RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0927-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.L.S.,

Defendant-Appellant.

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Argued September 18, 2023 — Decided October 3, 2023

Before Judges Mawla and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 18-12-3994.

James H. Maynard argued the cause for appellant (Maynard Law Office, LLC, attorneys; James H. Maynard, Designated Counsel, on the briefs).

Branden B. Couch, Special Deputy Public Defender/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Emily M. M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant J.L.S. appeals from his convictions on sexual assault, child endangerment, and child pornography offenses. We affirm.

The victim was G.M., defendant's eight-year-old step-granddaughter. Defendant sexually assaulted the child on three occasions, between October 2017 and August 2018. The child testified the first incident occurred in defendant's bedroom, when defendant removed her underwear and "[p]ut his fingers on [her] private." She told defendant to stop, but moments later defendant placed a vibrator on top of her "private," on "top of [her] skin" near her vaginal region. Defendant did not insert the vibrator inside the child's vagina. According to the child, defendant then removed his underwear and engaged in vaginal intercourse with her and ejaculated inside her vagina, leaving a white colored "juice." G.M. testified she felt "angry" and "bad."

On another occasion, when G.M. was approximately nine years old, defendant penetrated her using "two fingers." Defendant placed a blanket over her, sat down on the floor with her, and slightly lowered her underwear. He then lubricated his fingers using "cream" and penetrated her vagina with his fingers.

In August 2018, defendant assaulted G.M. a third time. Her mother, Gayle,[1] testified she was visiting her mother and defendant to pay off a personal loan. G.M.'s younger brother was four years old at the time. He and G.M. were in the living room with defendant while Gayle was in the kitchen with her mother. Defendant turned the television on and played teenage pornographic films. G.M. testified she told defendant to stop playing the films because they were "inappropriate." Defendant told G.M. he was "not going to stop."

While G.M. laid on the couch, defendant knelt on the ground, partially lowered his pants, and removed her pants and underwear. He then penetrated her vagina using his "private." G.M. testified she felt "weird" and "[n]ot okay." Later that evening G.M. entered the kitchen and told Gayle defendant touched her "private." When Gayle confronted defendant, he denied touching the child.

Gayle drove G.M. home and asked her what happened with defendant. Gayle recorded the child's descriptions of the sexual assaults on her phone and the following morning called her brother-in-law, a law enforcement officer, for assistance. G.M. went to the Belleville Police Department with her mother, grandmother, and uncle. There, Detective Matthew Dox took a statement from Gayle, took the cell phone recordings, and following his review of the recordings

[1] We use a pseudonym for G.M.'s mother pursuant to Rule 1:38-3(c)(12) and because she has the same initials as G.M.

charged defendant. Police located and arrested the defendant and took his telephone into evidence. Detective Dox then obtained a warrant to search defendant's other electronic devices.

G.M. was transported to Clara Maass Hospital where she was evaluated by Christine Ruggiero, a sexual assault nurse examiner. Ruggiero testified she could not conduct an examination because G.M. "was out of the window period[,]" had bathed, and changed her clothing, including her underwear. She also explained she would not perform an "internal exam" on G.M. because they are "very painful" for children. However, Ruggiero collected G.M.'s underwear and used swabs to recover the DNA on them.[2] Ruggiero also observed the child's vaginal area, particularly her hymen for any injuries, and took pictures for a doctor's evaluation.

Dr. Shaina Groisberg testified she conducted a "head[-]to[-]toe" evaluation on G.M. She did not perform an internal exam because the child had "not completed puberty, [and] an internal examination would be extremely painful." The doctor concluded there were no signs of blunt penetration to the hymen or any "injuries consistent with sexual assault[.]"

[2] A State Police forensic pathologist performed a biological fluid analysis on the child's underwear but recovered no semen or saliva.

Agent Karen Zambrano of the Essex County Prosecutor's Office (ECPO) testified in detail regarding her forensic interview of G.M. The child stated she often spent time with her grandmother and defendant. Agent Zambrano asked G.M. about inappropriate touching by any of her family members, and the child said defendant touched her "butt."[3] G.M. described the three sexual assaults in detail using pictures and dolls provided by Agent Zambrano to depict how defendant positioned himself over her and the places he touched. When Agent Zambrano asked G.M. to explain how defendant touched her during the third incident she responded, "[h]e touched me with his two fingers just like I told you."

Lieutenant David Sanabria from the ECPO, Cyber Crimes Unit, conducted a forensic examination of defendant's electronic devices. The examination produced a report of the 843,749 images recovered from the devices. The report was provided to Detective Thomas Chung from the ECPO, Special Victims Unit. The detective testified he found multiple images of naked teenage females, exposing their breasts and vaginal area, along with some young males engaged in sexual acts. There were approximately ninety-four images of child pornography on defendant's devices.

[3] The record shows G.M. referred to her vaginal region as her "butt" or "private."

An Essex County grand jury indicted defendant with: first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (counts one through five); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count six); and third-degree endangering the welfare of a child by possession of child pornography (for less than 1,000 items), N.J.S.A. 2C:24-4(b)(5)(B)(iii) (count seven).

Approximately a month before trial, defendant provided a letter to his attorney stating: "I no lo[n]ger wish the service of [my attorney]. I would like the service of a public defender." Defendant's attorney formally moved to be relieved as counsel and to dismiss the indictment for the State's failure to provide discovery, including the results of the DNA analysis of G.M.'s clothing and certain transcripts the defense was supposed to receive thirty days before trial. Defense counsel certified as follows:

> [G]iven [defendant]'s financial state, he would be better served to contest any DNA result, and/or have investigators if counsel is relieved, since the Office of the Public Defender or [p]ool [a]ttorney would have the resources of that office to consult and pay for an expert.
>
> . . . In light of [defendant]'s desire to have a new attorney, his economic circumstances (he lost his job due to incarceration), the delays that have been caused by the State due to their failure to turn over the transcripts and forensic examination reports, . . . detective reports (which I heard about for the first time in a phone call with the State last week), I am asking

> the court to honor [defendant]'s wish to have me relieved as counsel. The [s]ubstitution of a new lawyer will not result in any delay since the ongoing discovery issues will be the cause of delay anyway.

The trial judge adjourned trial and scheduled a conference to address the discovery issues. Regarding the motion to relieve counsel, the judge stated:

> . . . I reviewed the application. I saw [defendant]'s handwritten statement. I did not perceive from them . . . any question as to the competency of counsel, the diligence of counsel, and based upon what I've seen before me, every time we appeared there is no issue in the . . . [c]ourt's mind as to the competence of [defendant's attorney's] firm, or [defendant's attorney] himself. So I'm going to deny that application. I believe [defendant] is in good hands, in terms of rigorous competent representation. And I will hold that – I'm inclined to deny the [m]otion. But I will hold that [m]otion also in abeyance pending the conference . . . .

The matter was tried before a jury over eleven days. The State adduced testimony from: G.M., Agent Zambrano, Lieutenant Sanabria, Gayle, Detective Dox, Ruggiero, Dr. Groisberg, a forensic scientist, Detective Chung, and G.M.'s grandmother. Defendant testified on his own behalf.

Following the close of testimony, the court conducted a charging conference and had a lengthy discussion on the definition of digital penetration. The State and the court had the following exchange:

> [STATE]: A little bit further down on page [twenty] . . . according to the law insertion by defendant of finger or object into the vagina constitutes sexual

> penetration. The model jury charge . . . provides a definition of vaginal intercourse, as well, and the State would just like to ask the [c]ourt —
>
> THE COURT: Why would you have vaginal intercourse in the charge that's talking [about] a digital penetration?
>
> [STATE]: Because vaginal intercourse can mean any finger, penis or object inserted into the vagina under the definition of vaginal intercourse. . . .
>
> THE COURT: I say it in the preceding line it could be finger and I say what penetration is.
>
> [STATE]: Right.
>
> THE COURT: So why would you want to even include the term intercourse because . . . that is an act which the common juror would associate more with the penile.
>
> [STATE]: I don't necessarily disagree . . . I was just inquiring because it was in the model jury charge.
>
> THE COURT: Model jury charges are to be crafted based upon the evidence presented and the theories of the cases here. . . . [S]ince I'm giving that specific additional charge when there's penile penetration, I think it would confuse the jury. I'm going to exercise my discretion to overrule your objection.

The judge charged the jury on count two as follows:

> [T]he first element that the State must prove beyond a reasonable doubt is that the defendant committed an act of sexual penetration with [G.M.] According to the law, [insertion] by . . . defendant of a finger or object into the vagina constitutes sexual penetration. Any amount of insertion, however slight, constitutes

> penetration. That is, the depth of the insertion is not relevant.

Addressing count five, the judge stated:

> The first element that the State must prove beyond a reasonable doubt is that . . . defendant committed the act of sexual penetration with [G.M.] According to the law, vaginal intercourse between persons or the insertion by . . . defendant of his penis into the vagina constitutes sexual penetration. Any amount of insertion, however slight, constitutes penetration, that is, the depth of the insertion is not relevant.
>
> The definition of vaginal intercourse is the penetration of the vagina or of the space between the labia major and outer lips of the vulva.

The jury convicted defendant on: aggravated sexual assault by digital penetration, N.J.S.A. 2C:14-2(a)(1), (counts one, two, and three); acquitted on aggravated sexual assault by penile penetration, N.J.S.A. 2C:14-2(a)(1), (counts four and five), but convicted on the lesser included offenses of sexual assault by penile contact, N.J.S.A. 2C:14-2(b) for these counts; acquitted on endangering the welfare of child, N.J.S.A. 2C:24-4(a)(1) (count six), but convicted on the lesser included offense of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1); and convicted on endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b)(iii) (count seven).

Defendant was sentenced to an aggregate prison term of thirty-five years with thirty-three and one-half years of parole ineligibility, subject to the Jessica

Lunsford Act, N.J.S.A. 2C:14-2(a), and No Early Release Act, N.J.S.A. 2C:43-7.2. The judge also imposed fines and penalties, ordered defendant to comply with the Megan's Law registration requirements, N.J.S.A. 2C:7-1 to -23, and placed him on parole supervision for life, N.J.S.A. 2C:43-6.4.

Defendant raises the following points on appeal:

> I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO COUNSEL OF HIS CHOICE AS REQUIRED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I., PARAGRAPH 10 OF THE STATE CONSTITUTION.
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> > A. Denial of a Defendant's Choice of Counsel Constitutes Structural Denial of Defendant's Right to Counsel under the State and Federal Constitutions.
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> > B. In Seeking to Exercise His Right to Choice of Counsel, Defendant Did Not Seek a Continuance.
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> II. JURY INSTRUCTIONS REGARDING DIGITAL PENETRATION WERE ERRONEOUS AND CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT (NOT RAISED BELOW).
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> > . . . .
> >
> > B. The Offense of Sexual Penetration by Hand, Finger or Object, Requires Actual Penetration of the Vaginal Organ, Not the External Female Genitalia or Vulva.

C. The Legislature's Intent Is Clear from the Plain Meaning of the Words Used in a Criminal Statute.

D. Dr. Groisberg's Explanation of the Anatomy of the Female Genitalia Is Consistent with the Accepted Definitions.

E. The Legislature Did Not Intend to Criminalize Penetration of the Vulva without a Criminally-Based Motivation or Intent.

F. The Court's Jury Instruction Regarding Digital Penetration Failed to Adequately Distinguish between Vaginal Intercourse—Involving Penetration of the Penis into the Vulva or Vagina—Versus Digital Penetration involving Insertion of a Finger into the Vagina.

G. The Testimony of G.M. Did Not Support a Finding of Digital Penetration into the Vagina, Thus Making It Highly Unlikely the Jury Found that the Defendant Had Inserted His Fingers into G.M.'s Vagina.

I.

"Both the United States Constitution and our New Jersey Constitution grant defendants charged with a criminal offense the right to have the assistance of counsel." State v. King, 210 N.J. 2, 16 (2012). An essential element of this right is "the right of a defendant to secure counsel of [their] own choice." State v. Furguson, 198 N.J. Super. 395, 401 (App. Div. 1985). "However, the right to

retain counsel of one's own choice is not absolute . . . ." Ibid. The trial court has "wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar . . . ." United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (citation omitted); see also State v. Johnson, 274 N.J. Super. 137, 147-48 (App. Div. 1994).

We review a decision on a motion to be relieved as counsel under an abuse of discretion standard. State v. Hayes, 205 N.J. 522, 537 (2011); see also State v. Biengenwald, 126 N.J. 1, 21 (1991) ("The decision whether to relieve counsel is committed to the sound discretion of the trial court, with a presumption against granting the request.").

Defendant claims he was deprived of his constitutional right to counsel of his choice and the judge erred by adjudicating the motion to relieve counsel by only assessing counsel's competence as a defense attorney, without considering defendant's reasons for wanting new counsel. He argues the motion should have been granted because discovery was outstanding, trial was yet to occur, and there was no inconvenience in allowing him to change attorneys. He asserts the judge decided the motion without a hearing, oral argument, or much legal analysis. Defendant wanted to be represented by the public defender because the public defender would have paid for an expert that defendant could not afford to retain on his own.

"A party who consents to, acquiesces in, or encourages an error cannot use that error as the basis for an objection on appeal." Spedick v. Murphy, 266 N.J. Super. 573, 593 (App. Div. 1993). See also State v. Bailey, 231 N.J. 474, 490 (2018). "Elementary justice in reviewing the action of a trial court requires that that court should not be reversed for an error committed at the instance of a party alleging it." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996) (internal quotations omitted).

The record shows the trial judge indicated he was inclined to deny the motion, but never formally adjudicated the motion because it was tabled until a forthcoming status conference. We do not know whether the conference was ever held because the appellate record lacks a transcript of it. Regardless, jury selection began a little more than a month after the judge acknowledged receipt of the motion, but defendant never raised the issue of wanting a public defender again. He did not complete a 5A form to see whether he qualified for a public defender and proceeded to an eleven-day trial with private counsel representing him, never once raising the issue.

The invited error doctrine bars defendant from now raising this argument. The record does not support the argument the trial judge refused to adjudicate the motion, but rather leads us to the conclusion defendant did not pursue his motion.

II.

"[I]nsofar as consistent with and modified to meet the facts adduced at trial, model jury charges should be followed and read in their entirety to the jury." State v. R.B., 183 N.J. 308, 325 (2005). "When a jury instruction follows the model jury charge, although not determinative, 'it is a persuasive argument in favor of the charge as delivered.'" State v. Whitaker, 402 N.J. Super. 495, 513-14 (App. Div. 2008) (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000)).

When a defendant raises error in a jury instruction, the charge must be read as a whole. State v. Wilbely, 63 N.J. 420, 422 (1973). "No party is entitled to have the jury charged in [their] own words . . . ." State v. Jordan, 147 N.J. 409, 422 (1997). All that is required is that the overall instruction is accurate. State v. Thompson, 59 N.J. 396, 411 (1971); see also Borowicz v. Hood, 87 N.J. Super. 418, 423 (App. Div. 1965).

When the defense does not object to the instruction at trial, our review is under the plain error standard. R. 1:7-2. "[P]lain error requires demonstration of '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to

bring about an unjust result.'" State v. Burns, 192 N.J. 312, 341 (2007) (quoting Jordan, 147 N.J. at 422).

Defendant argues the judge confused the jury when he provided two definitions of "penetration" in reference to the aggravated sexual assault charge and sexual contact. He claims the jury convicted him of aggravated sexual assault by digital penetration, without any evidence a digital penetration occurred, and the jury misinterpreted the sexual assault charge to include a vaginal penetration. Further, the jury instruction provided a broad definition for penetrating a vagina and not a vulva.

Under certain circumstances, sexual contact may be a lesser included offense to sexual assault. Both sexual assault and aggravated sexual assault require penetration, N.J.S.A. 2C:14-2, while sexual contact and aggravated sexual contact do not. N.J.S.A. 2C:14-3. Consequently, if a basis exists to find penetration did not occur, the lesser included offense of criminal sexual conduct may be charged to the jury. State v. Muhammad, 182 N.J. 551, 575 (2005); see also State v. Gallagher, 286 N.J. Super. 1, 14 (App. Div. 1995).

Where there is testimony to substantiate sexual assault, which "by its nature involves physical contact between the assailant and the victim," a verdict may reflect that the jury credited part and rejected part of that testimony and, therefore, concluded the defendant touched the victim, but did not penetrate her.

Muhammad, 182 N.J. at 577-78. Only if a basis exists for a jury to find that penetration did not occur should the trial judge instruct the jury on the lesser included offense of criminal sexual contact. Gallagher, 286 N.J. Super. at 14.

Because of the difference in the definitions of the elements of penetration and contact in N.J.S.A. 2C:14-1, the two offenses have been found "generally distinct forms of touching." Cannel, New Jersey Criminal Code Annotated, cmt. 4 on N.J.S.A. 2C:14–2 (2023). An actor is guilty of sexual assault if he commits an act of sexual penetration with another person, along with a certain aggravating factor. N.J.S.A. 2C:14–2(b). An aggravating factor can be, as here, when the victim is less than thirteen years old and the actor is at least four years older than the victim. Ibid. Criminal sexual contact is defined as an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts. N.J.S.A. 2C:14–1(d). Criminal sexual contact can be a prelude to the act of penetration, or it can occur without penetration at all. Muhammad, 182 N.J. at 576. An actor is guilty of aggravated criminal sexual contact when he commits an act of criminal sexual contact along with a certain aggravating factor. N.J.S.A. 2C:14-2(a).

Sexual penetration includes "vaginal intercourse . . . between persons or insertion of the hand, finger or object into the . . . vagina either by the actor or upon the actor's instruction. The depth of the insertion shall not be relevant as

to the question of commission of the crime." N.J.S.A. 2C:14-1(c). The trial judge appropriately included this definition in the sexual contact instructions and not in the aggravated sexual assault instructions under counts one, two, and three because the latter instructions involved a digital penetration. As we noted, the State argued "vaginal intercourse" should be included in the aggravated sexual assault by digital penetration charge, but the judge properly rejected its inclusion because it would confuse the jury. For counts four and five, a "vaginal intercourse" definition was correctly included because defendant was charged with aggravated sexual assault by penile penetration.

Regarding counts one, two, and three, G.M. testified defendant digitally penetrated her in three instances. Although there were instances when she stated he "touched [her] with two fingers" and "put his fingers on [her] private," she also clearly testified defendant placed his fingers "inside of [her] private" on all three occasions. She provided the jury with detailed descriptions evidencing digital penetration, including that defendant used cream to lubricate his fingers.

We are unconvinced the instructions confused the jury. Rather, the record shows the evidence permitted the jury to parse the facts to decide whether to: (1) convict on sexual assault, if penetration were found, or (2) convict on the lesser included offense of criminal sexual contact, in the absence of penetration, or (3) find that neither offense occurred. Indeed, the fact the jury rejected the

aggravated assault charges by penile penetration and found defendant engaged in criminal sexual contact with G.M. on two instances shows it understood the instructions.

Further, N.J.S.A. 2C:14-1(c) does not consider relevant the depth of insertion on the question of whether there was "sexual penetration." Therefore, whether defendant penetrated G.M.'s vulva, entered the vaginal vestibule, or reached the child's hymen is irrelevant. State v. J.A., 337 N.J. Super. 114, 120-21 (App. Div. 2001) (noting the legal definition of vaginal intercourse is broad because it includes not only penetration of the vagina, but also penetration of the space between the labia majora). Therefore, including a broader term, such as "vulva" in the jury instructions, as defendant suggests, was not required and under the facts presented would not have been helpful.

The trial judge appropriately molded the model jury charges to meet the evidence presented. Defendant has not convinced us the instructions constituted error, let alone plain error such that they "led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

Affirmed.