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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5420-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHELLE HEALE a/k/a
MICHELLE PIRCHIO,

Defendant-Appellant.

Submitted November 14, 2017 – Decided January 3, 2018

Before Judges Hoffman, Gilson, and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
12-12-2033.

Steven Hernandez, attorney for appellant
(Thomas Cannavo, of counsel and on the brief).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Lisa
Sarnoff Gochman, Legal Assistant, on the
brief).

PER CURIAM

This case arises out of the tragic death of a young child.
On August 28, 2012, the child was in the care of defendant,
Michelle Heale, when she called 911 to report that the child was

having difficulty breathing. Responding emergency medical personnel rushed the child to a hospital, but three days later, the child was pronounced dead. Several doctors who examined the child opined that the child died as a result of blunt cerebral trauma and spinal shock, consistent with the child having been repeatedly shaken.

A jury convicted defendant of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a), as a lesser-included offense of murder, and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). On the aggravated manslaughter conviction, defendant was sentenced to fifteen years in prison with eighty-five percent of that time ineligible for parole as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On her conviction for endangering the welfare of a child, defendant was sentenced to six years in prison to run concurrent with her sentence for aggravated manslaughter. Defendant appeals her convictions and sentence. We affirm because the evidence at trial supports the convictions and none of the arguments raised by defendant establish reversible error. Moreover, the sentence was legal and we discern no abuse of discretion.

I.

Defendant was the caregiver to the fourteen-month-old child. The child's parents were friends with defendant and her husband, and the child's father and defendant's husband worked together.

The child was born in June 2011, and thereafter the mother went back to work, initially part-time and later full-time. Defendant was staying at home with her twin children who were approximately eighteen months older than the child. Defendant agreed to babysit the child several days a week. Typically, the mother would drop the child off at defendant's home around 8:00 a.m., and pick the child up on her way home from work in the late afternoon. Thus, the child would be with defendant and her two children for most of the day, which usually involved breakfast, play-time, lunch, and a nap.

On August 27, 2012, the child had a cough and after his mother picked him up from defendant, she took him to his pediatrician. The pediatrician examined the child and diagnosed him with an upper respiratory infection and a left ear infection, and prescribed Amoxicillin, an oral antibiotic.

The following day, August 28, 2012, the child was dropped off at defendant's home in the morning. Defendant, who testified at trial, stated that the child seemed tired. In the early afternoon, she put the child down for a nap in the master bedroom. The child

did not eat his lunch and defendant gave him a packet of squeezable apple sauce. Thereafter, defendant heard the child coughing and she thought the child might be choking on the apple sauce. She picked the child up, put him over her shoulder, and hit him on his back. Defendant testified that as she was putting the child down, his head snapped back, and he went completely limp. Defendant then ran down the hallway with the child and called 911 from a phone in the living room.

A police officer and, shortly thereafter, an emergency medical technician (EMT) responded to defendant's home. Defendant informed both the officer and the EMT that the child had choked. The child was then taken by ambulance to Community Medical Center. There, the child was examined by a doctor who ordered a CT scan and several other tests.

The child's parents and paternal grandmother came to the medical center, as did defendant. The paternal grandmother testified that while there, she saw defendant at the child's bedside and heard defendant say to the child "it was my fault. I'm sorry."

Subsequently, the parents decided to transfer the child to the Children's Hospital of Philadelphia (CHOP). At CHOP, the child was examined and treated by several doctors, who ordered additional tests, x-rays, and scans. The doctors found no

indications of choking. Thus, one of the doctors asked the Suspected Child Abuse and Neglect (SCAN) team to examine the child. A doctor with SCAN reviewed the child's medical records, consulted with other doctors, and came to the opinion that the child had suffered abusive head trauma and an injury to his upper spinal cord.

Several other doctors at CHOP also evaluated the child, and reviewed an additional CT scan that showed significant brain damage. Those doctors also opined that the child had suffered abusive head trauma caused by repeated banging of the child's brain against the inside of his skull.

Between August 28 and September 1, 2012, the child's condition deteriorated. On September 1, 2012, the child was declared legally brain dead and his parents authorized the donation of his viable organs.

Following the child's death, a medical examiner conducted an autopsy and consulted with other medical experts. The medical examiner concluded that the cause of the child's death was blunt cerebral trauma. The medical examiner also removed the child's brain and spinal cord and sent them to a doctor with an expertise in pediatric neuropathology. That expert, who had diagnosed several hundred cases of suspected child abuse, concluded that the child had suffered spinal shock due to an acute injury to the

upper spinal cord. That doctor also opined that the child had "most likely" been shaken several times.

