SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5316-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

W.S.C.,

Defendant-Appellant.

Argued telephonically April 16, 2018 – Decided April 26, 2018

Before Judges Simonelli, Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-04-1301.

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

Linda A. Shashoua, Assistant Prosecutor, argued the cause for respondent (Mary Eva Colalillo, Camden County Prosecutor, attorney; Linda A. Shashoua, of counsel and on the brief).

PER CURIAM

Tried before a jury on a two-count indictment, defendant W.S.C.[1] was convicted of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count two). The trial judge sentenced defendant to seventeen years in prison on count one, subject to an 85% period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, with a five-year period of parole supervision upon release. The judge sentenced defendant to a concurrent seven-year term on count two. The judge advised defendant that he was subject to Megan's Law registration and reporting requirements, and parole supervision for life. This appeal followed.

On appeal, defendant raises the following contentions:

> POINT I
>
> THE TRIAL COURT ERRED IN PERMITTING EXPERT TESTIMONY REGARDING CHILD SEXUAL ASSAULT ACCOMMODATION SYNDROME (CSAAS) WHERE THE ALLEGED CHILD-VICTIM NEVER CLAIMED THAT SHE WAS SEXUALLY ABUSED OR ENGAGED IN BEHAVIOR ASSOCIATED WITH CSAAS.
>
> POINT II
>
> REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE PERMISSIBLE AND FORBIDDEN USES OF THE CSAAS EVIDENCE, AS IT IS REQUIRED TO DO WHEN SUCH EVIDENCE IS ADMITTED AT TRIAL (Not raised below).

[1] We use initials and fictitious names to protect the identity of the victim.

POINT III

THE TRIAL COURT'S DISPERSAL OF THE JURY FOR NINE DAYS DURING DELIBERATIONS WAS A STRUCTURAL DEFECT IN THE TRIAL SO INTRINSICALLY HARMFUL THAT REVERSAL IS AUTOMATICALLY REQUIRED (Not raised below).

POINT IV

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE 17-YEAR PRISON TERM IMPOSED ON W.S.C., WHO HAD NO PRIOR CRIMINAL HISTORY, WAS EXCESSIVE AND BECAUSE THE COURT MISAPPLIED THE SENTENCING FACTORS.

POINT [V][2]

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME IS NOT BASED ON RELIABLE SCIENCE, AND THEREFORE, SHOULD NOT HAVE BEEN ADMITTED AT TRIAL.

For the reasons that follow, we agree with defendant's argument in Point II that the judge's failure to instruct the jury on the proper use of CSAAS expert testimony was prejudicial error. Therefore, we reverse defendant's conviction and sentence, and remand for further proceedings without reaching defendant's other arguments.

I.

Defendant is the biological father of V.C. (Vanessa), who was five years old at the time of the incident that is at the center of this case. Vanessa and her three-year-old brother were spending

[2] By leave granted, defendant's attorney raised this point in a supplemental brief.

the weekend at defendant's home, where he lived with his girlfriend, J.M., and her seven-year-old son. During the week, defendant's two children lived with their mother, S.W.

During the afternoon on August 26, 2012, defendant and Vanessa were upstairs in the house. J.M. was in the downstairs living room. J.M. testified that defendant came downstairs and asked J.M. to come to the upstairs bathroom because Vanessa was bleeding from her vagina. When she got to the bathroom, J.M. saw the child sitting on the toilet. Vanessa's underpants were bloody. Because there was no blood in the bowl, J.M. had Vanessa lay down on a clean towel. When she did so, J.M. could see there was blood coming from "her vagina area." J.M. put a clean pair of underpants and a feminine pad on Vanessa.

J.M. called S.W. to let her know that Vanessa was bleeding. S.W., who was a registered nurse, told J.M. to take Vanessa to the hospital emergency room. Before she did so, J.M. placed Vanessa's bloody panty in a plastic bag so she could show it to the medical staff. When J.M. and Vanessa left for the hospital, defendant stayed at home to care for the two other children.

At the hospital, a sexual assault nurse examiner (SANE nurse or nurse) with the county prosecutor's office did a physical examination of Vanessa. The nurse testified that the child "was very, very, very happy, pleasant, [and] cooperative" during the

examination. Detective Jayne Jones from the local police department was also in the emergency room during the examination. She testified that Vanessa was "calm," sitting up in bed, and playing with an Etch-a-Sketch while in the examination room.

The nurse observed redness on the outside of Vanessa's labia; a three-millimeter laceration on the inside of the labia, right at the vaginal opening; a large purple bruise at the site of the laceration, and "a lot of dried blood" as well as "an active bleed." The nurse used an "alternative light" and "special goggles" to look for saliva or semen secretions on Vanessa's body, but was unable to detect any. The nurse took vaginal and anal swabs from Vanessa for later testing. She also collected the underpants and pad Vanessa was wearing when she got to the hospital, dried the items, and placed them in an evidence box.

Around 8:00 p.m. Detective Nicholas Villano, who was assigned to the county prosecutor's office, came to the hospital, collected the evidence kit from the nurse, and interviewed Vanessa. The child stated she did not know how she got hurt. Vanessa told the detective that no one had touched her in a "not o.k. spot," and said she would tell him, her mother, or defendant if anyone had.[3]

[3] The detective videotaped the interview and it was played for the jury at the trial.

By this time, J.M. had returned home to care for the other children, so that defendant could join Vanessa at the emergency room. Detective Jones testified she heard defendant tell Vanessa that she was not going to get any ice cream that night because the other two children had eaten all their dinner. The detective said this made the child "real sad." Detective Jones stated that defendant's demeanor "was calm" while he spoke to Vanessa. On the other hand, the detective asserted that defendant was "aggressive" toward her because when she was introduced to him, he said he knew who Detective Jones "is, she's the one who plays bad cop."

The emergency room then transferred Vanessa to a hospital in Philadelphia. S.W. met her there around 12:30 a.m. on August 27, 2012.[4] When she arrived, Vanessa was in bed and defendant was sitting next to her on the bed. By this time, it was well past Vanessa's bedtime. S.W. testified that the child was "very quiet and very withdrawn," and would not let the doctors examine her. S.W. also stated that defendant's behavior was "bizarre" and "seemed inappropriate" because he "was just laughing, joking, [and] trying to goof around with" the child.

[4] S.W. was in Nevada visiting her mother when J.M. called to tell her that Vanessa was bleeding. S.W. immediately made arrangements to fly home.

S.W. took Vanessa home to her house later in the morning. The child "went to sleep immediately" and "slept for a long time." When she woke up, S.W. gave her a shower in the bathroom. S.W. testified that Vanessa then "began crying . . . [a]nd it appeared as if she was going to tell me what happened. And she shut down." S.W. tried to encourage the child to speak to her, but Vanessa said she was afraid she would get "daddy" in trouble. The child then "shut down" again and "wouldn't talk any further."

A couple of days later, S.W. asked Vanessa how she was feeling and the child stated "it really hurt when it first happened." S.W. then asked, "Oh, well what did happen?" Vanessa "proceeded to tell [S.W.] that she fell on a couch." Vanessa explained that she was on the couch in the children's playroom at defendant's house, and defendant was vacuuming the room. Defendant lifted the couch so he could vacuum underneath it. When he did so, Vanessa told S.W. she jumped and landed on the arm of the couch.

S.W. confirmed there was a couch in the playroom and that it had "very little padding on the back and the arms[.]" J.M. testified that all three children often played, stood, and jumped on the couch. Earlier on the weekend in question, J.M. told Vanessa to "get down" from the couch after she saw the child "up on the back . . . part of the couch, sitting up there."

S.W. testified that Vanessa was very "matter of fact" and "wasn't emotional" when she told her what happened. The child repeated this same account to S.W. on two other occasions, each time stating she "hurt [her]self down there" when she fell on the couch.

At trial, Vanessa testified she could not remember how she got hurt.[5] She also stated she could not recall if there was a couch at defendant's house.

The State called Dr. Julie Lippmann, a licensed psychologist with expertise in child sexual abuse, to testify regarding CSAAS.[6] Dr. Lippmann described five behavioral patterns associated with victims of child abuse. These behavioral patterns are: secrecy; helplessness or dependency; entrapment and accommodation; delayed and unconvincing disclosure; and retraction.

In identifying secrecy as a "precondition" for sexual abuse of a child, Dr. Lippmann explained:

> [I]f someone is going to sexually abuse a child they really don't want anybody to know about that. They may want to have continued

[5] Vanessa was seven years old when she testified.

[6] "[T]he use of . . . [CSAAS] expert testimony is well settled." State v. W.B., 205 N.J. 588, 609 (2011). The Court first discussed and accepted this psychological phenomenon over twenty years ago in State v. J.Q., 130 N.J. 554, 579 (1993), to permit the State to present expert testimony to "explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred."

> access to that child. They certainly don't want to be recognized as someone who abuses a child. And so the person who may offend against a child has a very strong, vested interest in making sure that that child doesn't tell. Usually a person who abuses a child who is in their care or who they know really well, really knows that child well enough to know how to engage that child in maintaining the secret.

Dr. Lippmann described some of the ways this is accomplished, including by direct threats, whether physical or psychological, so that children keep the secret because they recognize the "bad consequences" that will result if they tell. Dr. Lippmann also described "helplessness or dependency" as a precondition for sexual abuse, explaining that children are dependent on their parents and "are not in the position to reject the advances of . . . a loved caretaker."

Further, Dr. Lippmann stated that the accommodation aspect of the syndrome included "all kinds of symptoms" and that "many children don't seem, or at least on the surface, . . . to have symptoms at all. And maybe just trying their very hardest to be the perfect kid, so nobody will know and perhaps they will be safe." Dr. Lippmann also explained that "it is very much expectable" that disclosure will be delayed, seem inconsistent, or never occur at all, and that if a child does not tell, it is not a reason to dismiss the allegation.

Dr. Lippmann never interviewed Vanessa, was not familiar with the specific facts of the present case, and did not render an opinion as to what may or may not have happened between defendant and Vanessa. Significantly, while the trial judge provided the jury with a general instruction prior to Dr. Lippmann's testimony on how to evaluate the testimony of an expert witness, he did not give the jury the special Model Jury Charge[7] concerning CSAAS testimony either before or after Dr. Lippmann testified.

Alex Porigow, a forensic scientist with the Serology Unit of the New Jersey State Police, also testified as an expert for the State. Porigow tested the vaginal and anal swabs that the SANE nurse took from Vanessa in the emergency room, and found they were "negative" for semen and saliva. However, Porigow testified he found semen on the "back of the crotch panel" of Vanessa's underpants. On cross-examination, Porigow stated he could not determine "how long that biological stain had been on those panties." He also testified that biological material can be transferred from one surface to another.[8]

---

[7] Model Jury Charge (Criminal), "Child Sexual Abuse Accommodation Syndrome" (CSAAS Model Charge) (rev. May 16, 2011).

[8] Perhaps in anticipation of this testimony, J.M. testified that defendant masturbated in the house "on occasions" and that there was only one bathroom in the house.

Melissa Johns, the State's DNA expert, testified that based upon her testing, the DNA profile obtained from the semen found on Vanessa's underpants matched the DNA profile she obtained from a buccal swab defendant provided to her.

Dr. Monique Higginbotham, an expert in pediatrics and child abuse pediatrics, also testified for the State. Dr. Higginbotham conducted a physical examination[9] of Vanessa on August 28, 2012. Dr. Higginbotham testified that the right and left outer lips of Vanessa's vagina were "very tender"; she had a bruise on her clitoris; and there was "significant" and "contiguous" bruising going from the labia to the hymen, which was also bruised.

Dr. Higginbotham opined that the contiguous nature of the bruising indicated a "penetrating injury," which caused the doctor to be "very concerned" that Vanessa's injuries resulted from sexual abuse. Dr. Higginbotham rejected the suggestion that Vanessa suffered a "straddle injury" by jumping and landing on the arm of a couch while her legs were straddled. The doctor explained that it would be "very atypical to have injury to the hymen in a straddle injury."

Dr. Maria McColgan, who also qualified as an expert in pediatrics and child abuse pediatrics, testified for defendant.

[9] Dr. Higginbotham videotaped the examination, and it was therefore available for review by defendant's expert.

After reviewing the videotape of Vanessa's examination and the child's medical records, Dr. McColgan stated that Vanessa's injuries could have occurred from a straddle injury as she reported to S.W. a few days after she got home from the hospital. The doctor acknowledged she could not rule out sexual assault as the cause of the injuries because of the bruise to Vanessa's hymen. However, Dr. McColgan opined that the "bruise that's on the base of the [child's] hymen seems contiguous, seems continuous if you will, with the bruises on the outermost structures[,]" and, therefore, she did not believe the bruise on the child's hymen provided "definitive evidence of penetration."

Defendant did not testify on his own behalf at the trial.

During the trial judge's final charge to the jury at the conclusion of the testimony, he again failed to instruct them on the proper use of CSAAS testimony.[10] Defendant did not object to this omission.

II.

As stated at the outset, we focus our attention on defendant's argument in Point II of his brief that the judge plainly erred by neglecting "to instruct the jury on the permissible and forbidden

[10] Instead, the judge merely gave a general instruction on expert testimony and stated it applied to all of the experts who testified.

uses of the CSAAS evidence, as . . . required . . . when such evidence is admitted at trial." The principles guiding our review of this contention are well settled. "[A]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions must give a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)).

"[I]n reviewing any claim of error relating to a jury charge, the 'charge must be read as a whole in determining whether there was any error[.]'" State v. Gonzalez, 444 N.J. Super. 62, 70-71 (App. Div. 2016) (quoting State v. Torres, 183 N.J. 554, 564 (2005)). If, like here, defense counsel did not object to the jury charge at trial, the plain error standard applies. State v. Singleton, 211 N.J. 157, 182-83 (2012).

Under that standard, we reverse only if the error was "clearly capable of producing an unjust result," id. at 182 (quoting R. 2:10-2), and consider the totality of the circumstances when making this determination. State v. Marshall, 123 N.J. 1, 145 (1991). However, the Supreme Court has often cautioned that in a criminal trial, "erroneous jury charges presumptively constitute reversible

error . . . and are poor candidates for rehabilitation under the harmless error philosophy." Singleton, 211 N.J. at 196 (citations omitted).

The Court's observation in Singleton is particularly apt here because of the special nature of CSAAS expert testimony. The underlying rationale supporting the use of this testimony "was first presented in a comprehensive manner by Dr. Roland Summit." W.B., 205 N.J. at 609. According to Dr. Summit's scientific research of child sexual abuse victims, such victims may engage in five categories of behavior, "each of which contradicts the most common assumption of adults." Id. at 610. As noted above in our discussion of Dr. Lippmann's testimony, those identified behaviors are: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed disclosure; and (5) retraction. Ibid. (citing J.Q., 130 N.J. at 568-70).

When CSAAS expert testimony is presented at a criminal trial, it is offered to "explain[] a child's often counter-intuitive reactions" to sexual abuse. Ibid. (citing J.Q., 130 N.J. at 579). However, "[t]he Court has repeatedly emphasized that CSAAS is not a diagnostic tool as used by experts in psychiatry or psychology, and that in the setting of a criminal trial, CSAAS must not be admitted to demonstrate that the child was—or was not—subjected

to sexual abuse." State v. J.R., 227 N.J. 393, 411 (2017) (citing W.B., 205 N.J. at 610).

Thus, the expert can "not attempt to 'connect the dots' between the particular child's behavior and the syndrome, or opine whether the particular child was abused." W.B., 205 N.J. at 611 (citing State v. R.B., 183 N.J. 308, 328 (2005)). "Instead, 'CSAAS expert testimony may serve a "useful forensic function" when used in a rehabilitative manner to explain why many sexually abused children delay in reporting their abuse, or later recant allegations of abuse.'" J.R., 227 N.J. at 411 (quoting State v. P.H., 178 N.J. 378, 395 (2004)).

Because "it has set narrow parameters for CSAAS testimony, the Court has also underscored the critical importance of the trial court's limiting instructions to the jury." Id. at 413. (Emphasis added). Indeed, the Court has noted that the introduction of CSAAS testimony "is clearly hazardous ground" that requires the trial judge to ensure that "[t]he jury's function to make credibility determinations [is not] usurped by expert testimony." R.B., 183 N.J. at 328; see also J.R., 227 N.J. at 414 (stating that absent clear limiting instructions on the proper use of CSAAS testimony, there is "significant risk that jurors may misconstrue the expert's observations to be proof of the child's credibility and the defendant's guilt").

Thus, in P.H., the Court explained that the trial court must instruct the jury that:

> The law recognizes that stereotypes about sexual assault complainants may lead some of you to question [complaining witness's] credibility based solely on the fact that [he or she] did not complain of the alleged abuse sooner. You may not automatically conclude that [complaining witness's] testimony is untruthful based only on [his or her] silence/delayed disclosure. Rather, you may consider the silence/delayed disclosure along with all of the other evidence including [complaining witness's] explanation for his/her silence/delayed disclosure when you decide how much weight to afford to [complaining witness's] testimony. You also may consider the expert testimony that explained that silence is, in fact, one of the many ways in which a child may respond to sexual abuse. Accordingly, your deliberations in this regard should be informed by the testimony you heard concerning child abuse accommodation syndrome.
>
> [178 N.J. at 400.]

This mandatory language was later added to the CSAAS Model Charge. J.R., 227 N.J. at 413 n.4. The CSAAS Model Charge further requires the judge to instruct the jury as follows:

> You may not consider Dr. [A]'s testimony as offering proof that child sexual abuse occurred in this case . . . The Child Sexual Abuse Accommodation Syndrome is not a diagnostic device and cannot determine whether or not abuse occurred. It relates only to a pattern of behavior of the victim which may be present in some child sexual abuse cases. You may not consider expert testimony about the Accommodation Syndrome as proving whether

> abuse occurred or did not occur. Similarly, you may not consider that testimony as proving, in and of itself, that . . . the alleged victim here, was or was not truthful.
>
> Dr. [A]'s testimony may be considered as explaining certain behavior of the alleged victim of child sexual abuse. As I just stated, that testimony may not be considered as proof that abuse did, or did not, occur. The Accommodation Syndrome, if proven, may help explain why a sexually abused child may [delay reporting and/or recant allegations of abuse and/or deny that any sexual abuse occurred].
>
> . . . .
>
> The weight to be given to Dr. [A's] . . . testimony is entirely up to you. You may give it great weight, or slight weight, or any weight in between, or you may in your discretion reject it entirely.
>
> You may not consider the expert testimony as in any way proving that [defendant] committed, or did not commit, any particular act of abuse. Testimony as to the Accommodation Syndrome is offered only to explain certain behavior of an alleged victim of child sexual abuse.
>
> [CSAAS Model Charge.]

As our late colleague, Judge Sylvia Pressler, observed over twenty years ago, a trial court's "failure to give the jury a limiting instruction as to the use it could make of the CSAAS evidence" is an "egregious" error that warrants reversal even where defense counsel did not request such an instruction. State v. W.L., 278 N.J. Super. 295, 302 (App. Div. 1995). This is so

because, without a proper limiting instruction on the use of CSAAS testimony, a jury may improperly consider the expert's testimony, in and of itself, as evidence of defendant's guilt or the victim's credibility. Ibid.

Applying these principles here, we are constrained to conclude that the trial judge's failure to provide the jury with any guidance as to how it could consider the State's CSAAS testimony was plain error requiring the reversal of defendant's conviction. As noted above, the State presented Dr. Lippmann's testimony to explain why a child might not report sexual abuse. Because of the inherent risk in the introduction of CSAAS testimony, however, the judge was required to carefully and fully instruct the jury on the limited purpose of this testimony and provide the specific guidance set forth in the CSAAS Model Charge concerning how the evidence could be considered. The judge's failure to provide this critically important information to the jury was clearly capable of producing an unjust result and, therefore, defendant's conviction and sentence must be reversed.

In so ruling, we reject the State's contention that the omission of the mandatory CSAAS instructions was harmless error. The State correctly points out that the judge gave the jury a

general instruction on expert testimony[11] when Dr. Lippmann testified and again at the conclusion of the trial in his final charge to the jury. However, that general instruction did not warn the jury that the CSAAS evidence could not be considered as establishing that Vanessa was a victim of, or that defendant committed, an act of sexual abuse. Likewise, the judge's general charge did not even mention that the jury could not use Dr. Lippmann's testimony, in and of itself, to determine whether Vanessa was or was not truthful.

The State also argues that the judge's error in omitting the critical CSAAS instruction was harmless because the State otherwise presented "overwhelming evidence" of defendant's guilt. Again, we disagree.

As the State points out, the DNA evidence against defendant was strong, and Dr. Higginbotham provided expert medical testimony that Vanessa suffered a "penetrating" injury. At the same time, however, the SANE nurse found no evidence of semen on the child's body at the time of her examination; the vaginal swabs were negative for defendant's DNA; and defendant's medical expert testified that Vanessa suffered a "straddle injury" that could

[11] Model Jury Charge (Criminal), "Expert Testimony" (rev. Nov. 10, 2003).

have been caused by falling on the arm of the couch with her legs straddled.

Moreover, Vanessa never accused defendant of sexually abusing her and, after returning home from the hospital, claimed she was hurt when she jumped and landed on the arm of the couch. At trial, she stated she could not remember how she was injured.

Under these circumstances, the State made an apparent tactical decision to introduce CSAAS testimony as a means of explaining why a child victim of sexual assault might keep such an assault a secret. However, this testimony is only properly admitted when it is accompanied by the carefully crafted limiting instructions set forth in the CSAAS Model Charge that ensure the jury will not misunderstand its narrow purpose or otherwise misuse it. Because none of the required instructions were provided to the jury, the error can certainly not be deemed harmless.

As noted above, our determination of the jury instruction issue obviates the need to address defendant's other arguments on appeal, including his assertions that the CSAAS testimony was irrelevant and that CSAAS testimony is not sufficiently reliable to meet the admissibility standards of N.J.R.E. 702. In the event of a new trial, defendant may raise both of these arguments.

In this regard, we note that the Supreme Court has recently decided to reexamine the scientific basis of CSAAS. See State v.

J.L.G., 229 N.J. 606 (2017). In J.L.G., the Court granted certification on the question of "the reliability of CSAAS testimony" and summarily remanded the matter to the trial court for a Rule 104 hearing "to determine whether CSAAS evidence meets the reliability standard of N.J.R.E. 702, in light of recent scientific evidence." Id. at 607. We were advised at oral argument that the trial court has completed its task on remand and, on September 1, 2017, submitted a written opinion to the Court for its consideration. In that opinion, the trial court concluded there is no general acceptance of CSAAS among the relevant scientific community, rendering CSAAS testimony inadmissible under N.J.R.E. 702. On remand, the parties may certainly address the conclusions reached by the trial court and any further guidance that becomes available from the Supreme Court on this issue.

Reversed and remanded. We do not retain jurisdiction.