SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2296-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOSEPH GARES,

Defendant-Respondent.

Submitted May 31, 2023 – Decided June 14, 2023

Before Judges Messano and Rose.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Warren County, Indictment No. 22-03-0132.

James L. Pfeiffer, Warren County Prosecutor, attorney for appellant (Gloria Rispoli, Assistant Prosecutor, on the brief).

DeMasi & Williams, attorneys for respondent (Chad R. Williams, on the brief).

PER CURIAM

By leave granted, the State appeals from a February 14, 2023 Law Division order denying its application to admit fresh complaint evidence at the trial of defendant Joseph Gares. Because the record supports the motion judge's decision that the alleged victim's disclosures were not made within a reasonable time after the alleged sexual abuse, we affirm.

I.

We commence our review with the governing legal principles to give context to the issues raised on appeal. The fresh complaint doctrine's "narrow purpose," State v. Hill, 121 N.J. 150, 163 (1990), permits "evidence of a victim's complaint of sexual abuse, otherwise inadmissible as hearsay, to negate the inference that the victim's initial silence or delay indicates that the charge is fabricated," State v. R.K., 220 N.J. 444, 455 (2015). In Hill, our Supreme Court established a three-part test that out-of-court statements must satisfy to qualify as admissible fresh-complaint testimony, i.e., the statements by the victim must be: (1) "to someone she would ordinarily turn to for support"; (2) "made within a reasonable time after the alleged assault"; and (3) "spontaneous and voluntary." 121 N.J. at 163; see also State v. W.B., 205 N.J. 588, 616 (2011).

"These requirements are relaxed when they are applied to juvenile victims." R.K., 220 N.J. at 455. Relevant here, our Supreme Court has long

recognized "children may be too frightened and embarrassed to talk about sexual abuse" thus warranting relaxation of the fresh complaint requirements. State v. Bethune, 121 N.J. 137, 144 (1990); see also R.K., 220 N.J. at 455 (recognizing "juvenile victims are given additional time to complain" in sexual abuse cases). Whether a victim voiced a complaint within a reasonable period after a sexual assault must be decided on a case-by-case basis with the court "[s]triking the appropriate balance between a defendant's right to confrontation and society's interest in adjudicatory reliability." State v. P.H., 178 N.J. 378, 390 (2004).

II.

Defendant is charged in a nine-count Warren County indictment that alleges multiple acts of sexual abuse upon his stepson's daughter, L.F. (Lauren),[1] born February 15, 2004, at defendant's home in Phillipsburg. The abuse allegedly occurred between May 11, 2012, and February 24, 2016, when Lauren was between the ages of eight and eleven. The pending charges are: two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); one count of second-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and 2C:14-2(a)(1); four counts of second-degree sexual assault, N.J.S.A. 2C:14-2(b); one

[1] We utilize initials and pseudonyms when referring to the complaining witness and her family members. See R. 1:38-3(c)(9); see also N.J.S.A. 2A:82-46(d).

count of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1); and one count of fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(l).

The State's allegations are set forth at length in the motion judge's written decision that accompanied the order under review and need not be reiterated here in the same level of detail.[2] In essence, the allegations were reported to the authorities in March 2018, following Lauren's disclosure to her mother, C.K. (Connie). Lauren, then fourteen years old, "disclosed inappropriate touching that occurred in Pennsylvania's jurisdiction," and "acts of sexual abuse that occurred at [defendant]'s residence in Phillipsburg." The State further claimed Lauren previously reported the abuse to her father, B.F. (Bill), in July or August 2017. Bill told Connie, but neither parent reported the abuse to the authorities. By that time, Bill and Connie had separated; Lauren was living with Bill in New York; and Lauren's sister, A.F. (Anna), born November 2, 2006, was living with Connie in Pennsylvania.

[2] The judge noted the statement of facts set forth in the State's supporting brief "[wa]s derived from the information contained in the police reports" and "interviews of the victim and witnesses." It is unclear from the record whether the State's Law Division brief included an appendix containing those materials; they were not included in the State's appellate appendix.

The fresh complaint testimony the State seeks to introduce are the separate conversations between Lauren and Bill in July or August 2017,[3] and Lauren and Connie in March 2018. The motion judge conducted an N.J.R.E. 104 hearing on the admissibility of the parents' fresh complaint testimony on September 28, 2022, and January 4, 2023.[4]

Bill testified that on an unspecified date when Lauren was fourteen years old, Lauren said: "Poppy did things to her." Lauren "was crying" when she made the disclosure. She provided no further details, but Bill inferred Lauren was sexually abused by his stepfather, whom she called, "Poppy." The conversation occurred in Bill's car outside his house after he had "pick[ed Lauren] up from school." Bill called Connie and told her about Lauren's disclosure. Bill then "went off the deep end for a little while, . . . calling [defendant] and threatening him." Bill did not contact the authorities.

[3] The record reveals Lauren told police she disclosed the abuse to Bill in August 2017, but Connie testified Bill called her about Lauren's disclosure in July 2017.

[4] During the January 4, 2023 hearing, the judge also conducted an N.J.R.E. 104 hearing on the State's application to admit the tender-years testimony of Anna pursuant to N.J.R.E. 803(c)(27). According to Anna, when Lauren was around seven or eight years old, Lauren disclosed defendant "touche[d] her 'bird,'" which Anna inferred to mean, "vagina." The judge's decision on the State's tender-years motion is not reflected in the record on appeal.

According to Connie, Bill called her in July 2017 and said defendant "has been touching [Lauren]." Connie told Bill "to go ahead and get ahold of somebody." Connie confronted Bill's mother, D.G. (Doris) about Lauren's accusations via a Facebook message; Doris responded that "they didn't believe L[auren]." The message exchange, dated July 26, 2017, was admitted in evidence at the hearing. Connie said she was unaware that Bill never notified the authorities.

Connie further testified that in February 2018, Lauren's school contacted her about the child's hygiene issues, weight loss, and failing grades. Connie threatened to call child protection services if Bill did not agree to relinquish residential custody of Lauren.

The following month, Connie and Lauren argued about Lauren's desire to return to Bill's home. After the argument Lauren approached Connie, who was watching "Criminal Minds," and asked "if [defendant] was ever going to get in trouble." Connie responded: "For what? And [Lauren] said 'for him touching her.'" Connie inquired whether Bill had reported the abuse and Lauren answered, "no."

Connie explained the family lived with defendant and Doris at various times but ultimately moved out in April 2015, shortly after Connie refused to

permit Lauren's participation in a sleepover in the living room of defendant's home. According to the State's trial and appellate briefs, Lauren told detectives the abuse continued when the family "visited [d]efendant during the summer, on special occasions and/or for holidays."

Connie also testified about domestic violence when she and Bill were married. The abuse was both physical and verbal. She described their relationship as "toxic." The couple separated in March 2017 and divorced in November 2017.

The motion judge held oral argument on February 1, 2023. Citing W.B., State v. Hummel, 132 N.J. Super. 412 (App. Div. 1975), and State v. R.E.B., 385 N.J. Super. 72 (App. Div. 2006), the State argued Lauren's delay in reporting the abuse was "more than within the time frame as prescribed by our case law." Noting the indictment reflects the last act of abuse occurred in February 2016, the initial report to Bill was July 25, 2017, as reflected in the messages between Connie and Doris, and the second report to Connie was in March 2018, the State contended Lauren's disclosure was "a year and a half to approximately two years after the last acts of sexual abuse."

During colloquy with the prosecutor, the judge rhetorically asked: "Don't all the cases that you cite that have that large gap, . . . have some aura of

intimidation component to the delay, in that the disclosures were typically made within a couple of weeks to a couple of months after removal from the situation or the aura of intimidation?" The State disagreed that an aura of intimidation was required but contended that Lauren still had contact with defendant after the family moved out of his home because the family "regularly visited[e]d" defendant. In addition, Lauren and Anna "spen[t] summers with . . . defendant." The State also cited "the history of domestic violence that the child was exposed to and ongoing issues with [defendant]."

The motion judge denied the State's application in its entirety. Citing the relevant law, the judge acknowledged the timeframe is relaxed for sexual abuse reported by a child. However, the judge distinguished the present matter from the circumstances described in the cases cited by the State, where the disclosures were made from eighteen months to three years after the sexual abuse had occurred, concluding those cases involved an ongoing "aura of intimidation," which explained the delay. See State v. L.P., 352 N.J. Super. 369, 374 (App. Div. 2002).

For example, the judge noted in L.P., we upheld the admission of fresh complaint testimony where the victim reported sexual abuse by her adoptive father "nearly a year after the last of the alleged assaults." Id. at 374. In L.P.,

however, the defendant threatened to kill the victim if she disclosed the abuse, and she did so around four months after she left the defendant's home. Ibid.

Similarly, in Hummel, we upheld the admission of fresh complaint evidence, where both foster children were between the ages of twelve and fifteen when they were allegedly abused in the defendant's home, and one complainant disclosed the abuse three years after the abuse commenced. 132 N.J. Super. at 418, 423. In Hummel, however, that complainant reported the abuse "four to six weeks after she left the [defendant's] house." Id. at 423. Both girls also had disclosed the abuse to each other and testified at trial that the "defendant had threatened them with being put away in a children's shelter if they spoke." Ibid.

The motion judge also cited W.B., where our Supreme Court upheld the admission of fresh complaint evidence where the complainant "was fourteen years old when the attacks by defendant occurred, and sixteen when she confided in [her boyfriend]." 205 N.J. at 618. In W.B., the Court was persuaded the two-year interval was reasonable because the complainant, who was the defendant's stepdaughter, resided with the defendant "at least some of the time during that interval and also indicated to [her boyfriend] that she was afraid to report the abuse." Id. at 620.

Conversely, in this case, the judge noted the alleged abuse occurred between May 2012 and February 2016; Lauren's initial disclosure to Bill occurred in August 2017; and her second disclosure to Connie occurred in March 2018. The judge elaborated:

> The gap between the last alleged incident and the first disclosure is [eighteen] months; the second disclosure [is] over [two] years. The State is not alleging that . . . [d]efendant threatened the victim in any[]way or that there was such an aura of intimidation that it would make a delay in disclosing reasonable.
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> Here, the victim was taken away from the abuse on multiple occasions, and even though she did live with . . . [d]efendant for a year, it was [two] years after she and her family moved out of the residence [in April 2015] that she disclosed the abuse. The State offers no explanation as to why there was . . . over a [two]-year delay of disclosure even after she was removed from . . . [d]efendant's residence.

The judge rejected the State's proffer during its closing argument that Lauren visited defendant after she moved out of the home and "would spend summers at his house," noting "there [wa]s absolutely no testimony that there was more than scant contact with . . . [d]efendant after moving to New York."

Although Lauren's "disclosures were made to natural confidants, and seem to have been spontaneous and voluntary," the judge found "based on the totality

of the attendant circumstances there was no plausible, proffered explanation for the delay in disclosure." The judge concluded that because Lauren's disclosure to Bill was made two years after she moved from defendant's home, and there was no aura of intimidation during that timeframe, Lauren's separate disclosures to her parents were not admissible pursuant to the fresh complaint doctrine. The judge reserved decision and thereafter issued the February 14, 2023 order and accompanying written opinion.

On appeal, the State contends the motion judge erroneously concluded Lauren's disclosures to her parents were not made within a reasonable time under the governing law. The State claims the record evidence explains Lauren's delay. For example, Lauren told police defendant "ma[de] a 'shoosh' sound indicating to her to keep quiet," when she awoke to find him digitally penetrating her vagina. The State also cites Connie's testimony, which described "years of domestic violence . . . in the household, which culminated in a tumultuous divorce"; and explained Lauren experienced "additional abuse and neglect" while living with Bill, including "poor hygiene and weight loss."

The State further argues Bill's failure to report the allegations to the authorities upon Lauren's disclosure, and Doris's disbelief are indicative of "L[auren]'s vulnerability at the time and why she did not immediately disclose

being sexually abused." Citing our decision in State v. Bethune, 232 N.J. Super. 532, 535 (App. Div. 1989), aff'd 121 N.J. 137 (1990), the State contends the length of the delay affects the weight and not the admissibility of the child's delayed disclosure.

III.

The admissibility of fresh complaint evidence is "committed to the sound discretion of the trial judge." W.B., 205 N.J. at 616. As with other evidentiary rulings, our review falls "'under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" State v. Williamson, 246 N.J. 185, 198-99 (2021) (quoting State v. Prall, 231 N.J. 567, 580 (2018)). Absent "a clear error in judgment," State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)), or misapplication of the law, State v. Weaver, 219 N.J. 131, 149 (2014), we typically uphold a trial judge's evidentiary rulings.

As a preliminary matter, the record evidence does not necessarily support the motion judge's finding that there was a more than two-year delay in Lauren's reporting of the abuse after the family moved out of defendant's home in April 2015. As the State argued before the motion judge, the indictment alleges acts of abuse through and including February 14, 2016. That end date of the abuse

could explain what the State contends was only at most a seventeen-month delay before Lauren's initial disclosure to Bill in July or August 2017. Regardless, however, we are persuaded by the judge's reasoning that the record is devoid of any competent evidence explaining the delay in reporting from February 2016 until Lauren's initial disclosure to Bill.

Unlike the complainants in the cases cited by the motion judge, the State did not present a plausible explanation as to why Lauren did not voice her complaint until at least seventeen months after the last incident. There is no evidence in the motion record that defendant had threatened Lauren not to tell anyone about the alleged assaults, or that defendant coerced or intimidated Lauren. The record fails to disclose any reasonable explanation why Lauren could not have earlier confided in her parents.

For example, the State did not proffer any expert evidence explaining the reasons for the delay. See State v. J.L.G., 234 N.J. 265, 271-72 (2018) (holding expert testimony concerning the Child Sexual Abuse Accommodation Syndrome is unreliable, except in some instances involving a child's delayed disclosure of the abuse). Instead, the State posits, without support, that Lauren's delayed reporting was a result of domestic violence in the home. Even if true, Bill and Connie had separated by March 2017 and Lauren's first disclosure did not occur

until July or August 2017. Crucially, however, the summary of Lauren's statement to law enforcement does not include her reason for the delay.

Although we agree in principle with the State's contention that Lauren's delay in voicing a complaint to her parents is a relevant factor for the jury's consideration, see Model Jury Charges (Criminal), "Fresh Complaint" (rev. Feb. 5, 2017), that principle applies when the State has proffered a plausible explanation for the delay – not as a blanket principle prohibiting the trial court from exercising its gatekeeper role in the first instance. Moreover, the circumstances in Bethune involved a two-week delay in the victim's voicing of the complaint, 232 N.J. Super. at 534. That time frame is significantly different from the delay here.

Having considered the State's contentions in view of the motion record and governing legal principles, we find no basis for intervention. On this record, we cannot conclude the judge abused his discretion or misapplied the law. The judge properly exercised his gatekeeper function and conducted an N.J.R.E. 104(a) evidentiary hearing and carefully considered the testimony adduced at the hearing in view of the State's contentions and governing legal principles.

To the extent not addressed, the State's remaining contentions lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION