries.

The samples Raimondo collected were sent to a DNA laboratory for testing. At trial, a forensic scientist employed by the New Jersey State Police identified defendant as the source of the DNA in the sperm specimens.

S.G. testified that defendant sent her a series of text messages following the sexual assault. Among other things, defendant stated in the messages, "I know wha[t] I did was wrong;" "I'm sorry that was wrong;" "[d]on't tell anybody [S.G.] please;" and "[i]f you [going to] tell anybody tell me now I'll turn myself in now no sense [in] waiting." S.G. gave her cell phone to Westville Patrolman Daniel Rice at the hospital on February 7, 2011. Rice accidently wrote that he logged the evidence in on February 8, but testified this was a "typo." In conjunction with preparing the evidence log, he prepared a handwritten record of what he did with the evidence that was correctly dated February 7. He further testified he did not manipulate the cell phone or look through it.

S.G. left the hospital at approximately 3:30 p.m. on February 7, 2011. She went to the Westville Police Department where she met with Detective Eric Hibbs, articulated what happened, and gave the police consent to keep and search her cell phone. During her

interview with Hibbs, S.G. cried and "appeared to be upset" as she recounted what had occurred. S.G. also signed a Consent to Search form allowing the police to search "any and all messages, pictures, phone numbers and any other data contained on the phone that may assist in the investigation."

Hibbs "took the phone [from the evidence locker] to the Gloucester County Prosecutor's Office . . . and turned it over to Detective Brian Perticari, to extract possible information relating to this investigation." After Perticari finished retrieving the information, Hibbs returned the phone to S.G. on February 9, 2011. Hibbs testified he merely transported the phone to Perticari and did not manipulate the phone or view its contents.

Perticari testified he was contacted by Hibbs to examine S.G.'s cell phone on February 9, 2011. He detailed the process he used to extract data from the phone, which took approximately ten minutes. He was only able to conduct a logical extraction, which, he explained, allowed him to retrieve anything that was active on the phone, but not deleted information. Perticari did not sign an evidence log or prepare a report detailing the methodology he used to extract the information from the cell phone.

Defendant testified he broke up with S.G. on February 4, 2011. They had an altercation that day, which defendant described in part as follows:

> So it really was like a back-and-forth argument. I mean, it didn't really get anywhere. And as we got closer to her house, it kind of got physical, the fight.
>
> . . . .
>
> She — I don't remember what I said to strike it off. But she like she had a hand wallet and she like hit me a couple times in the side of the ear with the wallet.
>
> . . . .
>
> And, I don't know, my reaction, I just pulled — like I turned around and I pulled her hair. And I had gripped her up by her shoulders and like had her on the tree. But, I mean, I was more so just trying to make a point. I wasn't trying to hurt her at all. I just — it was my reaction when she was hitting me with the wallet.

He further testified that later that evening, they texted all night and "ended up making up" and made plans to see each other on Saturday evening at his father's house in National Park. According to defendant, they spent Saturday night together and engaged in consensual vaginal sex.

The next day, defendant received a text message from S.G. terminating their relationship. Defendant attempted to win S.G. back, but she refused and did not answer any of his text messages or calls. Because this was not typical, he went to S.G.'s home around 7:00 a.m. on February 7, 2011, to find out why she was ignoring him. Upon arriving, he saw S.G. coming out the front

door. S.G. told defendant she did not wish to talk to him. Defendant testified that, although they argued for about ten minutes, he did not put his hands on S.G., enter her house, or have sex with her that morning. After he left, defendant attempted to contact S.G. via a series of text messages on February 7 and 8, 2011. According to defendant, in these text messages he was apologizing to S.G. for the physical altercation that occurred the previous Friday.

II.

Defendant argues that the trial court erred in admitting the text messages extracted from S.G.'s cell phone. Specifically, he contends that the chain of custody for S.G.'s cell phone was not sufficiently established, and that the State failed to qualify Perticari as an expert witness. We find no merit to these contentions.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901; see also State v. Brunson, 132 N.J. 377, 393-94 (1993). "The determination of whether the State sufficiently established the chain of custody is within the discretion of the trial court." State v. Mosner, 407 N.J. Super. 40, 62 (App. Div. 2009). Such evidence will usually be admitted

"if the court finds in reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed." Ibid. (citations omitted). Defects in the chain do not negate admissibility, but go instead to the weight of the evidence. State v. Morton, 155 N.J. 383, 446 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001); Mosner, supra, 407 N.J. Super. at 62.

Here, through the testimony of each officer who possessed the cell phone, the State established an unbroken chain of custody. The fact that the dates in the evidence log may be inconsistent with the officers' testimony goes to the weight to be accorded the text messages rather than their admissibility. Morton, supra, 155 N.J. at 446. Each officer who possessed the cell phone testified who he gave it to or retrieved it from. Further, everyone who possessed the cell phone testified it was not tampered with. Id. at 447. Thus, the trial court properly found there was a "reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed." Brunson, supra, 132 N.J. at 393-94 (citations omitted).

Additionally, S.G. testified as to the general content of the text messages she received on February 7, 2011. She noted that

defendant apologized, stating: "I'm sorry. Please don't tell anybody. I promise if you don't tell anybody, I'll leave you alone for good." Her testimony corroborates the police testimony that the messages were not tampered with. More importantly, on cross-examination defendant admitted sending S.G. the text messages on the dates and times shown. His own admission clearly proves the reliability of the text messages. Accordingly, the evidence was properly admitted and defendant was not unduly prejudiced by its admission.

Defendant also argues that the State failed to qualify Detective Perticari as an expert witness. As defense counsel did not object when Perticari's testimony was presented, we review defendant's argument pursuant to the plain error standard. 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). A defendant's failure to

object leads to the reasonable inference that the issue was not significant in the context of the trial. State v. Macon, 57 N.J. 325, 333 (1971).

Witnesses, including police officers, testify in a variety of roles. A fact witness is one who testifies as to what "he or she perceived through one or more of the senses." State v. McLean, 205 N.J. 438, 460 (2011). "Fact testimony has always consisted of a description of what the officer did and saw[.]" Ibid. "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. (citations omitted).

Expert witnesses, however, "explain the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury." Ibid. "Expert testimony is admissible '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" State v. Simms, 224 N.J. 393, 403 (2016) (quoting N.J.R.E. 702); State v. Cain, 224 N.J. 410, 420 (2016) (quoting same). "In other words, to be admissible, expert testimony should 'relate[] to a relevant subject that is beyond the understanding of the average person of

ordinary experience, education, and knowledge.'" State v. Sowell, 213 N.J. 89, 99 (2013) (quoting State v. Odom, 116 N.J. 65, 71 (1989)). If the matter is "within the competence of the jury, expert testimony is not needed." Ibid.

Lay opinion testimony is governed by N.J.R.E. 701, which permits a witness not testifying as an expert, to provide "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." Mclean, supra, 205 N.J. at 456 (quoting N.J.R.E. 701). Courts in New Jersey "have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary." State v. LaBrutto, 114 N.J. 187, 198 (1989).

Here, Perticari was presented as a fact, not expert, witness. He testified as to the procedure he used in retrieving the text messages from S.G.'s cellphone. His testimony lacked opinion, lay or expert, and did not convey what the detective believed, thought, or suspected the text messages meant. Instead, his testimony was a simple recitation of what he did to retrieve the information from the cell phone.

Even if Perticari's testimony fell within the scope of the expert opinion rule because it was specialized knowledge based on his training and experience, we find any error in its admission to be harmless. R. 2:10-2. First, it is clear from Perticari's testimony during the N.J.R.E. 104 hearing that he possessed sufficient education, training, and experience to qualify as an expert in the field of cell phone data extraction. Where a witness possesses sufficient qualifications to have testified as an expert, any error in allowing the lay opinion may be deemed harmless. State v. Kittrell, 279 N.J. Super. 225, 236 (App. Div. 1995). Second, as we have previously emphasized, defendant admitted to sending the very same text messages that Perticari's extraction produced.

III.

Defendant argues that the trial court's cumulative errors deprived him of a fair trial. Specifically, he argues that the court erred when: (1) it admitted the text messages; (2) it questioned S.G. and then allowed the State further direct examination before permitting cross-examination by defendant; (3) it permitted the State to elicit hearsay testimony from the nurse; and (4) when it included "attempt to inflict bodily injury" in its burglary charge. The State counters that there were no errors, let alone cumulative errors.

Our case law recognizes that a "defendant is entitled to a fair trial, but not a perfect one." State v. Wakefield, 190 N.J. 397, 537 (2007) (quoting State v. R.B., 183 N.J. 308, 333-34 (2005)). Nonetheless, when legal errors cumulatively render a trial unfair, the Constitution requires a new trial. State v. Orecchio, 16 N.J. 125, 129 (1954). "[W]here any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse." Id. at 134 (citations omitted).

Having reviewed the record, we find no evidence of error, either standing alone or cumulatively, which would warrant reversal of defendant's convictions. First, for the reasons previously stated, the court did not err in admitting the text messages. Second, we discern no error in the three short questions the trial judge posed to S.G. at the end of her initial direct examination. N.J.R.E. 614 specifically allows judges to call or question witnesses "in accordance with law and subject to the right of a party to make timely objection." "Under our case law, it is entirely proper for judges to ask witnesses questions to clarify their testimony." Taffaro, supra, 195 N.J. at 450-51. Here, contrary to defendant's argument, the judge's questions did not suggest he was taking the State's side. The questions were

intended to clarify S.G.'s testimony on direct examination, which is permissible. Ibid.

Third, the court did not err in charging defendant with "attempt to inflict bodily injury" in its burglary charge, even though attempt was not specifically referenced in the language of the indictment. Defendant was on notice that he was being charged with second-degree burglary. See N.J.S.A. 2C:18-2 (providing that: "Burglary is a crime of the second degree if in the course of committing the offense, the actor: (1) Purposely, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone[.]"). Equally important, defendant's acquittal on the burglary charge moots his contention that he was prejudiced by the inclusion of this language in the jury charge.

Finally, defendant contends the court erred in permitting the nurse to testify as to specific facts S.G. shared with her about the sexual assault. The State in turn argues that the challenged evidence falls within the scope of N.J.R.E. 803(c)(4), which excludes from the hearsay rule:

> Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

The N.J.R.E. 803(c)(4) hearsay exception does not apply in cases where the purpose of the examination is to gather evidence. State in the Interest of C.A., 201 N.J. Super. 28, 33 (App. Div. 1985). Defendant contends that S.G. was transported to the hospital to undergo gynecological exams and take samples for a rape kit. Thus, the purpose of her visit was to gather evidence, rendering any hearsay statements inadmissible. The State responds that the primary purpose of the examination was to provide medical treatment to S.G., and that any evidence gathering was ancillary. Even if we accept defendant's interpretation, we conclude that any error in the admission of the nurse's testimony was harmless because S.G. testified to the events leading up to and during the sexual assault. The nurse's testimony was only a recitation of S.G.'s earlier testimony, and did not deprive defendant of a fair trial.

IV.

Defendant argues that the court's failure to find mitigating factor eleven resulted in an excessive sentence. Defendant contends that he should have been sentenced as a third-degree offender to a three-year prison sentence.

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.

Here, the judge provided an adequate factual basis for finding aggravating factors three, six, and nine, and mitigating factor eight. See Case, supra, 220 N.J. at 66 (citing State v. Fuentes, 217 N.J. 57, 73 (2014) (noting that a sentencing court must state a factual basis supporting a finding of particular aggravating or mitigating factors affecting the sentence)). The judge expressly considered mitigating factor eleven, but declined to apply it. Although the judge "underst[ood] for sure a hardship upon [] defendant being away from his family," he also noted that defendant

had been unemployed for a year and there was no indication he was supporting his one-year-old child. Accordingly, the judge found defendant failed to establish an "excessive hardship."

Mitigating factor eleven applies where "imprisonment of the defendant would entail excessive hardship to himself or his dependents." N.J.S.A. 2C:44-1(b)(11). However, our Supreme Court has made clear that the mere fact that a defendant has children does not require a trial court to find mitigating factor eleven. State v. Dalziel, 182 N.J. 494, 505 (2005). Instead, a defendant must demonstrate that the children are dependents who will suffer an excessive hardship if the defendant is incarcerated. Ibid. Defendant failed to do so here, as the trial judge correctly concluded.

We thus find no reason to second-guess the trial court's application of the sentencing factors. Defendant's five-year prison term is at the lowest end of the second-degree sentencing range. In sum, the sentence imposed was manifestly appropriate and by no means shocks our judicial conscience.

Affirmed.