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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5174-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

W.D.,

Defendant-Appellant.

Submitted October 10, 2017 – Decided November 2, 2017

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Indictment No. 12-09-0401.

Joseph E. Krakora, Public Defender, attorney for appellant (Gilbert G. Miller, Designated Counsel, on the brief).

Richard T. Burke, Warren County Prosecutor, attorney for respondent (Kelly Anne Shelton, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant, W.D., appeals from his judgment of conviction after a jury found him guilty of third-degree attempted endangering the welfare of a child. We affirm.

We discern the following facts from the trial record. In mid-March 2011, defendant met J.R. several times in a park in Phillipsburg. J.R.'s eleven-year-old daughter knew one of defendant's daughters from school.

On March 19, 2011, defendant and his children invited J.R. and her children to a barbecue. J.R. and her family arrived at the barbecue late in the day. Once there, J.R. consumed one beer and a number of non-prescribed pills, including Xanax and Oxycodone. She left at approximately midnight or 1:00 a.m.

At 2:00 a.m. on March 20, 2011, J.R. called defendant asking to borrow money to purchase gas and food. Defendant acquiesced and asked her to meet him at a Quick Chek, where he gave her sixty dollars, and the two sat in his car talking. J.R. testified it was then that defendant offered her $500 to have sex with her daughter. J.R. left defendant's car and returned to where she was living with her friend, A.H.

Later that day, J.R. called defendant with A.H. present and recorded her conversation with defendant. Again, defendant offered J.R. $500 to have sex with her daughter. J.R. did not

recall, at trial, whether she and defendant set a time and place for him to meet with her daughter.

Defendant called J.R. the next day, and again they spoke about him having sex with J.R.'s daughter. Over the next two days, defendant placed twenty-three unanswered calls to J.R. and three calls in which he spoke with J.R. J.R. informed her husband and her daughter about defendant's proposition. J.R. stated she informed her daughter so "she wouldn't be alarmed like what was going on" but J.R. never asked whether her daughter was willing to participate, and never intended to follow through with defendant's plan.

J.R. did not report the incidents to the police, and conceded she was using multiple drugs, including Xanax, Oxycodone, Methadone, OxyContin, and marijuana. She also testified she was afraid of retaliation against her and her family.

On March 23, 2011, A.H. called the Division of Child Protection and Permanency (Division). The Division contacted the Warren County Prosecutor's Office detectives, who notified the Pohatcong Police Department. A detective went to defendant's house, but he was not home. Defendant later went to the Phillipsburg Police Department on his own volition. Defendant was

informed of his Miranda[1] rights. He made a knowing and voluntary waiver of his rights, and thereafter provided a different, but ultimately incriminating, account of what occurred.

Defendant told the police he met J.R. in the park with her children and boyfriend. His daughter contacted J.R. and invited her and her children to a picnic at his house. While there, he gave J.R. twenty dollars for gas. After the picnic was over, J.R. called defendant at approximately 2:00 a.m., and asked him to meet her at the Quick Chek.

At the Quick Chek, J.R. asked defendant for $150 so she could move to her mother's house. During the encounter, J.R. ingested four or five pills from her purse, and defendant was drunk. Defendant said when he refused to give J.R. the $150, J.R. offered that she and a friend would have sex with him for $160. She repeatedly said, "I'll do anything please help me out." Defendant gave her the money, they parted ways, and both of them went home.

After that, J.R. did not call defendant, but he "called her a few times." Eventually, J.R. called back and told him she had been in the hospital. She also said her friend wanted $200 instead of an additional $10. They met again, in a Hess Station parking lot, where J.R. asked again for $200, which he refused to pay.

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

The detectives questioning defendant told him J.R. alleged the conversation with him was for "you to have sexual relationship with her ten-year-old daughter, which you were, you were [sic] aware of[.]" Defendant said, "maybe, maybe" when the detectives stated "you obviously knew that you were talking about her young daughter, correct?" Defendant then acknowledged he "got a little out of control that night." In response to the detectives stating, "you heard it on the tape, you know what happened" and "you avoided telling us all about this conversation because you know it was wrong deep down inside," defendant responded "yep." Defendant said, "she kept on pushing things to me, trying to make, I guess get the money" and "like I told you, she said she'll do anything" and "I guess she pushed . . . her daughter." At this point, defendant stated he was under the impression the daughter was fourteen or fifteen.

The detectives asked, "did you want to have sex with . . . [J.R.'s] daughter?" Defendant responded, "I guess I did[.]" The detectives then proposed a different version of event where "[J.R.] said I'll do whatever you want or I'll give you whatever you want and that's when you took the opportunity and you struck." Defendant responded "yeah probably."

Following this statement, police again informed defendant of his Miranda rights, and he was arrested. On September 19, 2012, defendant was indicted for third-degree attempted endangering the welfare of a child, N.J.S.A. 2C:5-1 and 2C:24-4(a); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); second-degree sexual assault, N.J.S.A. 2C:14-2(b); and second-degree promoting prostitution, N.J.S.A. 2C:34-1(b)(7).[2] Prior to trial, the State moved for and obtained dismissal of all counts except attempted endangering the welfare of a child and promoting prostitution.

Defendant was tried on various days between February 18 and 25, 2015. On February 24, 2015, the trial judge held a final jury charge conference with counsel. The judge reviewed the charges in depth with counsel, including how he would explain the elements of the crimes charged to the jury. At no point during the charge conference did defendant's trial counsel object or propose changes to the jury instructions.

The judge charged the jury that same day. The parts of the jury instruction pertinent to this appeal are excerpted below.

For the definition of attempt:

[2] More specifically, defendant was charged with soliciting a child under the age of eighteen to engage in sexual acts.

> The law provides that a person is guilty of an attempt to commit a crime if the person purposely does anything which[,] under the circumstances a reasonable person would believe them to be[,] is an act constituting a substantial step in the course of conduct planned to culminate in the commission of the crime.
>
> . . . .
>
> The substantial step taken must strongly show the defendant's criminal purpose. That is, the step taken must be substantial, and not a very remote, preparatory act, and must show that the accused had a firmness of criminal purpose in order to decide whether the State has proven a crime of . . . attempt to engage, or attempt to endanger the welfare of a child.

For the definition of endangering the welfare of a child:

> [I]n order to find a defendant guilty of endangering the welfare of a child . . . requires two elements to be shown . . .: [t]hat [the daughter] was a child; and that the defendant knowingly engaged in sexual conduct with the child which would impair or debauch the morals of a child.
>
> . . . .
>
> The second element the State must prove beyond a reasonable doubt is that defendant knowingly engaged in sexual conduct which would attempt -- which would impair or debauch the morals of a child, and this is conduct which tends to corrupt, mar or spoil the morals a child under the age of . . . 16.

During their deliberations, the jury did not express any confusion about the meaning of "attempt" or "conduct which would impair or debauch the morals of a child." Of the four notes

submitted to the judge by the jury,[3] two were requests to review taped evidence and transcripts, and two were regarding the solicitation charge. Defendant was acquitted of promoting prostitution but convicted of attempted endangering.

Defendant was sentenced to 364 days in county jail, parole supervision for life, Megan's Law consequences, Nicole's Law requirements, and fined. This appeal followed.

Defendant raises the following issues on appeal:

> POINT I.
>
> THE TRIAL COURT'S FINAL JURY INSTRUCTIONS WERE DEFICIENT IN THEIR FAILURE TO DEFINE CONDUCT WHICH WOULD IMPAIR OR DEBAUCH THE CHILD'S MORALS, DEPRIVING DEFENDANT OF A FAIR TRIAL (not raised below).
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> POINT II.
>
> THE STATE FAILED TO ESTABLISH THAT DEFENDANT COMMITTED A CRIMINAL ATTEMPT TO ENDANGER THE WELFARE OF A CHILD, REQUIRING THE ENTRY OF A JUDGMENT OF ACQUITTAL IN THIS CASE (not raised below).

When an error not brought to the attention of the trial court is the basis of an appeal, we will not reverse unless the appellant can show "plain error." R. 2:10-2. Plain error is one that is "clearly capable of producing an unjust result." Ibid. Not any possibility of an unjust result will suffice. State v. Macon, 57

[3] There was a fifth note notifying the court the jury reached a verdict.

N.J. 325, 336 (1971). The possibility must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Ibid.

Defendant argues the jury instructions were inadequate to explain the definition of conduct that would impair or debauch the morals of a child. He argues his acquittal on the solicitation charge meant the jury "reached its decision to convict on a vague feeling that defendant did an act which he planned would be a substantial step[.]" However, defendant's counsel did not object to the jury charges at trial, which follow the model jury charges for the charged offenses.

Viewing these arguments under the plain error standard, defendant provides no basis to conclude the jury was misled and came to an unjust result. We reject defendant's argument that the jury could not rationally acquit on the solicitation charge and convict on the attempt endangering charge.

"Jurors are free to accept or reject, in part or in whole, any aspect of testimonial evidence based on credibility." State v. Pickett, 241 N.J. Super. 259, 266 (App. Div. 1990). An appellate court reviews a jury verdict "under an extraordinarily lenient standard of review," and "a conviction should not be disturbed on appeal unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1; State v.

Jackson, 211 N.J. 394, 413-14 (2012). "There is no miscarriage of justice when any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present." Ibid. The jury could rationally have chosen to accept defendant's assertions that he was not the instigator of the solicitation, and to reject J.R.'s assertions. This would not bar the jury from convicting defendant on the attempt charge, if the jury determined the evidence showed defendant still attempted to have sex with J.R.'s daughter once J.R. offered him the opportunity.

Defendant argues it was incumbent upon the court to advise the jury as to the specific sexual conduct the State alleged defendant intended to do with J.R.'s daughter. We disagree. Whatever "sex" defendant intended when he agreed to pay J.R. to have sex with her minor daughter satisfies the elements of endangering.

Defendant argues the trial court erred in not entering a judgment of acquittal because the State failed to establish that defendant committed a criminal attempt to endanger the welfare of a child. However, defendant's counsel did not move at the close of the State's case, at the close of evidence, or after the jury verdict for a judgment of acquittal. Furthermore, the court did

not abuse its discretion by not granting the judgment of acquittal sua sponte.

Rule 3:18-1 provides "[a]t the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal . . . if the evidence is insufficient to warrant a conviction."

At the close of the State's case on February 24, 2015, defendant's counsel reserved the right to make a motion under Rule 3:18-1 until the conclusion of trial. Despite the reservation, defendant's counsel never moved for a judgment of acquittal.

Even if no motion is made during the pendency of trial, under Rule 3:18-2, "[i]f the jury returns a verdict of guilty . . ., a motion for judgment of acquittal may be made . . . or it may be renewed within 10 days after the jury is discharged or within such further time as the court fixes during the 10-day period." If the court grants this motion, it "may set aside a verdict of guilty and order the entry of a judgment of acquittal[.]" Ibid. However, after the jury returned its verdict, defendant's counsel did not move under Rule 3:18-2.

Under both Rule 3:18-1 and 3:18-2, a court has discretion to enter a judgment of acquittal sua sponte, regardless of whether a party makes a motion. To determine if the trial judge should have

acquitted defendant, we apply the same standard as the trial court. State v. Moffa, 42 N.J. 258, 263 (1964).

Here, viewing the evidence in a light most favorable to the State, the court did not abuse its discretion in not granting a judgment of acquittal because "a reasonable jury could find guilt beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458-59 (1967). The State presented testimony that defendant asked to have sex with J.R.'s daughter, he followed up on the plans to have sex with the daughter by making numerous phone calls, and he exchanged money with J.R. A reasonable jury could have found these actions were a substantial step in furtherance of the crime of endangering the welfare of a child.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION