

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5385-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

E.W.[¹],

Defendant-Appellant.

Submitted January 30, 2018 – Decided April 5, 2018

Before Judges Yannotti, Leone and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Sussex County, Indictment No.
11-11-0430.

Joseph E. Krakora, Public Defender, attorney
for appellant (Theresa Y. Kyles, Assistant
Deputy Public Defender, of counsel and on the
brief).

Francis A. Koch, Sussex County Prosecutor,
attorney for respondent (Shaina Brenner,
Assistant Prosecutor, of counsel and on the
brief).

¹ We use initials to identify defendant, the victims, and other individuals because this matter involves minors who were the victims of sexual offenses.

PER CURIAM

Defendant was tried before a jury and found guilty on two counts of first-degree aggravated sexual assault pursuant to N.J.S.A. 2C:14-2(a)(1), and two counts of second-degree endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4(a). Defendant appeals from the judgment of conviction (JOC), dated April 28, 2015. For the reasons that follow, we affirm in part, reverse in part, and remand the matter to the court for further proceedings on the counts charging second-degree endangering the welfare of a child.

I.

In November 2011, a Sussex County grand jury returned an indictment charging defendant with first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(1), by committing multiple acts of sexual penetration of A.G., who was less than thirteen years old at the time (count one). Defendant also was charged with first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(1), by committing multiple acts of sexual penetration of D.G., who was less than thirteen years old at the time (count two). In addition, defendant was charged with two counts of second-degree endangering the welfare of a child, specifically A.G. and D.G., contrary to N.J.S.A. 2C:24-4(a)(1) (counts three and four).

At the trial of the matter, which took place in December 2014 and January 2015, the State presented evidence that Ay.G. gave birth to A.G. in 1998, and to D.G. in 2000. Ay.G. did not have a lasting relationship with the birth father of A.G. and D.G., and the children apparently had no relationship with him. In 1994, Ay.G. met defendant.

In 2002, defendant began dating Ay.G., and shortly thereafter, defendant moved in with Ay.G., her father, and Ay.G.'s children. In October 2003, defendant, Ay.G. and the children moved to a two-bedroom condominium. Defendant and Ay.G. later had two children together, a boy and a girl. Defendant and Ay.G. remained together about nine years but never married.

D.G. testified that Ay.G.'s relationship with defendant was "very abusive." She said that occasionally, defendant "would come home drunk and he would just beat [Ay.G.] up for no reason." She stated that sometimes "during fights, [defendant] and [Ay.G.] would get very angry at one another." D.G. said "[she] would step in between them and [defendant] would hit [her]."

D.G.'s first memory of being sexually abused by defendant was when she was four. Ay.G. was not at home. She said defendant "made [her] lie down on the couch in the living room and he told [her] to take off [her] clothes." According to D.G., defendant began to touch her vagina. She did not report the abuse because defendant

"threatened to hurt" her mother and A.G. if she told anyone. D.G. said the abuse "got worse." She testified that defendant:

began to try to force himself on me. He would just push me onto the floor half the time or he would force me to play with his penis until he ejaculated. And at times, it got to the point where I would just keep on crying and he would hit me really hard for crying. And I would have a bruise. And the next time he did something even worse, like trying to penetrate my vagina with his penis.

D.G. did not recall if defendant ever penetrated her vaginally, but she stated that he "put his penis in [her] mouth." She said defendant "told [her] to suck his penis or else he would hurt [my brother], which really upset me. So I did it to protect him." She also said defendant tried to penetrate her anally.

When asked how often the sexual abuse occurred, D.G. responded:

He did it to me it seemed like almost every day or whenever he had the chance. So he did it pretty much all the time. . . . [T]here was one such time where he hadn't abused me for at least a week and it was my birthday. And he called me into the bedroom because my mom had gone to pick up my birthday cake for me and my older sister. And he said, I haven't touched you for one week, this is my birthday present to you. And he forced himself on me.

D.G. and A.G. did not speak with each other about defendant's abuse until D.G. was almost eight years old. At that time, D.G. learned that defendant also was sexually abusing A.G. D.G. did not

tell her mother about the abuse, but she told her defendant hit her when she was not around. According to D.G., defendant "sexually abused" and "beat the crap out" of her for revealing this to her mother.

In January 2011, defendant and Ay.G. had an argument, and defendant kicked her out of the home. She left with the four children and went to stay with friends. Ay.G. contacted a social services agency, which placed D.G. and the other children in a foster home. After a few days, a social worker told the children they would be going home with defendant.

D.G. testified that it "made me feel like there was no escape, like I was never going to be safe in my life." She said A.G. "screamed . . . at the top of her lungs" and her "little brother and sister began to cry horribly." D.G. and A.G. then told Danielle Cuoco, a caseworker for the Division of Child Protection and Permanency (Division), about defendant's sexual abuse.

A.G. testified that defendant essentially acted as her stepfather. She said defendant started to abuse her sexually when she was five years old. She described the first time defendant abused her. She said she was trying to sleep, and defendant entered the room. He indicated she should "just go to sleep." After everyone was asleep, defendant woke her up and took her to a couch. She was not wearing any clothes. According to A.G., defendant took

his pants off began to touch himself and touch her, until he ejaculated. A.G. said during that incident, defendant only touched her vagina and breasts but at subsequent times, he digitally penetrated her. She testified that defendant tried to penetrate her vaginally, but she was "too small."

She also stated that defendant put his penis in her mouth. He sometimes ejaculated in her mouth and forced her to swallow his semen. According to A.G., defendant penetrated her anally. She said almost every time defendant abused her sexually, he told her he would hurt her or other family members if she told anyone. Nevertheless, A.G. reported the abuse to her mother, and her mother confronted defendant. Even so, A.G. remained with defendant.

A.G. further testified that on another occasion, defendant's sexual abuse came up and her mother again confronted defendant. She said defendant and her mother were "arguing and screaming." Defendant hit her mother many times and she was bloody. He brought A.G. into his bedroom. Her mother was there and she "could barely move." A.G. testified defendant put her on the bed, said "watch this," and then penetrated her anally.

When asked how many times defendant did something sexual to her, A.G. responded that it was "too many times to count." She said defendant touched her "[a]lmost every time that [her mother] left the house." Defendant also made A.G. watch defendant have sex

with her mother. She said defendant and her mother would argue, and defendant would "beat her."

L.L. testified that D.G. and A.G. and their siblings were placed in her home. She testified that when Cuoco came and told the children they would be going home to defendant, A.G. became hysterical. A.G. and D.G. ran and locked themselves in the bathroom. Through the door, L.L. heard A.G. say "something to the effect that, we have to tell." A.G. and D.G. left the bathroom and waited outside for Cuoco. All of the children wound up staying with L.L.

Cuoco testified that in January 2011, after defendant kicked Ay.G. out of the house, defendant went to the Division's office and reported Ay.G. was abusing substances. At that time, no one had made any allegations of sexual abuse, but there were allegations of domestic violence. Defendant eventually left the Division's office, and threatened to seek a custody order. Cuoco took Ay.G. and the children to a motel for the night.

Thereafter, Ay.G. completed a drug test, which was positive for opiates, cocaine, benzodiazepines, methadone, and marijuana. When Cuoco went to the motel, she found Ay.G "incoherent." Cuoco removed the children and placed them with L.L. and her husband. At a court hearing the following day, the court awarded defendant temporary custody of the children.

Cuoco returned to L.L.'s home to bring the children to defendant. She said that when D.G. and A.G. heard they would be placed in defendant's custody, they became "emotional," and A.G. said, "I can't go there, I can't go there to that monster." D.G. and A.G. were crying. Cuoco said she was surprised by their reaction because she had "never seen them behave this way." Later, D.G. and A.G. said defendant had touched them sexually. Cuoco brought D.G. and A.G. to a child advocacy center.

There, they met with Detective Jennifer Williams of the Sussex County Prosecutor's Office. Williams interviewed D.G. and A.G., and they were then returned to L.L.'s home. In their interviews, D.G. and A.G. detailed defendant's sexual abuse. The videotape of Williams's interviews was played for the jury.

The State also presented testimony from Alyson Lane, a forensic scientist with the New Jersey State Police (NJSP). Lane had performed a forensic analysis of D.G.'s eyeglasses. D.G. had reported to Williams that defendant had ejaculated on her eyeglasses during one incident of sexual abuse, and D.G. thought the eyeglasses might contain some relevant evidence. Lane examined the eyeglasses for seminal material, but based on the tests she conducted, she was unable to detect sperm.

Williams then had the glasses sent to Bode Technology where forensic scientist Emily Herren performed additional tests. Herren

testified that she performed an Alternative Light Source (ALS) test, which helps visualize bodily fluids that cannot otherwise be seen. Herren said the interior side of the left lens had positive ALS staining.

Herren also performed a microscopic sperm search, which confirmed the presence of sperm. She then processed the sample and generated a DNA profile. Herren also obtained a DNA profile from defendant's reference sample. She determined that the DNA profile of the sperm found on D.G.'s eyeglasses matched defendant's DNA's profile.

Dr. Julia DeBellis is a pediatrician who performs physical examinations of children who have alleged sexual abuse. In January 2011, the Division referred D.G. and A.G. to DeBellis, and she obtained a medical history from them. They both described defendant's sexual abuse.

DeBellis testified that A.G.'s physical exam revealed no scars, bruising, or current bleeding, but said this did not necessarily indicate A.G. had not suffered a past injury. She said the results of the examination neither confirmed nor denied the possibility of sexual abuse and did not discredit A.G.'s disclosures.

DeBellis further testified that D.G.'s physical exam revealed no abnormalities, meaning she found no bruising, tearing, or

physical injury. She stated these findings were consistent with the history that D.G. had provided. She said the results of the exam did not confirm nor deny D.G.'s allegations of sexual abuse.

Defendant testified that he was a father figure for D.G. and A.G., and denied that he engaged in oral sex with them. Defendant also denied that he ever penetrated either D.G. or A.G. vaginally or anally. He stated that D.G.'s and A.G.'s allegations were "completely false." He also stated he never touched D.G. or A.G. in their vaginal areas, buttocks, or breasts.

The jury found defendant guilty on all counts. The judge sentenced defendant on April 17, 2015. The judge denied the State's motion to sentence defendant to an extended term as a persistent offender pursuant to N.J.S.A. 2C:44-3(a). The judge merged the counts charging endangering the welfare of a child with the counts charging aggravated sexual assault. The judge imposed two consecutive fifteen-year prison terms on counts one and two, each with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

The judge ordered defendant to register under Megan's Law, N.J.S.A. 2C:7-1 to -23; sentenced defendant to parole supervision for life, N.J.S.A. 2C:43-6.4; and imposed appropriate fees and penalties. The judge entered a JOC dated April 28, 2015. This appeal followed.

On appeal, defendant argues:

POINT I

THE ADMISSION OF EVIDENCE OF [DEFENDANT'S] REMOTE PRIOR CONVICTIONS UNDER THE OUTDATED VERSION OF N.J.R.E. 609 DEPRIVED [HIM] OF DUE PROCESS AND A FAIR TRIAL. HAD THE COURT USED THE CORRECT VERSION OF THE RULE, IT WOULD HAVE FOUND THAT THE REMOTE CONVICTIONS WERE INADMISSIBLE.

POINT II

PLAIN ERROR WAS COMMITTED WHEN TWO STATE'S WITNESSES, THE STATE'S EXPERT MEDICAL WITNESS AND THE INVESTIGATING DETECTIVE, WERE PERMITTED TO TESTIFY THAT THE ACCOUNTS OF SEXUAL ABUSE WERE CREDIBLE. (Partially Raised Below).

A. Detective Williams's Lay Testimony Regarding Credibility.

B. The Medical Expert's Testimony Regarding Credibility.

C. Summary.

POINT III

THE ADMISSION OF EVIDENCE THAT DEFENDANT WAS A VIOLENT MAN WHO ABUSED Ay.G. AND ALL OF THE CHILDREN WAS CLASSIC "OTHER CRIMES"/"BAD ACTS" EVIDENCE THAT SHOULD HAVE BEEN EXCLUDED. IF PROPERLY ADMITTED, IN THE ABSENCE OF AN APPROPRIATE LIMITING INSTRUCTION, THIS EVIDENCE DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (Not Raised Below).

POINT IV

[DEFENDANT] COULD NOT HAVE BEEN CONVICTED OF ENDANGERING THE WELFARE OF A CHILD IN THE SECOND DEGREE BEAUSE THE TRIAL COURT DID NOT CHARGE THE JURY CONCERNING AN ESSENTIAL ELEMENT OF THAT OFFENSE, WHICH INVOLVED HAVING

A LEGAL DUTY OR AN ASSUMED RESPONSIBILITY FOR THE CARE OF THE CHILD. (Not Raised Below).

POINT V

THE AGGREGATE THIRTY-YEAR NERA SENTENCE IS MANIFESTLY EXCESSIVE, OWING TO SEVERAL FAULTY FINDINGS AT SENTENCING.

II.

We first consider defendant's contention that the admission of his prior convictions pursuant to N.J.R.E. 609 deprived him of due process and a fair trial. We note that when reviewing a trial court's evidentiary rulings, we apply an abuse of discretion standard. State v. T.J.M., 220 N.J. 220, 233-34 (2015) (citing State v. Buda, 195 N.J. 278, 294 (2008)).

Prior to July 1, 2014, N.J.R.E. 609 stated that "[f]or the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence." N.J.R.E. 609 (2013); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 to N.J.R.E. 609 (2017).

The rule was amended effective July 1, 2014, and now states:

(a) In General

(1) For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to [N.J.R.E.]

403, must be admitted unless excluded by the judge pursuant to Section (b) of this rule.

(2) Such conviction may be proved by examination, production of the record thereof, or by other competent evidence except in a criminal case, when the defendant is the witness, and

(i) the prior conviction is the same or similar to one of the offenses charged, or

(ii) the court determines that admitting the nature of the offense poses a risk of undue prejudice to a defendant,

the State may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence

(b) Use of Prior Conviction Evidence After Ten Years

(1) If, on the date the trial begins, more than ten years have passed since the witness's conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.

(2) In determining whether the evidence of a conviction is admissible under Section (b)(1) of this rule, the court may consider:

(i) whether there are intervening convictions for crimes or offenses, and if so, the number,

nature, and seriousness of those crimes or offenses,

(ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,

(iii) how remote the conviction is in time,

(iv) the seriousness of the crime.

Here, the record shows that defendant was convicted in 1997 of third-degree aggravated assault, third-degree possession of a weapon for an unlawful purpose, and fourth-degree resisting arrest, and sentenced to probation. In 1998, defendant was convicted of a third-degree offense involving a controlled dangerous substance (CDS), and he was sentenced to a four-year custodial term. In addition, in 2003 and 2006, defendant was found guilty of committing two simple assaults, which are disorderly persons offenses. See N.J.S.A. 2C:12-1(a).

Prior to trial, the State informed the trial judge that it wanted to use defendant's 1997 and 1998 convictions for impeachment purposes in the event he were to testify. The judge ruled that, subject to certain limitations, the State could use the 1997 and 1998 convictions for impeachment purposes.

The judge explained that but for the intervening disorderly persons offenses, the convictions from 1997 and 1998 might be excludable. However, the intervening adjudications extended the range of the probative value of the earlier convictions thereby

balancing "sensible impeachment against the prejudicial effect" upon defendant. The judge stated it would be appropriate to limit the 1997 convictions to a single third-degree adjudication. The judge commented:

I think given the passage of time, it would be prejudicial to refer to all of those prior convictions from '97, so [I am] going to limit the State to a reference to a third degree adjudication in '97 and another third degree adjudication in '98 with reference to the sentence.

I think [it is] a fair way to understand the prior record in light of the fact that I am virtually certain . . . that the earlier adjudication was concurrent, [and are] all part of the same incident. So within those bounds, it is proper for [the State to] use [the convictions] as impeachment if and when [defendant] were to testify.

On appeal, defendant argues that the judge did not apply the version of the rule in effect after July 1, 2014. He argues the judge failed to make an explicit finding that the probative value of the evidence outweighed its prejudicial effect, as "contemplated by N.J.R.E. 609." He contends none of the factors favored admission of the convictions in this case.

He asserts the judge considered the intervening simple assaults but knew nothing of the underlying facts and therefore did not consider the nature or seriousness of those offenses. He further argues that the 1997 and 1998 convictions did not involve

dishonesty or a lack of veracity and the crimes were neither heinous nor serious, as shown by the sentences imposed.

We are not persuaded by defendant's arguments. Although the trial judge did not specifically reference the amended rule, the judge considered the appropriate factors in ruling that the 1997 and 1998 convictions were admissible to affect defendant's credibility.

Defendant argues that the judge did not undertake the required analysis under N.J.R.E. 403, but the judge specifically stated that he was balancing the probative value of the evidence against the prejudicial effect its admission would have upon defendant. Moreover, as noted, the judge found that it would be prejudicial to defendant if the State were to refer to three convictions in 1997, and ordered that the State could only refer to a simple offense.

In addition, the judge noted that in the time since his 1998 conviction, defendant twice had been adjudicated for simple assault. There is no indication that the judge was specifically informed of the facts and circumstances of those offenses; however, the judge noted that these offenses are not as serious as indictable offenses but could be considered in determining whether the probative value of the older convictions outweighed their prejudicial effect.

Thus, the judge made the analysis required by the version of N.J.R.E. 609 in effect at the time of trial. The record supports the judge's decision to admit the 1997 and 1998 convictions for impeachment purposes. We conclude the judge's decision was not a mistaken exercise of discretion.

Defendant also argues that the assistant prosecutor improperly commented on his prior convictions in his summation. The assistant prosecutor stated:

[There are] a couple factors to consider in judging credibility. You might recall at the end of cross, I mentioned one, criminal convictions. Very important, the [j]udge is going to tell you about this. You [cannot] say to yourself, well he committed a crime before, therefore he did this one. [You are] [n]ot allowed to do that.

The only thing [you are] allowed to use that conviction for is you know what, he knew it was wrong to do the things he did, but he did them anyway. He disregarded the law.

"[T]here is no doubt that the State may refer to the prior convictions in summation as long as it limits its references to the credibility of the accused." State v. Sinclair, 57 N.J. 56, 63 (1970). The State may not suggest: that because defendant committed other crimes, he probably committed the offense for which he is being tried; that he has a propensity towards crime and probably committed the subject offenses; or that his character

is so bad that crime is his way of life. State v. Driver, 38 N.J. 255, 292 (1962).

In this case, when considered in context, the prosecutor's comments were addressed to defendant's credibility. Indeed, as noted, the prosecutor specifically told the jurors they could not find that because defendant previously committed a crime, he committed the offenses at issue. The prosecutor's comments were not improper.

Furthermore, the judge thoroughly instructed the jury on the limits to its use of this evidence. The judge emphasized that the testimony about defendant's prior convictions was "admitted for a very specific and narrow purpose and that evidence may only be used in determining or possibly affecting the credibility or believability of the defendant's testimony." The judge added that the jury could not conclude that defendant "committed [the crimes charged] . . . simply because he committed a crime on another occasion."

We are therefore convinced the prosecutor's comments did not deny defendant of his right to due process and a fair trial, and the jury was properly instructed on the limits to its use of the evidence regarding defendant's prior convictions.

III.

Next, defendant argues that the trial judge erred by allowing Williams and DeBellis to testify that D.G.'s. and A.G.'s accounts of sexual abuse were credible.

"[C]redibility is an issue which is peculiarly within the jury's ken" State v. J.Q., 252 N.J. Super. 11, 39 (1991), aff'd, 130 N.J. 554 (1993). "While [a complainant's] credibility [is] clearly relevant, other witnesses are prohibited from giving their opinions" on it. State v. R.K., 220 N.J. 444, 460-61 (2015).

The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness. The phenomenon of lying, and situations in which prevarications might be expected to occur, have traditionally been regarded as within the ordinary facility of jurors to assess. For this reason, the question of a witness' credibility has routinely been regarded as a decision reserved exclusively for the jury.

[State v. Vandeweaqhe, 177 N.J. 229, 239 (2003) (quoting J.Q., 252 N.J. Super. at 39).]

The same principle applies to expert testimony. "[E]xperts may not opine on the credibility of a particular [witness]." State v. Henderson, 208 N.J. 208, 297 (2011). "Experts may not offer such testimony because 'credibility is an issue which is peculiarly

within the jury's ken and with respect to which ordinarily jurors require no expert assistance.'" State v. Jamerson, 153 N.J. 318, 341 (1998) (quoting J.O., 252 N.J. Super. at 39).

A. Williams's Testimony

As noted previously, D.G. had informed Williams that during one incident of sexual abuse, defendant had ejaculated onto her eyeglasses. She provided the glasses to Williams, believing they might still contain some evidence. On direct examination, Williams explained that D.G.'s eyeglasses had initially been examined by the NJSP forensic lab, but she decided to send the glasses to a private lab for further analysis. The prosecutor asked Williams why she took this action, and she replied, "Because I believed [D.G.] and I wanted to try something different." Defense counsel did not object to the question or answer.

On appeal, defendant argues that the judge erred by allowing Williams to express an opinion regarding D.G.'s credibility. We disagree. Williams did not offer an opinion on D.G.'s veracity, based on any assessment of her demeanor or other factors that might bear on the credibility of her allegations. Rather, Williams explained why she submitted D.G.'s eyeglasses to an independent lab after she had obtained negative findings from the NJSP analysis. Williams did not improperly bolster D.G.'s credibility.

In addition, defendant argues that Williams improperly commented on the credibility of D.G.'s and A.G.'s testimony in her re-direct examination. The prosecutor asked Williams if she had encountered situations where she found children who had been lying. Williams replied, "Yes." The prosecutor then asked Williams if she found that to be true with regard to either D.G. or A.G. Defendant's attorney objected and the judge sustained the objection.

During a sidebar discussion, the judge ruled that vouching for a witness's credibility was not permitted. The judge added, however, that the detective also had another function to perform, which was to assess whether information obtained in an investigation was an appropriate basis to charge an offense. The prosecutor continued her examination:

Q. So one of your functions was to get information from the children, correct?

A. Correct.

Q. Whatever that information may be.

A. Correct.

Q. And then did you serve a different function in determining the credibility of their statements and deciding what course of action to take in the investigation?

A. Yes.

Defendant's attorney did not object to the last question or Williams's answer.

Defendant argues that the judge erred by failing to strike Williams's testimony on re-direct. He argues that the detective provided lay opinion testimony as to her view of D.G.'s and A.G.'s credibility, and thereby superseded the jury's role in evaluating the credibility of these witnesses. He contends Williams's statement was highly prejudicial. We disagree.

As noted, the judge precluded Williams from offering an opinion on the credibility of D.G. and A.G., but correctly noted that an investigating officer must make an assessment of the credibility of information obtained in the investigation. Here, Williams testified that she must make credibility assessments as part of her duties as an investigator. Moreover, since defendant was arrested almost immediately following Williams's interviews, the jury could readily infer that she found D.G.'s and A.G.'s allegations sufficiently credible to warrant defendant's arrest.

In addition, both D.G. and A.G. testified at trial, and the jurors had the opportunity to see their videotaped interviews. The judge also instructed the jury that the jurors were the judges of the facts and it was their responsibility to assess the credibility of the witnesses. The judge's instruction addressed any possible prejudice that could have resulted from Williams's comments.

B. DeBellis's Testimony

As noted previously, DeBellis conducted physical examinations of D.G. and A.G. She stated that the results of her examinations showed no abnormalities or injuries, and these results neither confirmed nor refuted the allegations of sexual abuse. In discussing the history that A.G. provided, DeBellis stated that A.G. had provided a "very descriptive" and "idiosyncratic" details which provided "credibility" to the statements. The doctor also referred to the "idiosyncratic detail" of D.G.'s statements, but made no comment on her credibility.

Defense counsel did not object to DeBellis's testimony. Defendant argues for the first time on appeal that DeBellis's testimony was improper and the judge erred by failing to strike it. We are convinced, however, that even if the admission of DeBellis's comment regarding A.G.'s "credibility" was erroneous, it did not rise to the level of plain error. R. 2:10-2.

Before she performed her physical examinations, D.G. and A.G. provided DeBellis with their allegations of sexual abuse. DeBellis did not find any physical injuries, but she stated that these results neither confirmed nor denied the allegations of sexual abuse. DeBellis did not comment on D.G.'s credibility, and viewed in context, DeBellis's passing reference to the credibility of A.G.'s allegations was harmless. Moreover, as noted previously,

the judge instructed the jurors that they were the judges of the facts and they were responsible for assessing the credibility of the witnesses.

IV.

Defendant further argues that the judge erred by allowing the State to present evidence he was a violent man who physically abused Ay.G. and her children. He contends this was evidence of "other crimes/bad acts" under N.J.R.E. 404(b), which should have been excluded. He further argues that even if this evidence was properly admitted, the judge erred by failing to provide the jury with an appropriate limiting instruction.

Defendant did not raise these issues at trial. Thus, we consider whether the admission of the evidence or the failure to provide a limiting instruction to the jury was erroneous and, if so, whether any such error was "clearly capable of producing an unjust result." R. 2:10-2.

N.J.R.E. 404(b) provides that except as otherwise provided by N.J.R.E. 608(b), evidence of "other crimes, wrongs, or acts" may not be admitted to prove a person's disposition and that the person acted in conformity with that disposition. N.J.R.E. 404(b) further provides, however, that such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, or

accident when such matters are relevant to a material issue in dispute."

When considering whether evidence of "other crimes, wrongs, or acts" should be admitted pursuant to N.J.R.E. 404(b), the trial court must make a threshold determination as to whether the evidence relates to "other crimes, wrongs, or acts," or whether it is evidence intrinsic to the charged offense. State v. Rose, 206 N.J. 141, 179-80 (2011). Evidence is intrinsic if it "directly proves" the charged offense. Id. at 180 (quoting United States v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010)). Uncharged acts that a defendant performed contemporaneously with the charged offense are considered intrinsic if they facilitated the commission of the offense. Ibid. (quoting Green, 617 F.3d at 248-49).

Evidence that is intrinsic to the charged offense is exempt from the requirements of N.J.R.E. 404(b) because it is not evidence of "other crimes, wrongs, or acts." Id. at 177 (citation omitted). Such evidence "need only satisfy the evidence rules relating to relevancy, most importantly the Rule 403 balancing test." Id. at 177-78.

Here, D.G. and A.G. testified that they delayed disclosure of defendant's repeated acts of sexual abuse because he was physically abusive and threatened to harm them and other family members if they told anyone of the abuse. Defendant's violent acts

and threats were intrinsic to the charged offenses because they were performed contemporaneously with and helped facilitate defendant's repeated acts of sexual abuse. The evidence was clearly relevant to the charged offenses. Moreover, the probative value of the evidence outweighed any prejudice to defendant from its admission. N.J.R.E. 403. Thus, the judge did not err by allowing the State to present this evidence.

Defendant further argues that if the evidence regarding his violent acts and threats was admissible, the judge should have provided the jury with a limiting instruction, explaining the purpose of the evidence and the limits on its use. He claims that without the instruction, the jury could have considered the evidence as showing he was predisposed to violent behavior.

The argument is without sufficient merit to warrant discussion. R. 2:11-3(e)(2). We note, however, that the evidence was presented to explain why D.G. and A.G. delayed disclosure of defendant's sexual assaults. It was not evidence that showed defendant had a propensity to commit the offenses for which he was charged. Thus, the absence of a limiting instruction to guide the jury in its consideration of the evidence was not plain error.

V.

Defendant argues that his convictions for second-degree endangering the welfare of a child, as charged in counts three and

four of the indictment, must be reversed because the judge erred in charging the jury on this offense. Defendant did not raise this issue in the trial court. We therefore consider whether the judge erred in her instructions to the jury and, if so, whether the error rises to the level of plain error. R. 2:10-2.

As stated previously, defendant was charged with two counts of endangering the welfare of a child in violation of 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.

The model jury instructions for second-degree endangering the welfare of a child state that in order to find a defendant guilty, the State must prove beyond a reasonable doubt: (1) that the victim was a child; (2) that defendant knowingly engaged in sexual conduct that would impair or debauch the morals of a child; and (3) that "defendant had a legal duty for the care of the child or had assumed responsibility for the care of the child." Model Jury Charge (Criminal), "Endangering the Welfare of a Child, Sexual Conduct (Second Degree) (N.J.S.A. 2C:24-4(a)(1))" (rev. April 7, 2014). It is undisputed that when the judge instructed the jury, he failed to include the last of the three elements of the offense.

"Correct jury charges are essential to a fair trial and failure to provide a clear and correct charge may constitute plain error." State v. Holden, 364 N.J. Super. 504, 514 (App. Div. 2003). Indeed, erroneous instructions on matters or issues that are material to the jury's decision are presumed to be reversible error. State v. Warren, 104 N.J. 571, 579 (1986) (quoting State v. Crisantos, 102 N.J. 265, 273 (1986)). Moreover, if a jury instruction is particularly "crucial to the jury's deliberations on the guilt of a criminal defendant," then "[e]rrors [having a direct impact] upon these sensitive areas of a criminal trial are poor candidates for rehabilitation' under a plain error theory." State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Simon, 79 N.J. 191, 206 (1979)).

"[O]ur case law requires the jury to find all the elements of an offense with specific reference to that offense." State v. Casilla, 362 N.J. Super. 554, 567 (App. Div. 2003). Accordingly, "[t]he trial court must give a clear explanation of the applicable law to provide the jury with an adequate understanding of the relevant legal principles." State v. Hackett, 166 N.J. 66, 85 (2001) (citing State v. Burgess, 154 N.J. 181 (1988)).

The State concedes the charge was erroneous but argues that defendant's convictions for second-degree endangering the welfare of a child should be affirmed because the evidence clearly

established that defendant had assumed responsibility for the care of D.G. and A.G., and defendant never disputed this element of the offense. The State also argues that the error was harmless because for sentencing purposes, the court merged counts three and four with counts one and two and therefore the convictions had no effect on the sentences imposed.

We are not persuaded by the State's arguments. We conclude that the absence of the instruction on an essential element of the charge of second-degree endangering the welfare of a child requires reversal of the convictions on counts three and four. The jury was not instructed on an essential element of the offense, and we cannot presume the jury found that the State had established all of the elements of second-degree endangering beyond a reasonable doubt. Although the convictions on counts three and four did not affect the overall sentence, the JOC nevertheless reflects that defendant was, in fact, convicted of two second-degree offenses.

In the alternative, defendant argues that we should mold the verdict and find him guilty on two counts of third-degree endangering the welfare of a child. A jury verdict may be molded to a conviction for a lesser-included offense, so long as there is no undue prejudice to the defendant, defendant has had his day in court, the elements of the lesser-offense are contained in the more serious offense, and defendant's guilt of the lesser offense

is implicit in the verdict. State v. R.P., 223 N.J. 521, 528 (2015) (quoting State v. Farrad, 164 N.J. 247, 266 (2007)).

We decline to mold the verdict. The State has not agreed to such a result. We remand the matter for further proceedings on counts three and four. On remand, the State may re-try defendant on counts three and four, file a motion to mold the verdict, or resolve these charges in some other fashion.

Accordingly, we remand the matter to the trial court for further proceedings on counts three and four.

VI.

Defendant contends his thirty-year NERA sentence on counts one and two is manifestly excessive. He also argues that the judge made several erroneous factual findings at sentencing.

The scope of our review of the trial court's "sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). When reviewing a sentence, we consider "whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether the 'factfinder [has applied] correct legal principles in exercising its discretion.'" Ibid. (quoting State v. Roth, 95 N.J. 334, 363 (1984)).

An appellate court should not set aside a trial court's sentence "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.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting Roth, 95 N.J. at 364-65).

Here, the trial judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (extent of defendant's prior criminal record and the seriousness of the offenses of which he has been convicted); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law). The judge found no mitigating factors. The judge denied the State's motion to sentence defendant to an extended term as a persistent offender, and imposed two consecutive fifteen-year terms, each with an eighty-five percent period of parole ineligibility, as prescribed by NERA.

On appeal, defendant argues that the judge erred by finding aggravating factor three. He contends the judge erroneously based this finding on the assumption that defendant could commit another offense if he were to exercise care and control over another potential victim in the future. Defendant argues that this finding is "entirely imaginary." We disagree. The record supports the judge's finding that there was a substantial risk defendant would

commit another crime if he were in a position to do so. The judge's finding is not "imaginary."

Defendant further argues that the judge erred by finding aggravating factor six. He contends his prior criminal record consists of two prior third-degree Superior Court convictions, committed in 1997 and 1998 when he was twenty-three and twenty-four years old. He argues that his criminal record was remote and neither excessive nor serious. He therefore contends there is an insufficient factual basis for the judge's finding on aggravating factor six.

Again, we disagree. The judge noted that while defendant's criminal record is not as extensive as the criminal records of other defendants, it was entitled to some weight in the sentencing analysis, even if his prior convictions did not warrant imposition of an extended term. The record supports that finding. Defendant's arguments on this issue lack sufficient merit to warrant further comment. R. 2:11-3(e)(2).

In addition, defendant argues that the judge failed to explain the reasons for finding aggravating factor nine. He contends the judge should have addressed both the need for general and specific deterrence. However, the judge made clear that there was a strong need to deter defendant and others from violating the law, a finding that is amply supported by the evidence presented at trial.

Defendant also argues that his consecutive sentences are manifestly excessive. We cannot agree. The judge properly considered the factors for imposing consecutive sentences as set forth in State v. Yarbough, 100 N.J. 627, 644 (1985):

[1] the crimes and their objectives were predominantly independent of each other;

[2] the crimes involved separate acts of violence or threats of violence;

[3] the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

[4] any of the crimes involved multiple victims;

[5] the convictions for which the sentences are to be imposed are numerous.

Here, the judge found consecutive sentences were warranted because defendant had been convicted of crimes involving two young victims, who each suffered "tremendously." The judge noted that the crimes involved separate but similar acts, against separate victims, over a significant period of time.

Defendant contends that the sentences imposed here are inconsistent with the Yarbough guideline that "successive terms for the same offense should not ordinarily be equal to the punishment for the first offense." State v. Rogers, 124 N.J. 113, 119 (1991) (quoting Yarbough, 100 N.J. at 644).

However, this case was extraordinary because the evidence showed that defendant committed multiple acts of sexual assault against two victims over many years, but he was charged with only one count of aggravated sexual assault for each victim. See State v. J.G., 261 N.J. Super. 409, 427-27 (App. Div. 1993) (upholding two consecutive twenty-year terms for aggravated assault under Yarbough where the crimes "were committed at different times and involved multiple victims," and the case was "extraordinary"). Moreover, the imposition of consecutive sentences in this case is entirely consistent with the Yarbough guideline that "there can be no free crimes in a system for which the punishment shall fit the crime." Yarbough, 100 N.J. at 643.

We therefore conclude there is sufficient credible evidence in the record to support the judge's factual findings, and the sentences imposed represent a reasonable exercise of the judge's discretion.

Accordingly, we affirm defendant's convictions on counts one and two, and the sentences imposed on those counts. We reverse the convictions on counts three and four, and remand the matter to the trial court for further proceedings on those counts.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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

