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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2174-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.V.F.,[1]

Defendant-Appellant.

Submitted February 13, 2018 – Decided April 6, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 15-03-0811.

Jacobs & Barbone, PA, attorneys for appellant (Louis M. Barbone, on the brief).

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (Melinda A. Harrigan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

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[1] We use initials to identify defendant and others to protect the identity of the victim.

Defendant pled guilty to third-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a)(1), but reserved the right to appeal from an order entered by the trial court on February 8, 2017, which denied his motion to dismiss the indictment. We affirm.

I.

In March 2015, an Atlantic County grand jury charged defendant with second-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a)(1) (count one); third-degree showing obscene material to a person under eighteen-years old, contrary to N.J.S.A. 2C:34-3(b)(2) (count two); and fourth-degree tampering with evidence, contrary to N.J.S.A. 2C:28-6(1) (count three).

In August 2015, defendant filed a motion to dismiss the indictment. He argued that: (1) the State failed to present a prima facie case of endangering under N.J.S.A. 2C:24-4(a), and (2) the State presented factual misrepresentations and half-truths to the grand jury. The judge heard oral argument on September 8, 2015, and placed an oral decision on the record, concluding that the motion must be denied. The judge later entered an order memorializing his decision.

On August 27, 2016, defendant pled guilty to an amended charge of third-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a)(1). The judge sentenced defendant to a five-

year term of incarceration, which was suspended. The judge dismissed the remaining charges; ordered defendant to comply with Megan's Law, N.J.S.A. 2C:7-1 to -23; ordered the forfeiture of defendant's public employment; and required defendant to remain law-abiding and arrest-free. The court entered a judgment of conviction dated January 13, 2017. This appeal followed.

On appeal, defendant presents the following arguments:

> POINT I
> THE TRIAL COURT ERRED IN FINDING THAT THE FACTS ESTABLISH THE PRIMA FACIE ELEMENTS OF ENDANGERING AS A MATTER OF LAW.
>
> POINT II
> ALTERNATIVELY, THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT BASED UPON THE STATE'S FACTUAL MISREPRESENTATIONS AND HALF TRUTHS [WHICH WERE] INTENDED TO MISLEAD THE GRAND JURY AND USURP ITS FAIR AND IMPARTIAL DECISION-MAKING FUNCTION.

II.

We briefly summarize the testimony presented to the grand jury by Detective Robert Gray of the Somers Point Police Department (SPPD). Gray testified that on December 3, 2014, J.F. and her sixteen-year-old daughter, L.S., came to the SPPD. J.F. and defendant were married, but they were estranged. L.S. was defendant's stepdaughter. Defendant and J.F. were living in separate residences, although they are in close proximity.

J.F. reported that around 9:00 p.m. on December 2, 2014, defendant picked up L.S. at the high school after L.S.'s softball practice and took her to his residence because he had to retrieve certain documents that J.F. had requested. According to L.S., when she and defendant arrived at his house, defendant went to use the bathroom and asked L.S. to wait in his bedroom. Defendant's house was under construction and defendant's bedroom was the only room in the house that was functional.

L.S. told J.F. that while she was in defendant's bedroom, she observed pictures of defendant's penis, which had been printed out and scattered about the room. L.S. said defendant told her she could use his iPad, and when she opened it, she saw an Internet search history which had "sexually suggestive terms" on it. Gray interviewed L.S. and she confirmed what J.F. reported.

L.S. told Gray defendant had previously engaged in this same conduct. She said it seemed every time defendant picked her up to take her home, he would stop off at his house. She stated that while they were at defendant's house, "nine times out of ten," he would ask L.S. to go into the bedroom and lock the door while he used the bathroom. L.S. reported that every time she was in his bedroom, pictures of defendant's penis would be spread about for her to see. L.S. also reported that there were cameras throughout defendant's house, including in the bedroom. One camera was on the

television stand, but defendant told L.S. it was not functional. Defendant said the other cameras were for "security purposes."