In November 2012, defendant was arrested and charged with the murder of the child. Thereafter, a grand jury indicted defendant for first-degree murder, N.J.S.A. 2C:11-3a(2), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

The case was tried before a jury in March and April 2015. Pre-trial, the court ordered the sequestration of witnesses. Defendant made a request to restrict where the parents of the child could sit in the courtroom, arguing that the parents should not be allowed to sit near the jury. The trial judge denied that application, noting that the courtroom was open and that people could sit anywhere they wanted.

During the State's case-in-chief, it called twenty witnesses, including members of the child's family, treating physicians, law enforcement officers, an EMT, and medical examiners. The jury heard testimony from seven different doctors and medical experts presented by the State, all of whom had examined the child or the child's medical records. All of those doctors and medical experts opined that the child suffered blunt cerebral trauma consistent with the child having been repeatedly shaken. Several of those doctors also opined that the injuries the child suffered could not have been caused by choking.

At the close of the State's case, defendant moved for judgments of acquittal. The trial court denied that motion. The defense then called five witnesses, including defendant and four experts.

At the close of defendant's case, the State sought to offer rebuttal testimony from three witnesses, two of whom were law enforcement personnel and one of whom was a medical expert. Defendant objected because those witnesses had been present in the courtroom during defendant's case, and were given transcripts of defense witnesses' testimony. The trial court entered an order precluding the three witnesses from testifying in rebuttal because such testimony was inconsistent with the court's earlier witness sequestration order.

The State applied to us for emergent relief. We granted that application, affirmed the preclusion of the rebuttal testimony from the two fact witnesses, but reversed the preclusion of rebuttal testimony from the expert witness. We also expressly stated that our order "applie[d] to these three witnesses only."

Thereafter, the State decided that it would not offer rebuttal testimony from the original expert it identified. Instead, the State sought to offer rebuttal testimony from three other medical experts and the child's mother. The trial court conducted a Rule 104 hearing outside the presence of the jury. The court then

ruled that the State could offer limited rebuttal testimony from those four witnesses.

After hearing all of the evidence, the jury acquitted defendant of first-degree murder, but found her guilty of the lesser-included offense of aggravated manslaughter. The jury also found defendant guilty of endangering the welfare of a child.

II.

On appeal, defendant presents six arguments, which she articulates as follows:

POINT I — DEFENDANT WAS DENIED A FAIR TRIAL GIVEN THE PREJUDICIAL VIOLATION OF THE SEQUESTRATION ORDER ALLOWING THE REBUTTAL TESTIMONY OF STATE WITNESSES.

POINT II — THE MULTI-FACETED, EGREGIOUS PROSECUTORIAL MISCONDUCT DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL.

POINT III — THE COURT BELOW ERRED IN REJECTING DEFENDANT'S REQUEST TO REQUIRE THE VICTIM'S PARENTS TO SIT FURTHER AWAY FROM THE JURY. THUS, DEFENDANT WAS DEPRIVED OF A FAIR TRIAL.

POINT IV — THE CUMULATIVE ERRORS BY THE COURT AND PROSECUTOR VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND CONSTITUTE REVERSIBLE ERROR.

POINT V — THE SENTENCE IS ILLEGAL BECAUSE THE COURT FAILED TO MERGE THE ENDANGERING INTO THE AGGRAVATED MANSLAUGHTER CONVICTION AND VIOLATES DOUBLE JEOPARDY PRINCIPLES. THUS, THE SENTENCE MUST BE CORRECTED.

POINT VI – THE SENTENCE BELOW IS EXCESSIVE AND SHOULD BE LOWERED BY THIS COURT OR REMANDED FOR RESENTENCING.

Having reviewed the record in light of the applicable law, we discern no grounds warranting reversal of the jury verdict or sentence. We address each of defendant's arguments in turn.

A. The State's Rebuttal Witnesses

Defendant argues that the trial court erred in permitting the State to present four witnesses to testify in rebuttal. Specifically, defendant contends that the rebuttal testimony of the child's mother and the three doctors violated her constitutional right to a fair trial because the rebuttal witnesses had been present during defendant's case or had been provided with transcripts of the testimony of defendant's witnesses in violation of the sequestration order.

Trial courts have discretion to order the sequestration of witnesses. State v. Miller, 299 N.J. Super. 387, 399 (App. Div. 1997). Under N.J.R.E. 615, "[a]t the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses." The purpose of sequestration is to prevent prospective witnesses from hearing other witnesses testify so that a witness' testimony is not shaped or tailored by another witness' testimony. State v. Williams, 404 N.J. Super. 147, 160 (App. Div. 2008). A witness who violates a sequestration

order may be barred from giving testimony at trial. State v. Dayton, 292 N.J. Super. 76, 89 (App. Div. 1996). Nevertheless, "[a]bsent a clear showing of prejudice[,], an inadvertent violation of a sequestration order does not trigger automatic exclusion of the witness' testimony." Williams, 404 N.J. Super. at 160.

Here, the State initially sought to offer rebuttal testimony from three witnesses. Two of those witnesses were law enforcement officers who had investigated the child's death, and the third witness was another medical expert. Defendant objected, and the trial court precluded testimony from all three of the State's proposed rebuttal witnesses.

The State filed an emergent application to appeal that ruling, which we granted. We then issued an order affirming the preclusion of rebuttal testimony by the fact witnesses, but reversing the preclusion of rebuttal testimony by the expert witness. As previously noted, we expressly limited our order to those three witnesses.

Thereafter, the State decided not to call the expert it had originally identified. Instead, the State proposed to offer rebuttal testimony from the child's mother and three other experts. The court conducted a Rule 104 hearing and ultimately allowed limited rebuttal testimony from each of those four witnesses. With regard to the child's mother, the court limited her rebuttal

testimony to disputing a conversation that defendant testified had taken place. The experts' testimony was limited to rebutting testimony offered by defense experts.

Initially, we clarify that our April 13, 2013 order does not control the issue on this appeal. In issuing that order, we expressly stated that we were only addressing the three proposed rebuttal witnesses who had been identified at that time. Accordingly, our order did not address proposed testimony from expert witnesses in general.

We also need not decide whether a sequestration order can properly apply to expert witnesses. Here, the trial court made it clear that all witnesses, including expert witnesses, were subject to the sequestration order. No one is challenging that order on this appeal. Instead, the limited question is whether the court properly permitted rebuttal testimony.

Trial courts are vested with broad discretion to allow rebuttal testimony, which will not be disturbed absent a gross abuse of discretion. State v. Cook, 330 N.J. Super. 395, 418 (App. Div. 2000). Here, we find no such abuse. The mother was allowed to give limited rebuttal testimony that directly challenged testimony presented by defendant. Defendant testified that she and the mother had a conversation in early August 2012, during which defendant told the mother that she was "blessed with

twins." In rebuttal, the mother denied that such a conversation ever took place. The trial court permitted the mother's rebuttal testimony, reasoning that it did not frustrate the purpose of the sequestration order. We agree. The limited rebuttal testimony from the mother directly challenged testimony from defendant. Accordingly, the mother was not tailoring her testimony based on other witnesses' testimony; rather, the mother was directly rebutting defendant's testimony.

Similarly, the three experts who testified in rebuttal for the State responded to testimony from defendant's expert witnesses. One of the rebuttal experts had previously testified in the State's case-in-chief. The other two experts had not testified, but had produced reports. Consequently, the experts were not tailoring their testimony. Instead, they were responding to and rebutting testimony from defendant's experts. In the context of this trial, which involved testimony from numerous experts, the trial court did not abuse its discretion by allowing limited rebuttal testimony. Moreover, such limited rebuttal testimony did not have the clear capacity of producing an unjust result. See R. 2:10-2 (defining harmless error); see also State v. Reeds, 197 N.J. 280, 298 (2009) (stating that appellate courts will ignore an error unless it is of such a nature as to have been clearly capable of producing an unjust result).

B. Alleged Misconduct by the Prosecutor

Defendant contends that the prosecutor engaged in misconduct during her closing arguments and that the misconduct warrants reversal of the jury verdict. When considering such an argument, we first determine whether misconduct occurred and, if so, whether it deprived the defendant of a fair trial. State v. Wakefield, 190 N.J. 397, 446 (2007); State v. Frost, 158 N.J. 76, 83 (1999).

"[A] prosecutor must refrain from improper methods that result in wrongful conviction[s], and is obligated to use legitimate means to bring about a just conviction." State v. Ingram, 196 N.J. 23, 43 (2008) (quoting State v. Jenewicz, 193 N.J. 440, 471 (2008)). Nevertheless, "[p]rosecutors are afforded considerable leeway in their closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Neal, 361 N.J. Super. 522, 534-35 (App. Div. 2003).

"In determining whether a prosecutor's misconduct was sufficiently egregious [to warrant a new trial], an appellate court must take into account the tenor of the trial and degree of responsiveness of both counsel and the court to improprieties when they occurred." Frost, 158 N.J. at 83. In the absence of objections by defense counsel, a reviewing court will not reverse unless the prosecutor's misconduct "so grievously affect[ed] the

substantial rights of the defendant as to convince [the court] that [the misconduct] possessed a clear capacity to bring about an unjust result." State v. Sherman, 230 N.J. Super. 10, 18-19 (App. Div. 1988) (quoting State v. Hipplewith, 33 N.J. 300, 309 (1960)).

Here, defendant raises six separate instances of alleged prosecutorial misconduct. First, she contends that the prosecutor attempted to divert the jury's attention from the evidence by appealing to the jury's sense of outrage. In support of that position, she identifies two statements made by the prosecutor in closing arguments: (1) "We're here for justice for [the child]"; and (2) "[this is the child's] day now in court for you to decide." Second, she contends that the prosecutor expressed a personal belief of defendant's guilt by arguing that defendant's theory of the case was "impossible" and by stating "we know that spinal shock caused [the child's] death. We know it." Third, she contends that the prosecutor improperly referred to God, when in closing arguments she stated, "How in God's name do you know where it happened? How in God's name . . . ?" Fourth, defendant contends that the prosecutor made an inaccurate factual assertion by stating that an officer testified that there was no dog in the bedroom and, therefore, defendant lied when she said there was a dog in the bedroom. Fifth, defendant contends that the prosecutor

improperly suggested that defendant should have confessed when she argued that defendant was "not taking responsibility for herself[.]" Finally, defendant argues that the prosecutor improperly attacked defendant's expert witnesses and questioned their credibility.

At trial, defense counsel only objected to the prosecutor's alleged inaccurate reference to the officer's testimony regarding the dog. The judge overruled that objection. We discern no clear showing of prosecutorial misconduct. At best, there was a dispute as to the officer's testimony and whether he ever mentioned a dog. After defendant's counsel objected and there was a sidebar, the prosecutor reminded the jury that it was their recollection of the witnesses' testimony that controlled. Reviewed in context, the prosecutor's statements regarding what the detective saw in the bedroom did not rise to the level of reversible error.

Having reviewed all of the other statements made by the prosecutor in the full context of the closing argument, we find no showing of misconduct. Instead, the prosecutor's arguments in closing, when read in context, did not overstep the bounds of a fair closing argument. Moreover, as this alleged misconduct was not objected to, there was no showing of plain error. R. 2:10-2. In other words, the alleged misconduct by the prosecutor was not clearly capable of producing an unjust result. State v. Black,

380 N.J. Super. 581, 592 (App. Div. 2005) (explaining that we review statements made in summation to which there is no objection for plain error).

C. Request That the Child's Parents Not Sit Near the Jury

Before trial, defense counsel asked the trial court to limit where the parents of the child would be permitted to sit in the courtroom. Defendant argued that it would be unfair to allow the parents to sit near the jury. The trial court rejected that request.

The trial court has the authority and responsibility to control the courtroom during a trial. State v. Cusumano, 369 N.J. Super. 305, 311 (App. Div. 2004). Accordingly, trial judges have discretion to determine who may enter the courtroom and where individuals may sit. That exercise of discretion is circumscribed by the responsibility to act reasonably and within constitutional and statutory bounds. Ibid. (citing Ryslik v. Krass, 279 N.J. Super. 293, 297-98 (App. Div. 1995)). The Legislature has declared that criminal victims and witnesses are entitled to be present at judicial proceedings. N.J.S.A. 52:4B-36(p).

Here, we discern no abuse of discretion in the trial court's decision not to restrict where the parents could be seated within the courtroom. Just as critically, defendant has made no showing

that there was any improper conduct by the parents when they were in the courtroom.

D. Alleged Cumulative Errors

Defendant argues that the cumulative effect of the various errors she has identified warrants the reversal of the jury verdict. In assessing such an argument, the question is whether the cumulative effect casts sufficient doubt on a verdict to require reversal. Jenewicz, 193 N.J. at 473. We have already analyzed that the individual errors did not warrant reversal of the jury verdict and there has been no showing that the cumulative effect of the errors was sufficient to cast doubt on the jury verdict. Instead, the trial record establishes that defendant was accorded a fair trial.

E. Merger of the Convictions

Defendant argues that her conviction for endangering the welfare of a child should have merged into her conviction for aggravated manslaughter. We disagree.

A defendant who has been convicted of one offense cannot, under principles of merger, be punished as if convicted of two offenses. State v. Hill, 182 N.J. 532, 542 (2005) (citing State v. Brown, 138 N.J. 481, 561 (1994)). In determining whether convictions merge, courts consider the elements of the crimes, the Legislature's intent in creating the offenses, and the specific

facts of each case. Ibid. Moreover, the merger analysis is guided by the principle that "the Legislature may fractionalize a single criminal episode into separate offenses when the Legislature intends them to be punished separately and when the fractionalization does not offend constitutional principles." Id. at 543 (quoting State v. Mirault, 92 N.J. 492, 504 (1983)).

Defendant argues that her convictions merge because the conviction of endangering the welfare of a child was based on the same evidence as the manslaughter conviction. Our Supreme Court has explained, however, that endangering the welfare of a child is aimed not only at the specific conduct, but also at violations of the duty owed by a responsible person to care for a child. State v. Miller, 108 N.J. 112, 118-21 (1987). Accordingly, in Miller, the Court held that the convictions for aggravated sexual assault and endangering the welfare of a child, which were based on the "same general conduct," did not merge. Id. at 120.

Applying the holding in Miller to the facts of this case dictates that defendant's conviction for endangering the welfare of a child does not merge with her conviction for aggravated manslaughter. A person is guilty of aggravated manslaughter if that person "recklessly causes death under circumstances manifesting extreme indifference to human life." N.J.S.A. 2C:11-4(a)(1). In contrast, a conviction for endangering the welfare

of a child "is aimed not only at specific conduct but also at the violation of the duty that [a caregiver] owes to a child." Miller, 108 N.J. at 118. Accordingly, a conviction for endangering the welfare of a child requires both proof of the act that recklessly endangered the child, and proof of a custodial relationship between the caregiver and the child. Ibid.; see N.J.S.A. 2C:24-4(a) and N.J.S.A. 9:6-8.21(c). Consequently, we find no error in the sentencing court's decision to not merge defendant's convictions.

F. Whether the Sentence Was Excessive

Finally, defendant argues that her sentences were excessive. We review sentencing decisions for an abuse of discretion. State v. Blackmon, 202 N.J. 283, 297 (2010). "The reviewing court must not substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). We will affirm a sentence unless

- (1) the sentencing guidelines were violated;
- (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or
- (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'

[Ibid. (alterations in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Whether a sentence violates sentencing guidelines is a question of law that we review de novo. State v. Robinson, 217 N.J. 594, 603-04 (2014).

Here, defendant was sentenced to fifteen years in prison with eighty-five percent of that time ineligible for parole for her conviction for aggravated manslaughter. Defendant was then sentenced to a concurrent term of six years in prison for her conviction for endangering the welfare of a child. The aggravated manslaughter conviction was a first-degree conviction and the statute called for a prison term between ten and thirty years. N.J.S.A. 2C:11-4(c). Moreover, NERA mandates that a defendant convicted of aggravated manslaughter must serve eighty-five percent of the imposed sentence without eligibility for parole. N.J.S.A. 2C:43-7.2. The endangering the welfare of a child conviction was a second-degree crime subject to a prison term between five and ten years. N.J.S.A. 2C:24-4(a) and N.J.S.A. 2C:43-6(a)(2). Accordingly, defendant was sentenced within the applicable guidelines.

Moreover, in sentencing defendant, the judge considered the aggravating and mitigating factors. The judge found aggravating factor two, N.J.S.A. 2C:44-1(a)(2) (the gravity and seriousness of the harm inflicted on the victim, particularly when the victim was vulnerable or incapable of resistance), three, N.J.S.A. 2C:44-

1(a)(3) (the risk that defendant will commit another offense), and nine, N.J.S.A. 2C:44-1(a)(9) (the need to deter). The judge identified the facts supporting each of those aggravating factors, and those facts are based on substantial credible evidence in the record.

With respect to mitigating factors, the sentencing judge found factors seven, N.J.S.A. 2C:44-1(b)(7) (defendant had no prior criminal history), and eleven, N.J.S.A. 2C:44-1(b)(11) (defendant's imprisonment would entail excessive hardship to her children). The court then identified the facts supporting those mitigating factors. The court also considered, but rejected, other mitigating factors argued by defendant. Finally, the court balanced the aggravating and mitigating factors and found that the mitigating factors slightly outweighed the aggravating factors. Those determinations were supported by substantial credible evidence. Consequently, we find no abuse of discretion in the sentences imposed on defendant.

In summary, having considered all of the arguments put forward by defendant, we affirm the convictions and sentence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION