RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3999-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

B.D., JR.,

Defendant-Appellant.

Submitted January 10, 2017 – Decided August 17, 2017

Before Judges Reisner and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Salem County, Indictment No. 14-05-0334.

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

John T. Lenahan, Salem County Prosecutor, attorney for respondent (Marianne V. Morroni, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury found defendant B.D.,Jr.[1] guilty of committing first-degree aggravated sexual assault, N.J.S.A 2C:14-2(a), against his daughter, S.D., between 1987 and 1993, while she was under the age of thirteen. Defendant appeals from the judgment of conviction and his fifteen-year prison sentence subject to five years of parole ineligibility. After reviewing the record in light of the applicable law, we affirm both the conviction and the sentence.

I.

At a Rule 104 (a) fresh complaint hearing, Be.D., defendant's wife and S.D.'s stepmother, testified that in May 1997, S.D. told her about the years of sexual abuse she suffered from defendant. Be.D. also testified as to the context in which the disclosure occurred. Be.D. recalled cutting short an out-of-town trip after defendant telephoned her to tell her that S.D., sixteen years old at the time, had run away from home. Before finding S.D., Be.D. was able to reach her on the phone. S.D., hysterical and crying, told Be.D. that she ran away from home because defendant failed to heed S.D's warning not to peek at her when she was in the bathroom.

After Be.D. located S.D., she drove her to school, and during the drive, S.D. revealed details about defendant's sexual abuse

[1] We use initials to preserve the confidentiality of the victim. R. 1:38-3(c)(12).

over the course of many years. Again, S.D. was very emotional. She told Be.D. that defendant liked her to dress up and wear high heels, and that they engaged in oral sex. She also described a scar on defendant's penis and alleged that he digitally penetrated her anus and vagina. S.D. also showed Be.D. that she had been cutting herself, "because she felt [the abuse] was her fault."

When Be.D. and S.D. arrived at school, defendant was in the parking lot and tried to get S.D. into his car. Be.D. testified that S.D. refused, and was "hysterical[,] crying and, you know, screaming, 'Don't let him get me; don't let him get me.'" About a week later, Be.D. separated from defendant by moving out of their home, with S.D. and her younger brother, B.D., joining her.

The trial judge held that Be.D.'s testimony was admissible as fresh complaint evidence based upon consideration of: the nature, time, and place of the complaint; S.D.'s age at the time of the complaint; the circumstances under which she made the complaint; the complaint was against her father; S.D.'s conduct at the time of her complaint; and the proofs S.D. offered to her stepmother. As for the time it took S.D. to eventually reveal the abuse, the judge reasoned:

> One, [] the victim remained in the defendant's home; two, the defendant threatened her; and three, [] he continued to abuse her in

> Tennessee[2] throughout this time as she is maturing, until she finally reaches the age of approximately 16 and indicates . . . to her stepmother that she had had enough . . . [T]hose factors are [] often discussed in our case law. And I would suggest that they adequately explain the delay. And what I mean by 'delay' . . . I want to make sure I'm pretty specific — there was no delay at least on the facts that I've gotten. . . . this isn't a situation where the conduct stopped and five years later the victim made an allegation.

At trial, S.D., then thirty-two years old, testified regarding her parents' separation, and living with her brother, defendant and Be.D. According to S.D., defendant's physical and sexual assault began when she was between the ages of three and five years old. When she was six, defendant was performing oral sex on her, forcing her to perform oral sex on him, making her watch pornographic movies in order to emulate what the women were doing in those movies, and coercing her to get naked so that he could suck on her toes, kiss every part of her body and ejaculate on her. S.D. described, in detail, a scar on defendant's penis that he told her occurred when he was a child. Defendant made her pay particular attention to the scar during oral sex because it was sensitive. S.D. also testified that defendant digitally

[2] In addition to the sexual abuse incidents in New Jersey, defendant and S.D. had lived in Tennessee, where defendant pled guilty in 1998 to amended counts of sexual battery resulting in a suspended sentence and probation.

penetrated her vaginally and anally, and attempted to penetrate her vaginally with his penis on numerous occasions.

S.D. testified that, at age seven, defendant was abusing her, "several times a week to every day and sometimes more than once a day," depending on when defendant's job took him away from home. Although S.D. had doctor's appointments while growing up, she did not disclose the abuse, and she did not have any vaginal exams that could have exposed sexual activity.

When defendant wanted to have sex with S.D., he would wait until Be.D. and her brother were not home, and then lock the door. If S.D.'s brother did not accompany their stepmother when she left the house, defendant would send him outside to do chores. There were also times that defendant would take S.D. to a "house behind the property that he was caretaker of" to abuse her. When defendant could not get Be.D. and her brother out of the house, he would take S.D. on rides in his car and force her to perform oral sex on him in the car. If a car passed by with a driver who could see inside their vehicle, defendant would slap S.D.'s head away so no one could see what they were doing. Additionally, when defendant worked driving an 18-wheeler tractor-trailer, he would sometimes take S.D. with him, then force her to look at pornographic magazines and engage in oral sex.

If S.D. refused to have sex, defendant would choke her, threaten her and her brother with homelessness, or assault her brother in front of her. Defendant also claimed that he knew people in the "mob" who would kill her and dispose of her body in a barrel if she ever told anyone about having sex with him.

After a speaker talked to her third-grade class about sexual abuse, she recalled crying in class afterwards, but since no one asked her why she was upset, she did not tell anyone about defendant's abuse. S.D. also never told anyone at school because she believed defendant's threats.

S.D. stated that defendant's abuse made her punish herself as she grew older. She cut herself, deprived herself of food or made herself throw up, and attempted suicide.

S.D. confirmed her stepmother's testimony about how in May 1997, she revealed defendant's sexually abusive conduct towards her throughout her youth, and that thereafter, she never again lived with defendant. She did not report defendant's conduct to the police because when she relocated to Tennessee after moving out of defendant's house, she was advised that she could not press charges there for offenses occurring in New Jersey. She eventually reported defendant's abuse to law enforcement in 2012, when New Jersey State Police Detective Neal Everingham contacted her. She admitted she did not tell Everingham that defendant had threatened

to kill her and place her in a barrel, or that she cried in the third grade after a class speaker talked about sexual abuse.

Everingham testified that he conducted an investigation into defendant's alleged abuse after being contacted by the Salem County Prosecutor's Office.[3] Based upon his training and experience investigating sexual abuse cases, it was not uncommon for victims to wait "sometimes years" before reporting the abuse because of fear.

Everingham stated that he had several telephone conversations with S.D., because she was not living in New Jersey. S.D. told him that on a regular basis between 1986 and 1993 in New Jersey, defendant abused her through, "[o]ral sex, both given and received. Sucking on toes, dress-up in adult clothing. . . reenacting of pornographic videos or scenarios. Digital penetration, both vaginal and anal."

He also testified that in separate interviews, both S.D. and Be.D. mentioned that defendant had a scar on the "underside of his penis, just below the head [of the penis.]" A photograph of the scar, obtained through a search warrant, was admitted into evidence.

[3] The investigation was initiated as a result of B.D.'s report of being sexually abused by defendant.

The State also presented the expert testimony of Dr. Julie Lippmann, a clinical child psychologist, regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). She did not comment on the specific allegations against defendant, but explained that CSAAS involves the often-delayed reporting of sexual abuse by child victims who are "abused repeatedly, over and over again perhaps, by someone that they love and trust; [such as] a parent . . . ."

In addition, Be.D. reiterated the testimony she gave at the fresh complaint hearing concerning S.D.'s revelation of defendant's sexual abuse. She mentioned that defendant spent more time with S.D. to the exclusion of his son, and that defendant would send her out of the house on errands, like grocery shopping, and suggest that she take his son with her. On cross-examination, she confirmed that defendant did not drive an 18-wheeler when the family lived in New Jersey, which controverted S.D.'s allegations of sexual abuse in an 18-wheeler.

Defendant exercised his right not to testify. After deliberating, the jury found defendant guilty of first-degree aggravated sexual assault.

At sentencing, the judge denied defendant's request that he not consider information related to a charge, dismissed the day before the trial started, that defendant had sexually abused his son at various times between 1987 and 1993. The judge found that

aggravating factors two, three, six, and nine applied. N.J.S.A. 2C:44-1(a)(2)(gravity and seriousness of harm inflicted on a vulnerable victim); -1(a)(3)(the risk of re-offense); -1(a)(6) (the extent of defendant's prior criminal record and the seriousness of the current offense); and -1(a)(9) (the need for deterrence). He also found that mitigating factors seven and ten applied. N.J.S.A. 2C:44-1(b)(7)(no history of prior criminal or delinquent conduct); and -1(b)(10)(likely to respond affirmatively to probationary treatment). The judge determined that the aggravating factors substantially outweighed the mitigating factors, and sentenced defendant to a fifteen-year prison term, with five years of parole ineligibility. This appeal followed.

II.

Defendant raises the following arguments for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN ALLOWING [BE.D.] TO TESTIFY ABOUT S.D.'S ACCUSATIONS AGAINST DEFENDANT BECAUSE THAT EVIDENCE DID NOT MEET THE REQUIREMENTS OF THE FRESH COMPLAINT DOCTRINE.
>
> POINT II
>
> THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT S.D.'S PRIOR INCONSISTENT STATEMENTS IN POLICE WITNESSES' REPORTS WERE ADMISSIBLE AS SUBSTANTIVE EVIDENCE. (Not Raised Below).

POINT III

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE BECAUSE IT IS FOUNDED ON IMPROPER FINDINGS REGARDING AGGRAVATING FACTORS.

Defendant argues in Point I, that the trial judge violated his rights to a fair trial and due process by misapplying the fresh-complaint doctrine in admitting S.D.'s out-of-court statements to her stepmother reporting defendant's sexual abuse. Specifically, he argues that the testimony did not qualify as fresh complaint evidence because the allegations were not spontaneous and were the result of a series of questions from Be.D. We disagree.

In reviewing the fresh-complaint doctrine, our Supreme Court has stated:

> That doctrine allows the admission of evidence of a victim's complaint of sexual abuse, otherwise inadmissible as hearsay, to negate the inference that the victim's initial silence or delay indicates that the charge is fabricated. See State v. Hill, 121 N.J. 150, 163 (1990); State v. Balles, 47 N.J. 331, 338 (1966), cert. denied, 388 U.S. 461, 87 S. Ct. 2120, 18 L. Ed. 2d 1321 (1967). In order to qualify as fresh-complaint evidence, the victim's statement must have been made spontaneously and voluntarily, within a reasonable time after the alleged assault, to a person the victim would ordinarily turn to for support. State v W.B., 205 N.J. 588, 616 (2011); Hill, supra, 121 N.J. at 163 (citing State v. Tirone, 64 N.J. 222, 226-27(1974));

> Balles, supra, 47 N.J. at 338-39. These requirements are relaxed when they are applied to juvenile victims. State v. Bethune, 121 N.J. 137, 143-44 (1990). This Court has recognized that children may be "too frightened and embarrassed to talk about" the sexual abuse they have encountered, and therefore, juvenile victims are given additional time to complain, and their complaint may be elicited through non-coercive questioning. Ibid.
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> [State v. R.K., 220 N.J. 444, 455 (2015).]

"[T]he fresh complaint rule was developed to counteract the persistent 'timing myth' that victims of sexual assault would cry out and alert others to the crime." W.B., supra, 205 N.J. at 616 (quoting State v. P.H., 178 N.J. 378, 392 (2004)). "The rule allows the State to neutralize this myth by introducing evidence that the victim did indeed make a complaint within a reasonable time after the alleged assault." Ibid.

The Court has cautioned that a child's statements

> made directly in response to coercive questioning are inadmissible under the fresh-complaint rule, because coercive interrogation robs those statements of the self-motivation necessary to qualify as fresh complaint.
>
> . . . .
>
> There is a line, however, between questioning that merely precedes a complaint of sexual abuse and coercive questioning. We leave it to the trial court to determine when that line is crossed. In each case the trial court must

> examine the degree of coercion involved in the questioning of the child and determine whether the child's complaint was spontaneous or directly in response to the interrogation. Among the factors the court should consider in arriving at its determination are the age of the child, the child's relationship with the interviewer, the circumstances under which the interrogation takes place, whether the child initiated the discussion, the type of questions asked, whether they were leading, and their specificity regarding the alleged abuser and the acts alleged.
>
> [State v. Bethune, 121 N.J. 137, 145 (1990).]

Applying these principles, we discern no abuse of the judge's discretion in admitting Be.D.'s testimony. Our review of the record demonstrates that S.D.'s statements were general inquiries about why S.D. was upset and what happened, and by no means were coercive. Moreover, Be.D.'s testimony was not the sole account of S.D.'s complaint or defendant's sexual abuse of S.D. See ibid. (fresh complaint to social worker "was not of singular weight or importance at trial."). The jury heard S.D.'s first-hand account of her complaint to Be.D. and the constant sexual abuse inflicted upon her by defendant throughout her youth. Further, the credibility of Be.D.'s and S.D.'s recollections were both subject to cross-examination. See ibid.

Turning to Point II, defendant contends his conviction should be reversed because the judge should have instructed the jury that

S.D. made prior inconsistent statements regarding defendant's abuse that were admissible as substantive evidence. Defendant acknowledges that he did not request such instruction, but that the judge's failure to do so was plain error, which had the clear capacity to lead to an unjust result. In particular, defendant cites to allegations in S.D.'s testimony - defendant threatened to kill her and stuff her body in a barrel if she told anyone about the sexual abuse, the third grade speaker who spoke to her class, about sexual abuse, and the allegation that defendant told her that he ate specific fruits to make his semen taste a certain way — that was not included in her statement to Everingham. Defendant contends that the judge erred in instructing the jury that they only had to "'determine the credibility of the witnesses', including considering 'whether the witness made any inconsistent or contradictory statements.'" We find no merit in this contention.

We are mindful of some well-settled principles. A defendant is entitled "an adequate instruction of the law." State v. Pleasant, 313 N.J. Super. 325, 333 (App. Div. 1998) (citation omitted), aff'd, 158 N.J. 149, 150 (1999). "Clear and correct jury instructions are essential for a fair trial." State v. Randolph, 441 N.J. Super. 533, 558 (2015) (quoting State v. Brown, 138 N.J. 481, 522 (1994)). "'[E]rroneous instructions on material

points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)).

Where, however, a "defendant did not object to the jury instructions at trial, we must apply the plain error standard." State v. Burns, 192 N.J. 312, 341 (2007) (citing R. 2:10-2; State v. Torres, 183 N.J. 554, 564 (2005)). Regarding a jury charge, the plain error analysis requires demonstration of "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant 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." Ibid. (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). An "error in a jury instruction that is 'crucial to the jury's deliberations on the guilt of a criminal defendant' is a 'poor candidate[] for rehabilitation' under the plain error theory." Ibid. (quoting Jordan, supra, 147 N.J. at 422). Nevertheless, any such error is to be considered "in light of 'the totality of the entire charge, not in isolation.'" Ibid. (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). Moreover, "any alleged error also must be evaluated in light 'of the overall strength of the State's case.'" Ibid. (citation omitted).

Applying these principles, we are satisfied there was no plain error due to the judge's decision not to charge the jury that S.D.'s prior inconsistent statements regarding defendant's abuse were admissible as substantive evidence. We have held that "[a]n apparently inconsistent pretrial statement of a witness . . . is not limited to . . . affecting the witness's credibility at trial. The rule is clear that such statements are admissible for their substantive content." State v. Ramos, 217 N.J. Super. 530, 538 (App. Div.), certif. denied, 108 N.J. 677 (1987). However, when a witness's prior testimony is not substantially different from his or her trial testimony, a general credibility jury instruction will not constitute plain error. See Ibid.; see also State v. Turner, 310 N.J. Super. 423, 431 (App. Div. 1998).

Here, there are no substantial differences in between S.D.'s pretrial statement and her trial testimony assertions regarding defendant's sexual abuse. In both situations, S.D. consistently reflected her allegations concerning oral sex, digital penetration, defendant's toe fetish, and the distinguishing scar on his penis. Moreover, she consistently alleged that defendant regularly abused her throughout her youth until she ran away from home at the age of sixteen. The fact that S.D. may have provided certain allegations in her testimony that were not mentioned in her pretrial statement did not constitute inconsistency, and did

not warrant the specific jury charge defendant now claims the court should have given.

Lastly, we address defendant's argument in Point III that the judge made errors at sentencing. Defendant maintains his sentence should be vacated because the judge improperly considered the unproven charge of sexual abuse related to his son, which the State dismissed prior to trial, and because the judge insufficiently explained the application of aggravating factor nine. We disagree.

We begin by noting that review of a criminal sentence is limited. A reviewing court must decide "whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). Under this standard, a criminal sentence must be affirmed unless: "(1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" Ibid. (alteration in original) (citation omitted). If a sentencing court properly identifies and balances the factors and their existence is supported by sufficient credible evidence in the record, this court will affirm the sentence. See State v.

Carey, 168 N.J. 413, 426-27 (2001); State v. Megargel, 143 N.J. 484, 493-94 (1996).

We agree with defendant's contention that under State v. Lawless, 214 N.J. 594, 609 (2013), "consideration of an inappropriate aggravating factor violates the guidelines and thus is grounds for vacating [a] sentence." (quoting State v. Pineda, 119 N.J. 621, 628 (1990); internal quotation omitted). However, despite initially rejecting defendant's request that the dismissed charge not be considered, the judge does not appear to have considered that information when he imposed sentence. There is no indication in the judge's detailed explanation of the aggravating factors that he in fact considered the allegations concerning the son. At most, the judge's initial comment was harmless error.

Our review of the record leads us to conclude the record supports the aggravating factors the judge applied. This includes application of aggravating factor nine, the need to deter defendant and others from violating the law, given the seriousness and the extended time of the sexual abuse against S.D. Thus, the judge did not abuse his discretion, and we discern no basis to vacate defendant's sentence.

Affirmed.