Gray testified that when L.S. returned to J.F.'s home on December 2, 2014, J.F. began to send text messages to defendant. Defendant tried to explain to J.F. that the photos had been in a bag and must have fallen out. He said L.S. may have seen the photos accidentally. However, L.S. told Gray that she believed defendant had placed the photos in the room so she could see them.

On December 4, 2014, detectives from the Atlantic County Prosecutor's Office met defendant at his workplace and informed him they were going to collect evidence from his house. Defendant agreed to return home with them. He also agreed to return to the SPPD to discuss the allegations.

When they arrived at defendant's home, the detectives confirmed that the home was "under construction." They also observed cameras on the exterior and inside the home. Gray noted that defendant's bedroom was the only room with sheetrock walls and a bed. Blankets separated the other rooms in the house. Gray stated that although L.S. reported defendant's room was in total disarray, it looked as though defendant had "cleaned up." The cameras in the bedroom appeared to be unplugged.

Gray stated that defendant was interviewed at the SPPD. Defendant confirmed that on December 2, 2014, at around 9:00 p.m.,

he picked up L.S., took her to his house, and had her wait in his bedroom while he used the bathroom. He said J.F. had confronted him with "these allegations," but he denied he had engaged in any inappropriate behavior with L.S. He said he did not purposely leave the photos around the bedroom.

Defendant admitted that after J.F. confronted him with the allegations of improper conduct, he ripped up all the photos he had of his penis and flushed them down the toilet. Gray testified, however, that the detectives found pictures of what appeared to be defendant's penis, "[s]ome erect, some flaccid," on digital media, meaning a phone or computer.

Defendant also admitted that on December 3, 2014, after J.F. confronted him with the allegations, he disposed of the digital video recording (DVR) system that he had in his bedroom. Gray explained to the grand jury that defendant was able to connect the DVR system to his iPhone so that he could watch a "live feed" of the images transmitted by the cameras in the bedroom.

Gray testified that defendant admitted he would go into the bathroom and masturbate while using his iPhone to observe L.S.'s reactions to the photos he left around the bedroom. Defendant also admitted he would record L.S.'s reactions, watch the recording on the big-screen television in his room, and masturbate. Defendant admitted he had done this more than five, but less than ten, times.

Defendant said the DVR system had only been operational for several months.

III.

On appeal, defendant argues that the trial court erred by finding that the State had presented a prima facie case of endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a)(1). The statute provides in pertinent part that:

> [a]ny person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree.
>
> [Ibid.]

Defendant notes that N.J.S.A. 2C:24-4(a)(1) requires proof of "sexual conduct," but that term is not defined in the Criminal Code. He asserts that "exposure" to nudity, whether in person or by photo, is not sufficient to establish endangering the welfare of a child under N.J.S.A. 2C:24-4(a)(1).

Under the New Jersey Constitution, an individual may not be required to stand trial on a criminal charge unless the State has presented the matter to a grand jury and the grand jury has returned an indictment. State v. Saavedra, 222 N.J. 39, 56 (2015) (citing State v. Morrison, 188 N.J. 2, 12 (2006); N.J. Const., art. I, ¶ 8). The grand jury's role is to determine if there is

an adequate basis to bring a criminal charge. Ibid. (citing State v. Hogan, 144 N.J. 216, 229-30 (1996); United States v. Williams, 504 U.S. 36, 51 (1992)). "The absence of any evidence to support the charges would render the indictment 'palpably defective' and subject to dismissal." Ibid. (quoting Morrison, 188 N.J. at 12).

In considering a motion to dismiss an indictment, the trial court must determine "whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." Id. at 56-57 (quoting Morrison, 188 N.J. at 13). "A court 'should not disturb an indictment if there is some evidence establishing each element of the crime to make out a prima facie case.'" Id. at 57 (quoting Morrison, 188 N.J. at 12).

Here, the trial court found that the State had presented sufficient evidence to establish a prima facie case of second-degree endangering the welfare of a child under N.J.S.A. 2C:24-4(a)(1). Gray's testimony before the grand jury established that in December 2014, L.S. was a "child," which is defined as "any person under [eighteen] years of age." N.J.S.A. 2C:24-4(b)(1). L.S. was sixteen years old at the time defendant committed the offenses. Furthermore, the State presented evidence that defendant

was L.S.'s stepfather and he had a legal duty to care for L.S., or had assumed responsibility for her care.

The State also presented evidence that defendant engaged in "sexual conduct which would impair or debauch the morals of the child." N.J.S.A. 2C:24-4(a)(1). As Gray explained, L.S. reported that defendant asked her to wait in his bedroom while he used the bathroom. He left photos of his penis in the room, where L.S. could see them. Using a camera system that he had devised, defendant watched L.S.'s reaction to the photos on his iPhone and masturbated.

As noted, defendant argues that the State failed to present sufficient evidence to show that he engaged in "sexual conduct which would impair or debauch the morals of the child." Ibid. In support of his argument, defendant relies upon State v. Hackett, 166 N.J. 66 (2001). In that case, the defendant was charged with fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). Id. at 69-70. The victims were three young girls, two of whom were eleven years old, and another who was thirteen. Id. at 71.

The evidence presented at trial indicated that on several occasions, while the girls were walking to their school bus stop, which was located in front of defendant's house, the girls observed defendant standing nude in the front window of his home. Ibid. The

Court noted that N.J.S.A. 2C:24-4(a) requires the State to show that the defendant engaged in sexual conduct that "would impair or debauch the morals of a child." Id. at 80. The Court held that the statute did not require the State to prove that the victims' morals were actually impaired or debauched. Ibid.

In addition, the Court held that the evidence presented at trial provided a sufficient basis for the jury to find defendant guilty of third-degree endangering. Id. at 81. The Court stated that the testimony

> revealed that defendant stood nude in his house, in open view through a front window on October 2, 1996 and several other occasions in the morning hours at the designated time children were assembling at a school bus stop located directly in front of his home. This was not a case involving a child's stolen glimpse of nudity, but instead there was testimony of repeated instances when the defendant allowed himself to be viewed naked, through an unobstructed window, by girls who were age thirteen and under. That description of defendant's conduct supports an endangering charge. The jury might well have determined that defendant's actions appeared designed to attract the attention of little girls in a flagrant and repetitive way. Furthermore, [one of the victims] testified that defendant waved at her while he stood nude, talking on the phone. [Another victim] stated that she saw defendant "posing." And, the testimony [of this victim] . . . revealed that she confronted defendant to inform him that she was "getting sick" of the nudity and that her "friends are too young to see this." This suggests that the girls sensed a sexual element to defendant's conduct.

[_Ibid._]

On appeal, defendant argues that _Hackett_ requires proof that the nudity went beyond mere exposure and would impair or debauch the morals of a child exposed to such conduct. He contends that in this case, the State failed to present any evidence establishing he engaged in any conduct which knowingly or purposely conveyed anything of a sexual nature to L.S. He claims the case involved mere exposure of nudity.

We find no merit in these arguments. Defendant's reliance upon _Hackett_ is misplaced. Indeed, that decision supports the trial court's determination that the evidence presented was sufficient to support the endangering charge. This case does not involve an inadvertent glimpse at a photograph showing nudity to a child.

Here, defendant admitted that he placed photos of his erect penis throughout his bedroom so that L.S. could see them and he could observe her reaction to them. He acknowledged that he observed L.S.'s reactions to the photos on his iPhone, using a camera system he set up in his bedroom, and masturbated when he viewed her reactions. L.S. said defendant had engaged in this conduct on more than one occasion.

Thus, the evidence presented to the grand jury provided sufficient evidence to charge defendant with endangering under

N.J.S.A. 2C:24-4(a). There was sufficient evidence to show that he engaged in "sexual conduct" by displaying photos of his penis to L.S. on more than one occasion. There were "repeated instances" when defendant allowed L.S. to view pictures of his naked penis. Moreover, based on this evidence, a jury could reasonably determine that defendant's conduct "had the capacity to debauch or impair the morals of an average child in the community." Hackett, 166 N.J. at 83.

We therefore conclude the judge did not err by denying defendant's motion to dismiss the indictment.

IV.

Defendant further argues that the State committed prosecutorial misconduct in presenting the case to the grand jury. He contends the assistant prosecutor failed to present the jury with exculpatory evidence. Again, we disagree.

Defendant contends the State acted improperly by failing to present the grand jury with recordings of his statement, as well as the statements of J.F. and L.S. He contends Gray summarized the statements and misrepresented "the truth" by providing his subjective recollection, impressions, and conclusions regarding the statements.

Defendant claims that Gray led the grand jury to believe: (1) he printed out and scattered multiple nude photos in his room; (2)

defendant left an iPad in the room so that L.S. could see sexually suggestive terms on it; (3) photos of defendant's erect penis were scattered throughout the room; (4) nine times out of ten when he picked up L.S., he asked her to wait in the bedroom; (5) every time L.S. waited in the bedroom, the photos would be laid out for her to see; and (5) defendant's sole purpose in leaving the photos out was so that he could masturbate as he watched L.S.'s reactions.

Defendant further argues Gray failed to disclose to the grand jury that: (1) J.F. asked defendant to bring her certain items when he dropped L.S. off and defendant did, in fact, give J.F. these items; (2) defendant's bedroom was actually the only habitable room in his house; (3) defendant sent J.F. photos of his erect penis when they were separated and attempting to reconcile; (4) L.S. claimed that other than December 2, 2014, she saw similar photos of defendant at his house "only a couple of times."

A grand jury is "an accusatory and not an adjudicative body." Hogan, 144 N.J. at 235 (citing Williams, 504 U.S. at 51). Furthermore, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." Ibid. (citing United States v. Calandra, 414 U.S. 338, 343 (1974)). Therefore, prosecutors are generally not required to "provide the grand jury with evidence on behalf of the accused." Ibid. However, the State "may not deceive the grand jury or present its evidence

in a way that is tantamount to telling the grand jury a 'half-truth.'" Id. at 236.

Under the New Jersey State Constitution, the grand jury has an important function, which is to protect "persons who are victims of personal animus, partisanship, or inappropriate zeal on the part of a prosecutor." Ibid. (citations omitted). "In order to perform that vital protective function, the grand jury cannot be denied access to evidence that is credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a prima facie case against the accused." Ibid. (citations omitted). Evidence is "clearly exculpatory" if it "squarely refutes an element of the crime in question." Id. at 237.

Here, the trial court correctly found that defendant did not establish that the State failed to present the grand jury with clearly exculpatory evidence. Defendant asserts he had a legitimate reason to bring L.S. to his home on the evening of December 2, 2014, but that evidence did not "squarely" refute any element of the offense. Indeed, it had no bearing on whether he left photos of his penis in his bedroom so that L.S. could see them.

Defendant also claims he took the photos and sent them to J.F. in an effort to reconcile with her, but this does not

"squarely" refute the evidence that defendant scattered the photos about in his bedroom for L.S. to see. Moreover, in light of the other evidence present, there is a question as to whether defendant's assertion is credible. The State is not obligated to inform the grand jury that the defendant did not have a motive for committing a charged offense. Ibid. In addition, "[c]redibility determinations and resolution of factual disputes are reserved almost exclusively for the petit jury." Id. at 235 (citation omitted).

Defendant further claims that the State failed to inform the grand jury that his bedroom was the only room that was livable in his house. That may be an explanation as to why defendant had L.S. wait for him in his bedroom while he used the bathroom, but it does not "squarely" refute the evidence that defendant left photos of his penis in the room so that L.S. could see them.

Defendant also asserts that Gray failed to tell the grand jury that L.S. only said she saw photos of defendant's penis "a couple of times." However, L.S. told Gray that what occurred on December 2, 2014, was not an isolated incident and she had seen inappropriate photos of defendant in his room on other occasions. Thus, Gray's testimony was consistent with L.S.'s statement.

We therefore reject defendant's contention that the State presented the evidence to the grand jury in a way that was

tantamount to telling it a "half-truth." Id. at 236. We find no merit in defendant's contention that the State failed to present the grand jury with credible evidence that was clearly exculpatory.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION