

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5126-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.Y.,¹

Defendant-Appellant.

Argued December 5, 2017 – Decided January 16, 2018

Before Judges Summers and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. 15-01-
0005.

Jay L. Wilensky, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Jay L. Wilensky, of counsel and on the brief).

Roberta Di Biase, Senior Assistant Prosecutor,
argued the cause for respondent (Joseph D.
Coronato, Ocean County Prosecutor, attorney;
Samuel Marzarella, Chief Appellate Attorney,
of counsel; Nicholas D. Norcia, Assistant
Prosecutor, on the brief).

¹ We use initials to protect the identity of the victims.

PER CURIAM

Tried by a jury, defendant was charged with two counts of first-degree aggravated sexual assault, two counts of second-degree endangering the welfare of a child, for digitally penetrating seven-year-old S.H. and her five-year-old sister, B.H., and resisting arrest. Critical to the State's prosecution was the testimony of the victims and a statement defendant gave to police in which he admitted to sexually assaulting them. Defendant testified, denying the allegations and refuting his police statement. Prior to defendant's testimony, the trial court granted the State's motion to preclude a defense witness from testifying S.H. stated that D.S., defendant's stepson, was the only person who gave her a "bad touch."

Defendant was found guilty of all offenses except resisting arrest. The court imposed concurrent sentences amounting to an aggregate twenty-year term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2(a). Defendant appeals arguing:

POINT I

THE TRIAL COURT GROSSLY VIOLATED [DEFENDANT'S] RIGHT TO A FAIR TRIAL BY EXCLUDING TESTIMONY THAT A VICTIM HAD IDENTIFIED ANOTHER PERSON AS THE ASSAILANT. U.S. CONST., AMENDS. VI, XIV; N.J. CONST. (1947), ART. [I], PARS. 9 [AND] 10.

POINT II

DEFENDANT WAS PREJUDICED BY THE STATE'S USE OF EXCESSIVELY LEADING QUESTIONS.

POINT III

THE [JUDGE] IMPOSED AN EXCESSIVE SENTENCE, NECESSITATING REDUCTION.

We conclude that the trial court did not abuse its discretion in barring S.H.'s testimony and allowing the State to ask leading questions of the children victims. We also conclude there is no merit to defendant's claim that his sentence was excessive.

From April to August 2012, defendant's wife took care of S.H. and B.H. for a fee while their parents worked. The families were such close friends that the girls referred to defendant and his wife as "uncle" and "aunt." On the morning of August 30, 2012, S.H. and B.H. told their mother that defendant, "Uncle [R]," touched their vaginal areas. That same day, she informed her husband and a co-worker of the girls' allegations, but did not complain to law enforcement or the New Jersey Division of Child Protection & Permanency (Division), and did not confront defendant or his wife with the allegations.²

The record does not disclose who contacted the Division but the next day, Division caseworker Thomas DeAngelis visited the

² Without an explanation, the mother merely told defendant and his wife that she would not allow them to babysit her children again.

girls' home and interviewed them separately and alone, each for about eight to fifteen minutes. DeAngelis acknowledged before interviewing the girls that he had not met them nor received any training on the forensic interviewing of children. He took notes of the interviews to prepare a report but did not record their statements. After the interviews, the girls were taken to the Special Victims Unit (SVU) of the county prosecutor's office where they gave video-recorded statements alleging that defendant put his finger inside their vaginas.

At trial, the State presented the testimony of S.H. and B.H., now ages eleven and eight, respectively, who both confirmed their statements. In the absence of any DNA testing because there was no allegations of an exchange of bodily fluids, a certified forensic nurse examiner testified on behalf of the State that her examination of B.H. revealed digital manipulation of B.H.'s vagina, but discovered no similar finding in her examination of S.H. She explained, however, that with respect to digital manipulation, "it is more common not to find injury than it is to find injury." In addition, the State showed the jury defendant's video-recorded police statement, as well as a transcript of the recording, in which defendant admitted to the girls' accusations.

Defendant denied any sexual touching of the girls. He asserted his police statement was untruthful; the result of

misleading questions by the interrogating police officers, fatigue and fear due to spending four or five days in jail, stress due to his wife's recent and third miscarriage, and concern over his family's financial welfare.

In the first two points of his appeal, defendant challenges the court's evidentiary rulings. When reviewing a trial judge's ruling on the admissibility of evidence, we must determine whether there has been an abuse of discretion. Brenman v. Demello, 191 N.J. 18, 31 (2007). Our Supreme Court has recognized "that discretion is abused when relevant evidence offered by the defense and necessary for a fair trial is kept from the jury." State v. Cope, 224 N.J. 530, 554-55 (2016). Hence, "when the mechanistic application of a state's rules of evidence or procedure would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against the charged offenses, the Confrontation and Compulsory Process Clauses must prevail." State v. Garron, 177 N.J. 147, 169 (2003), cert. denied, 540 U.S. 1160 (2004).

In Point I, defendant argues the trial court erred in granting the State's motion to preclude DeAngelis from testifying S.H. told him that only D.S. made a "bad touch" on her. The State argued there was no indication by S.H. that the "bad touch" was of a sexual nature, and thus does not qualify as a false allegation

requiring a Guenther³ hearing. The State also asserted defendant's failure to timely notify it of his third-party guilt defense bars him from presenting the accusations against D.S. In addition, the State maintained D.S.'s alleged sexual touching of S.H. was inadmissible because it was protected by the Rape Shield Law, N.J.S.A. 2C:14-7. The State also asserted defendant's failure to notify the court before the trial that he wanted to admit the evidence bars its admission.

Defendant agreed that S.H.'s statement should not be admitted as a prior false allegation requiring a Guenther hearing. On the other hand, he asserted it should be inferred that S.H.'s reference to D.S.'s "bad touch" meant that she was touched in her vaginal area because she was too shy to point to that area of her body but felt comfortable to point to her arm to indicate a "good touch." Thus, defendant maintained, given S.H.'s trial testimony that defendant sexually abused her, her out-of-court statement only accusing D.S. of sexual abuse was admissible as a prior inconsistent statement under N.J.R.E. 803(a)(1). Defendant further contended that since D.S. had more access to S.H. than defendant did, her accusation against D.S. was admissible to show third-party guilt.

³ State v. Guenther, 181 N.J. 129 (2004).

After considering the parties' written submissions and oral argument, the court issued an oral decision granting the State's application. Citing State v. Jimenez, 175 N.J. 475, 487-88 (2003), the court found defendant did not present sufficient evidence of the possible third-party guilt of D.S. The court also determined the Rape Shield Law barred DeAngelis' testimony regarding D.S.'s alleged sexual touching because of defendant's failure to make an application before the trial to admit the testimony. N.J.S.A. 2C:14-7(a).

After the court's ruling, and following DeAngelis' testimony on behalf of defendant regarding prior inconsistent statements by B.H., the court excused the jury to conduct a Rule 104 hearing so that DeAngelis could proffer his testimony regarding S.H.'s accusation of D.S.'s "bad touch." He testified that when he discussed the concept of "good touch" with S.H., she said she knew what it was and referred to her arm. Conversely, when he asked S.H. if she knew what a "bad touch" was, she did not respond verbally but nodded her head in affirmance that she knew what it was. DeAngelis testified he asked S.H. if someone "did a bad touch to her in a bad touch part?" She answered "yes[,]" by D.S., on occasion. According to DeAngelis, upon inquiry, she denied that anyone else did so.

On cross-examination, however, DeAngelis expressed uncertainty regarding S.H.'s understanding of a "good touch" and "bad touch" as follows:

[Prosecutor]: And also in regards to this conversation [with S.H.] about bad touch or good touch, you were never able to get clarification from [S.H.] about what she was referring to in regards to bad touch; is that correct?

[DeAngelis]: That is correct.

[Prosecutor]: So, for example, you don't know whether that bad touch was in regards to a pinch, a punch or a sexual contact; is that correct?

[DeAngelis]: That is correct.⁴

At the conclusion of DeAngelis' Rule 104 testimony, the court noted, without explanation, that the proffer did not affect its earlier ruling to preclude his testimony regarding S.H.'s accusation against D.S.

We conclude that the trial court did not deprive defendant of his fundamental right to a fair trial by precluding DeAngelis'

⁴ Defendant indicated that had DeAngelis been permitted to testify before the jury regarding the "bad touch" by D.S., he would have objected if the prosecutor's asked the same questions on cross-examination. The court gave no indication how it would have ruled. Thus, we cannot speculate what the trial court would have decided. Yet, based upon the record before us, such testimony would have been relevant and probative in understanding S.H.'s accusations. See N.J.R.E. 401 and 403.

testimony that S.H. accused D.S. of a "bad touch." Specifically, defendant contends that DeAngelis' testimony was admissible as a prior inconsistent statement under N.J.R.E. 803(a)(1), was relevant under N.J.R.E. 401, and should not have been excluded by the Rape Shield Law, because his constitutional right to confront and cross-examine a witness outweighs the State's concerns under the Rape Shield Law.

Before addressing the merits of defendant's respective arguments, we must point out that DeAngelis' precluded testimony is limited to defendant's conviction for sexually abusing S.H. The accusations against D.S. bear no relevance to the guilty finding as to B.H. because there were no allegations that D.S. made a "bad touch" on B.H. In reviewing defendant's arguments, we discern no claim that the barring of S.H.'s allegation against D.S. impacted the conviction for abusing B.H. Hence, even if we concluded DeAngelis' testimony was admissible, we see no reason why defendant's convictions pertaining to B.H. should be reversed.

As to the admissibility of the "bad touch" allegations, our analysis begins with the relevance of the statement. N.J.R.E. 401 defines relevant evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Considering the lack of verbal or non-verbal confirmation by S.H. to indicate what constitutes a "bad touch,"

it is unclear what she meant by her accusation against D.S. Thus, it is highly questionable that only D.S. sexually abused her as defendant sought the trial court to infer from her statement. In fact, it is telling that the witness to the statement, DeAngelis, who had no specialized training in interviewing techniques with child victims of abuse, was not sure what she meant by a "bad touch."

The uncertainty of S.H.'s statement also influences our evaluation as to whether it should be admitted as a prior inconsistent statement. In order for the statement not to be excluded as hearsay under N.J.R.E. 803(a)(1), it must be "inconsistent with the witness' testimony at the trial[.]" S.H. stated at trial that defendant digitally penetrated her vagina. Her statement to DeAngelis, however, was inconclusive as there was never a clear understanding of what she meant by telling him that the only person who made a "bad touch" on her was D.S. When S.H. was cross-examined prior to the State's motion to preclude DeAngelis testimony regarding D.S., she was never asked if she told DeAngelis that D.S. had done a "bad touch" to her and that no one else had done a "bad touch" but D.S. She was asked only if she remembered giving those statements to DeAngelis; she said she did not recall making any allegations against D.S. and she was not confronted with DeAngelis' claim of her allegations. Since

she was not given an "opportunity to explain or deny the statement and the [State was] afforded an opportunity to interrogate on the statement," the statement may be excluded. N.J.R.E. 613. Moreover, S.H. was never asked to define or describe a "bad touch."

Admissibility of S.H.'s statement to establish third-party guilt is likewise without merit. A defendant has a constitutional right under the due process clause of the Fourteenth Amendment to offer evidence of third-party guilt. See Chambers v. Mississippi, 410 U.S. 284 (1973). Third-party guilt evidence is admissible only when "the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case." State v. Loftin, 146 N.J. 295, 345 (1996) (quoting State v. Sturdivant, 31 N.J. 165, 179 (1959), cert. denied, 362 U.S. 956 (1960)). "Testimony concerning third-party guilt is not admissible unless there is evidence linking a third party to the crime." State v. Perry, 225 N.J. 222, 242 (2016). Thus, defendant must do more than "introduce evidence of some hostile or indecent event and 'leave its connection with the case to mere conjecture.'" Id. at 239 (quoting Sturdivant, 31 N.J. at 179).

A defendant is not required "to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt." Id. at 238 (quoting State v. Cotto, 182 N.J. 316, 332 (2005)). "Indeed, even

if there is no evidence linking another specific suspect to the crime, we 'have recognized that evidence that tends to create reasonable doubt that someone else, generically, rather than defendant, committed the offense, is admissible.'" Id. at 238-39 (quoting Loftin, 146 N.J. at 345 (citation omitted)).

Not only did defendant fail to establish – during trial cross-examination or at the Rule 104 hearing conducted by the trial judge – that S.H. actually made the statement concerning D.S. to DeAngelis, he also failed to establish that by "bad touch," she meant digital-vaginal penetration so as to link D.S.'s act with the allegations against defendant. Moreover, because there was no competent evidence that adduced what S.H. meant by only accusing D.S. of a "bad touch," the court did not abuse its discretion to restrict defendant's ability to present a third-party defense. Aside from S.H.'s vague accusation, no trial evidence connected D.S. to sexual assault against either sister. In fact, neither the Division nor SVU investigators interviewed D.S. or his family members concerning alleged misconduct by D.S. Thus, the record did not justify, let alone compel, admission of third-party guilt evidence.

As to the Rape Shield Law, it does not apply to the present situation. The law limits the admissibility of evidence of a victim's previous sexual conduct. N.J.S.A. 2C:14-7. As noted,

it is not clear that S.H.'s "bad touch" allegation involved sexual activity. Moreover, even assuming it did, the accusation does not relate to S.H.'s sexual conduct, but to abuse against her by D.S.

In Point II, defendant contends that the State was given unlimited rein to pose leading questions to B.H. and S.H. to produce sought after responses and not because they were "hesitant, evasive, or reluctant." For example, defendant cites the following questions posed to B.H. by the prosecutor that he objected to but was overruled by the court: "And was it [defendant] who touched you?"; "Were you able to [tell what defendant did] or did somebody put their hand over their mouth?"; and "When somebody tried to tell [defendant's wife what happened] did somebody put somebody's hand over their mouth?" Defendant made no objection when B.H. was asked: "But did [defendant] . . . touch you with [his] hand on your private?" Also without objection, S.H. was asked: "And it was [defendant] who lived in that house[,] was he the one that touched you?"

There is no dispute that these questions were leading. However, "[i]t is well-settled that a court may in its discretion allow counsel to use leading questions in order to elicit testimony from an infant." State v. R.R., 79 N.J. 97, 114-15 (1979); see also, State v. Bueso, 225 N.J. 193, 207 (2016). The court neither abused its discretion in overruling defendant's objections to

leading questions nor committed plain error in allowing leading questions that were not objected to. Leading questions were appropriate in light of the subject matter of the victims' testimony, their ages when the incidents occurred, and when they testified.

Lastly, we address defendant's contention that his sentence was excessive because the court's weighing of aggravating and mitigating factors did not support the imposition of two concurrent maximum twenty-year terms for the first-degree convictions of aggravated sexual assault. He contends aggravating factors two and three should not have been applied. N.J.S.A. 2C:44-1(a)(2)(the gravity and seriousness of harm inflicted upon the victim); -1(a)(3) (the risk of re-offense). He also argues mitigating factor seven should have been given more weight, and that mitigating factors eight and eleven should have been considered. N.J.S.A. 2C:44-1(b)(7) (lack of an adult record); -1(b)(8) (circumstances unlikely to occur); -1(b)(11)(imprisonment entails excessive hardship to defendant or his dependents).

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) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). 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).

Here, we are not persuaded the court erred in sentencing defendant. We find support in the record for the court's findings, and the sentence does not shock our judicial conscience. We note that defendant was eligible for consecutive sentences for offenses against two victims, which the court did not impose. Therefore, we shall not second-guess and disturb the trial court's sentence. See State v. Bieniek, 200 N.J. 601, 608-09 (2010); State v. O'Donnell, 117 N.J. 210, 215-16 (1989).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION