SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4057-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MELVIN A. OWENS, a/k/a MEL OWENS, MELVIN ANDREWS OWENS, and MELVIN ANDRREW OWENS,

Defendant-Appellant.

Submitted March 14, 2018 - Decided April 19, 2018

Before Judges Fuentes and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 15-06-0480.

Joseph E. Krakora, Public Defender, attorney for appellant (Jaime B. Herrera, Assistant Deputy Public Defender, of counsel and on the brief).

Charles A. Fiore, Acting Gloucester County Prosecutor, attorney for respondent (Douglas B. Pagenkopf, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Melvin A. Owens appeals from an October 2, 2015 order denying his motion to dismiss a third superseding indictment arising out of alleged acts of sexual penetration against a child on or about January 10, 2014. He argues the indictment must be dismissed because the State failed to present exculpatory evidence that the five-year-old victim denied penetration occurred. We disagree and affirm.

After the prosecutor dismissed the first two indictments, a Gloucester County grand jury charged defendant in the third indictment with: first-degree aggravated sexual assault by digitally penetrating the victim's anus, N.J.S.A. 2C:14-2(a)(1) (count one); two counts of second-degree sexual assault of a child less than thirteen years old, N.J.S.A. 2C:14-2(b) (counts two and three); second-degree sexual penetration through the use of physical force or coercion, N.J.S.A. 2C:14-2(c)(1) (count four); and second-degree knowingly engaging in sexual conduct with a child in his care, N.J.S.A. 2C:24-4(a) (count five).

After the court denied his motion to dismiss the indictment, defendant pled guilty to count one, first-degree aggravated sexual assault, reserving his right to appeal from his motion to dismiss.[1] Consistent with the plea agreement, defendant was sentenced to an

[1] Defendant also pled guilty to second-degree endangering a child, pursuant to N.J.S.A. 2C:24-4(a) under Indictment No. 14-08-0801-I, which is not a part of this appeal.

eleven-year term of incarceration with an eighty-five percent parole disqualifier and five years of parole supervision pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.[2] The remaining counts of the indictment were dismissed.

The sole witness at the grand jury proceeding for the third indictment, Detective Louis Butler, testified to the following. Detective Butler received a call from a patrolman who stated a woman had come into the police station and reported that a neighbor, defendant, had touched her five-year-old son, C.H.,[3] inappropriately. The mother had taken C.H. to stay at defendant's house overnight. Upon returning home, C.H. told his mother he did not want to stay with defendant anymore. C.H. told his mother that defendant had placed his hands down C.H.'s pants and touched C.H.'s penis and put his finger between C.H.'s buttocks. Defendant followed C.H. into the bathroom and requested they play sword fights with their penises.

After the incident, C.H.'s mother called defendant on a taped line facilitated by law enforcement. During that phone call, defendant admitted that his finger probably touched C.H.'s "butt

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[2] Defendant was also sentenced to a concurrent six-year term of incarceration under Indictment No. 14-08-0801-I.

[3] We use initials for the child to protect his privacy. R. 1:38-3(c)(12).

hole" when he picked C.H. up, and that he put his hands down C.H.'s pants.

Detectives Butler and Stacie Lick also obtained a taped admission from defendant. Defendant stated he drank a twelve-pack of beer and took prescription painkillers, but knew what he was doing. Defendant admitted he grabbed C.H.'s butt cheek and that his finger could have penetrated C.H.'s anus. Defendant later acknowledged it was "more than likely" his finger did penetrate C.H.'s anus. Additionally, the police report reveals that C.H. told his mother that defendant did not penetrate his anus, but the child complained his "butt was sore."

C.H.'s denial of penetration, which had been presented to the other grand juries, was not presented to the third grand jury.

On appeal, defendant argues:

> POINT I: THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT BECAUSE DEFENDANT MADE ONLY EQUIVOCAL ADMISSIONS AND THE STATE NEGLECTED TO PRESENT THE VICTIM'S EXCULPATORY STATEMENT THAT REFUTES AN ESSENTIAL ELEMENT OF THE CRIMES CHARGED.

We review the denial of a motion to dismiss an indictment under an abuse of discretion standard. State v. McCrary, 97 N.J. 132, 144 (1984). Furthermore, the discretionary authority to dismiss "should not be exercised except on 'the clearest and plainest ground' . . . ." State v. N.J. Trade Waste Ass'n, 96

N.J. 8, 18-19 (1984) (quoting State v. Weleck, 10 N.J. 355, 364 (1952)).

Defendant argues the grand jury was unable to properly perform its function because the State withheld exculpatory information that negates an essential element of the crime charged.

The judge stated his reasons for denying the dismissal motion:

> The child's statement, although possibly relevant to the defense at trial, does not negate an element; but, contradicts the defendant's own personal account. A [p]etit [j]ur[y] will determine proper weight to give [to] both of these statements, [because] they are the ones [who] will be the trier of fact in a jury trial.
>
> By defendant's own admission, he put his hand down the child's pants, played with child's penis three times, put [h]is hand in the child's butt cheek, and more than likely, penetrated the child's anus.
>
> This statement made by the defendant is enough to show that a crime was committed. And, the crimes that were elicited were committed. And, that the defendant was the one that committed it, or them.
>
> The State has put forth evidence [of] each element of the crime charged, based upon my review of the transcript, and that which was submitted.

"An indictment is presumed valid and should only be dismissed if it is 'manifestly deficient or palpably defective.'" State v. Feliciano, 224 N.J. 351, 380 (2016) (quoting State v. Hogan, 144 N.J. 216, 229 (1996)). "The court should evaluate 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." State v. Morrison, 188 N.J. 2, 13 (2006). Thus, an indictment must be upheld as long as the State presents "some evidence establishing each element of the crime to make out a prima facie case." State v. Saavedra, 222 N.J. 39, 57 (2015) (quoting Morrison, 188 N.J. at 12).

N.J.S.A. 2C:14-2(a)(1) provides "[a]n actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: (1) [t]he victim is less than [thirteen] years old . . . ." N.J.S.A. 2C:14-2(b) states that "[a]n actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than [thirteen] years old and the actor is at least four years older than the victim." Lastly, N.J.S.A. 2C:14-2(c)(1) provides "[a]n actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: (1) [t]he actor uses physical force or coercion, but the victim does not sustain severe personal injury . . . ."

N.J.S.A. 2C:14-1(c) defines "sexual penetration" as the "insertion of the hand, finger or object into the anus." The

statute states "[t]he depth of insertion shall not be relevant as to the question of commission of the crime . . . ."

Defendant argues C.H.'s statement that there was no penetration, produced at the first two grand jury hearings, was exculpatory evidence that should have been introduced at the presentation for the third indictment. In contrast, the State argues C.H.'s statements were not "clearly exculpatory" as defendant made contrary and incriminating statements and the young victim's statement was merely evidence of the degree that defendant violated him.

During the grand jury presentation for the first indictment, Detective Butler testified:

> Q: And, he stated that he did not want to sleep at [defendant]'s house ever again because [defendant] tickled his penis and stuck his finger between [C.H.]'s butt cheeks?
>
> A: Correct.
>
> Q: Okay. And, did [C.H.] indicate that [defendant] did not actually penetrate his "poopie hole" (phonetic) as he called it?
>
> A: Correct.
>
> Q: Okay. But, that he did place his finger between his butt cheeks?
>
> A: Correct.

The grand jury proceedings for the second indictment also included similar testimony from Detective Butler about C.H.'s statements.

Our Supreme Court determined the prosecutor's duty to present exculpatory evidence to a grand jury in State v. Hogan, 144 N.J. 216 (1996). The Court held that "[i]n order to perform [its] 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." Id. at 236. The Court noted that "the routine presentation of evidence by prosecutors to grand juries only rarely will involve significant questions about exculpatory evidence." Ibid. These rare cases that trigger a prosecutor's duty arise only when the evidence both directly negates guilt and is clearly exculpatory. Id. at 237.

As to whether the evidence directly negates guilt, the evidence at issue must "squarely refute[] an element of the crime in question . . . ." Ibid. (emphasis in original). Further, as to the second requirement, a court must evaluate the "quality and reliability of the evidence." Ibid. "[T]he exculpatory testimony of one eyewitness is not 'clearly exculpatory' if contradicted by the incriminating testimony of a number of other witnesses."

Hogan, 144 N.J. at 238. The Court noted that the testimony of a "reliable, unbiased alibi witness that demonstrates that the accused could not have committed the crime in question would be clearly exculpatory." Ibid. The Court cautioned that courts should dismiss on such a ground only after considering the prosecutor's evaluation of whether the evidence at issue is "clearly exculpatory." Ibid.

The record does not support defendant's assertion that C.H. adamantly stated no penetration occurred. Apart from the references in the first two grand jury presentations, the only other evidence of an interview with C.H. is in Detective Lick's investigation report, noting that C.H. was "withdrawn and reticent during his interview" and did not disclose any abuse.

Under the principles in Hogan, there are no "clearly exculpatory" statements by C.H. that had to be presented to the grand jury. Under the first prong, C.H.'s statements do not "squarely refute an element" — here that there was sexual penetration — and thus C.H.'s statements do not directly negate the guilt of defendant.

Under the second prong, C.H.'s statements are not particularly reliable. C.H. was a young child at the time and as such may not have realized what had happened to him, especially considering the upsetting nature of the incident. He complained

of soreness, which appears inconsistent with a lack of penetration. Most importantly, defendant's incriminating statements contradict the claim that no penetration occurred.

The trial judge carefully reviewed the grand jury record and appropriately found that the State presented sufficient evidence to support each element of the offenses. Feliciano, 224 N.J. at 381. Defendant's incriminating statements support the element of penetration. Defendant admitted on more than one occasion that he touched C.H. inappropriately and that it was more than likely his finger did penetrate C.H.'s anus. As such, viewing this evidence in the light most favorable to the State, the grand jury could reasonably believe the crime of aggravated sexual assault occurred and defendant committed it. Morrison, 188 N.J. at 13. "Credibility determinations and resolution of factual disputes" are not appropriately before a grand jury, but are "reserved almost exclusively for the petit jury." Hogan, 144 N.J. at 235.

Affirmed.