

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3163-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.R.L.,¹

Defendant-Appellant.

Argued April 19, 2023 – Decided September 5, 2023

Before Judges Vernoia, Firko, and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 16-12-0904.

Cody T. Mason, Assistant Deputy Public Defender argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Cody T. Mason, of counsel and on the briefs).

¹ We employ initials to identify defendant and pseudonyms to identify the victim of the crime and family members to protect the victim's privacy and because the identity of victims of alleged sexual abuse, such as Anna, are not subject to public disclosure under Rule 1:38-3(c)(9) and N.J.S.A. 2A:82-46.

Matthew S. Samel, Assistant Prosecutor, argued the cause for respondent (Angelo J. Onofri, Mercer County Prosecutor, attorney; Matthew S. Samel, of counsel and on the brief).

PER CURIAM

After a six-day jury trial, defendant J.R.L. was convicted of two counts of first-degree aggravated sexual assault and second-degree endangering the welfare of a child. Defendant perpetrated these acts upon his then six-year-old daughter "Anna." The trial court imposed an aggregate forty-year sentence subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2; parole supervision for life, N.J.S.A. 2C:43-6.4; and the registration requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23.

On appeal, defendant argues the following points:

POINT I

THE STATE IMPROPERLY BOLSTERED ITS CASE WITH UNSUPPORTED AND OFTEN INACCURATE STATEMENTS REGARDING THE MEANING AND SIGNIFICANCE OF THE HERPES SIMPLEX VIRUS 2 (HSV-2)² TEST RESULTS. (Partially Raised Below)

² HSV-2 and HSV-1 cause genital herpes, a common sexually transmitted infection. Genital Herpes—Symptoms and Causes, Mayo Clinic (Nov. 22, 2022), <https://www.mayoclinic.org/diseases-conditions/genital-herpes/symptoms-causes/syc-20356161>. "HSV-2 is the most common cause of genital herpes." Ibid. It can be present on blisters, ulcers, fluid from ulcers, as well as the moist lining or fluids of the mouth, vagina, or rectum. Ibid. HSV-2 "moves from one

POINT II

THE PROSECUTOR UNFAIRLY BOLSTERED [ANNA'S] CREDIBILITY BY OPINING ON HER TRUTHFULNESS AND DEFENDANT'S GUILT, AND BY ELICITING TESTIMONY SHOWING THAT A MEDICAL EXPERT, AN INVESTIGATING DETECTIVE, AND A JUDGE ALSO BELIEVED [ANNA]. (Not Raised Below)

- A. The Prosecutor Improperly Vouched For [Anna's] Credibility By Opining On Her Truthfulness, Overemphasizing Her Recorded Out-Of-Court Statement, And Pronouncing Defendant Guilty.
- B. The State Improperly Had A Medical Expert And An Investigating Detective Opine On The Credibility Of The Allegations.
- C. The State Improperly Told The Jury That A Judge Issued A Court Order Based On [Anna's] Allegations.

POINT III

THE COURT ERRED WHEN IT FAILED TO ENSURE THAT A JUROR WHO BELATEDLY REVEALED THAT SHE KNEW AND TRUSTED THE STATE'S MEDICAL EXPERT DID NOT

person to another during sexual activity." Ibid. HSV-1, on the other hand, causes cold sores or fever blisters. Ibid. Children may be exposed to HSV-1 due to close skin-to-skin contact with someone infected. Ibid. "A person with HSV-1 in tissues of the mouth can pass the virus to the genitals of a sexual partner during oral sex." Ibid. While neither HSV-1 and HSV-2 is likely spread through surfaces, HSV-1 may spread through "kissing or sharing a drinking glass or silverware." Ibid.

CONTAMINATE OTHER JURORS. (Not Raised Below)

POINT IV

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSES OF SEXUAL ASSAULT AND ATTEMPTED AGGRAVATED SEXUAL ASSAULT. (Not Raised Below)

POINT V

THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

POINT VI

RESENTENCING IS REQUIRED BECAUSE THE FORTY-YEAR SENTENCE WAS BASED ON FLAWED FINDINGS REGARDING AGGRAVATING FACTORS THREE AND SIX.

We are persuaded by defendant's challenges to the State's comments concerning HSV-2 test results, the related testimony on this issue, the State's improper bolstering of its case with claims about HSV-2 information that are unsupported by any evidence and the cumulative effect of the errors raised in Points I, II, and V. We conclude the trial court erred by allowing the State to exceed the limits on permissible comments in its opening and summation about HSV-2 transmission, including its claim HSV-2 was sexually transmitted from

defendant to Anna, in the absence of qualified expert testimony concerning HSV-2 test results, and its assertions about how HSV-2 is transmitted, its dormancy characteristics, and symptoms.

Defendant also asserts the State did not present expert testimony to explain how or if defendant could have infected Anna with HSV-2 without also infecting Anna's mother, Janelle, despite defendant having unprotected sex with her during the relevant 2015 and 2016 time period. For these reasons, and based on our review of the record, the parties' arguments, and the applicable legal principles, we vacate the judgment of conviction and remand the matter for a new trial. For these reasons, we find it unnecessary to address defendant's contentions about juror contamination (Point III), the trial court's failure to instruct the jury on the lesser-included offenses of sexual assault (Point IV), or his sentence (Point VI).

I.

Pre-Trial Proceedings

The facts leading to defendant's arrest and conviction as developed at trial are summarized as follows. Anna was born in 2009. Janelle and defendant separated when Anna was born. Anna's grandparents, Tracy and Hank, assumed custody of Anna when she was three months old because Janelle moved to

Michigan to "pursue work and school." Janelle returned to New Jersey seven months later, but the grandparents retained custody of Anna until she was almost three years old.³

At that point, Janelle and Anna relocated from the grandparents' home to a shelter. In December 2012, Janelle and defendant reconciled and moved into a one-bedroom apartment together with Anna. All three of them shared the bedroom. Defendant assisted Janelle with bathing and potty-training Anna. He also got her ready for school in the morning and picked her up in the afternoon.

For reasons not explained in the record, in 2013 or 2014, Tracy claimed Janelle and defendant prevented her from seeing Anna. Tracy stated she was unsure why she could not see Anna but thought defendant had something to do with it. Due to her concerns about Anna's well-being and Anna's allegations about Janelle's care for her, Tracy filed an application "to regain" custody of Anna in March 2013, but was unsuccessful.⁴ Janelle denied that Tracy filed an

³ Janelle claimed she moved to Michigan when Anna was approximately six months old; Janelle lived in Michigan for about three months, and she regained custody of Anna within a month or two of her return to New Jersey. However, Janelle and Tracy agreed that Tracy could have temporary custody of Anna.

⁴ The record is unclear as to whether there were any non-dissolution or Title 9 proceedings concerning Anna.

application for custody and claimed she only had "small issue[s]" with Tracy. In September 2013, Janelle gave birth to another daughter, Jackie.

In February 2015, Tracy filed an application seeking grandparent visitation with Anna and Jackie. In addition, Tracy contacted the Division of Child Protection and Permanency (the Division) due to her lack of access to the children. On March 30, 2015, Janelle and defendant ended their relationship, and Janelle and the children moved out of the apartment. The court granted Tracy's application for visitation, which commenced in May 2015. At the time, Anna was five years old.

In June 2015, during her visitation with the children, Tracy claimed she noticed Anna exhibited unusual behaviors, such as appearing "anxious and afraid" and wetting the bed. Tracy also witnessed Anna "grinding on" Jackie and touching her in "inappropriate places." When Tracy questioned Anna about her behavior, Anna "got really quiet," started crying, and asked if they could talk privately in the bedroom. Anna mentioned to Tracy that she was "itching and hurting" in her private area.

According to Tracy, Anna told her that defendant "puts his private parts on [her] private parts in the front and in the back[,] " which made her backside and butt "hurt" all the time. With Anna's permission, Tracy inspected the child's

genital area and claimed she saw sores on the "right side of the outer part of [Anna's] vagina," resembling a herpes infection. She further described the sores as "clustery" and "pussy."⁵

Although Tracy testified she relayed Anna's allegations to Janelle and recommended that she make "an immediate appointment" with the pediatrician, Tracy did not show Janelle the child's sores. Janelle claimed Tracy did not explain Anna's allegations in detail to her, and Tracy never discussed Anna's sores. Janelle stated she did not examine Anna, never saw "any blisters or sores or lesions on [Anna's] genitalia," and never observed any sexual conduct between Anna and defendant. Janelle also testified that Anna's disclosure occurred at the end of July 2015, not the month before.

Janelle did not seek immediate medical attention for Anna, but she called the Division caseworker on the same day that she learned of the allegations.

⁵ At trial, Tracy's testimony regarding Anna's allegations of the sexual offenses was admitted as fresh complaint evidence and the jury was instructed not to consider it for its underlying truth. "[F]resh complaint evidence serves a narrow purpose. It allows the State to negate the inference that the victim was not sexually assaulted because of [their] silence." State v. Hill, 121 N.J. 150, 163 (1990). "[T]he purpose of the rule is to prove only that the alleged victim complained, not to corroborate the specifics of the victim's allegations." State v. P.H., 178 N.J. 378, 393 (2004) (quoting State v. Bethune, 121 N.J. 137, 146 (1990)).

Janelle also reported Anna's allegations to a healthcare provider days later when she brought Anna to an emergency room for unrelated issues. The healthcare provider recommended Janelle call Anna's pediatrician. Janelle claims she called Anna's pediatrician but was unable to make an appointment. Janelle also refrained from contacting the police to report Anna's allegations regarding sexual abuse.

On October 1, 2015, the Division referred Anna for a medical examination. On November 6, 2015, Janelle brought Anna to the Dorothy B. Hersh Child Protection Center (CPC). Dr. Gladibel Medina,⁶ the medical director at the CPC, conducted Anna's medical examination and met with Janelle separately to encourage them to "speak freely regarding their concerns without being exposed to any expressions or words or worries by looking at the other person." Janelle reported Anna's medical history was significant for anemia, short stature, low weight, and emphysema. Janelle also reported Anna's bedwetting episodes decreased after she was treated at PEI Kids, which provides counseling for child victims of sexual abuse and assaults and their caregivers.

⁶ At trial, the State offered Dr. Medina as an expert witness "in the area of diagnosis and treatment of child sexual abuse." Defense counsel did not object. Also, the court found Anna's statements made to Dr. Medina were admissible under N.J.R.E. 803(c)(4) and the tender years exception to the hearsay rule, N.J.R.E. 803(c)(27).

According to Dr. Medina, "a variety of stressors" lead to bedwetting, including changes in housing or family situations.

Dr. Medina also met with Anna alone. Dr. Medina testified Anna "got really quiet," said defendant "did bad stuff to her," and "touched" her "front genital region." Anna pointed to her front genital region. Dr. Medina then gave Anna two anatomical dressed dolls, a male doll and female doll, to "demonstrate" how she was touched by defendant. Dr. Medina claimed Anna undressed the dolls and had them demonstrate "penis contact of the front private part" and the "buttocks region." Anna was not instructed that the dolls had anatomically correct body parts. According to Dr. Medina, Anna was unable "to say any details about the frequency or how many times" this occurred, but she "indicated that it was not painful" or uncomfortable. Dr. Medina authored a CPC report.

In her report, Dr. Medina's physical evaluation of Anna revealed her "genital areas were completely normal," and her vagina area had no "visible damage." The doctor observed "dry skin and pigmentation to the buttocks but not around the anus and not in the front." Anna's hymen was intact, and her anus had no "redness" or "tearing." Dr. Medina opined it is typical not to have injuries from vaginal or anal penetration in child sex abuse cases. Dr. Medina

noted that Anna's physical examination was not "grossly indicative" of a sexually transmitted disease (STD) infection. Dr. Medina also stated that Anna could have learned about sexual conduct by hearing or seeing such conduct. Although not addressed by Dr. Medina, Janelle admitted that she and defendant had sex while Anna was sleeping in the same room, and Anna walked in on them at least once.

Based on her findings, Dr. Medina recommended sexual abuse counseling and an STD screen for Anna because Anna made a disclosure of "explicit sexual contact" that could only be explained by "exposure or experience." Dr. Medina noted "penis to genital" contact "has a high risk for infection" warranting testing for a variety of STDs, including the human immunodeficiency virus, hepatitis C, syphilis, HSV-2, gonorrhea, and chlamydia. On March 2 and 14, 2016, Anna underwent the STD screen. Dipak Patel, a LabCorp employee, reported Anna tested positive for HSV-2 and negative for HSV-1.

On March 23, 2016, Detective Britt Olsen of the Mercer County Prosecutor's Office conducted a recorded interview of Anna⁷ and asked her to

⁷ The court held the videotaped interview offered at trial was "substantively admissible" under the tender years exception to the hearsay rule. N.J.R.E. 803(c)(27). No objection was raised, and the court's ruling on this issue is not challenged on appeal.

talk about "bad" and "good" touches. Anna responded defendant touched the "[i]nside and the outside" of her "privates" with his hand, and that "[h]e digged in it." Anna drew a picture depicting her story. She also stated defendant touched her "private" and "butt" with [h]is "private," and drew another demonstrative picture before stating defendant only put "his private inside [her] butt." Anna stated this happened more than once when she was four, five, and six years old, including "[l]ast night even though she had not seen defendant in a year."⁸ In addition, Anna stated it "hurt" when defendant "put his private part inside [her] butt" and that Janelle was home with her when it occurred. Anna's recorded forensic interview was played for the jury in its entirety at trial.⁹

On December 7, 2016, defendant was charged with first-degree aggravated sexual assault (digital vaginal penetration), N.J.S.A. 2C:14-2(a)(1), (count one); second-degree aggravated sexual assault (anal penetration), N.J.S.A. 2C:14-2(a)(1), (count two); second-degree sexual assault (sexual contact), N.J.S.A. 2C:14-2(b), (count three); second-degree endangering the

⁸ Since "a six-year-old does not have the developmental ability to know time," Detective Olsen testified at trial that she mistakenly asked Anna when the incidents occurred.

⁹ Anna's recorded forensic interview was part of the record on appeal and was reviewed by this court.

welfare of a child (digital vaginal and/or anal penetration), N.J.S.A. 2C:24-4(a)(1), (count four); and second-degree endangering the welfare of a child (sexual contact), N.J.S.A. 2C:24-4(a)(1), (count five).¹⁰

Almost three years after Anna tested positive for HSV-2, on February 20, 2019, the State had defendant's blood tested for HSV-2. Detective Shari Johnson, who works for the Mercer County Prosecutor's Office Special Victims and Bias Crimes units, personally witnessed his blood being drawn. The blood was drawn by Colleen Greer, an employee at BioReference Laboratory. Dr. Medina and Nick Cetani, the founder and senior clinical director of BioReference Laboratory, reported that defendant tested positive for HSV-2 and negative for HSV-1. They also testified at trial that defendant tested positive for HSV-2 on June 22, 2018, but the record is unclear as to why defendant was tested previously.

On March 29, 2019, the State served a letter outlining the scope of Dr. Medina's proposed expert testimony. In relevant part, the letter states:

[Dr. Medina] will also explain the connection between her treatment and what is revealed to her by her patient

¹⁰ Before trial, on October 10, 2019, the State dismissed counts three and five of the indictment, amended the indictment to specify that count two charged a first-degree offense, and modified the language regarding counts one and four to remove the word "digital."

[Anna] and/or what she learned in regard to her patient's medical history. Finally, she will discuss the usefulness of diagnosing STDs in sexually abused children as a tool for identifying and treating sexual abuse.

Defendant did not raise any objection to Dr. Medina's proposed testimony until after the trial commenced and the opening statements concluded.

On April 14, 2019, defendant moved in limine to bar admission of his herpes serological test results at trial. Defendant argued his positive HSV-2 test result is "irrelevant" and should be excluded under N.J.R.E. 403(a), because any probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury. The State countered that defendant's blood test result should be admissible in its case in chief because it corroborates Anna's allegations and, under N.J.R.E. 403(a), the probative value of the evidence is not outweighed by the "inflammatory potential."

The State moved in limine to admit statements made by Anna to Dr. Medina at the time of trial. The State argued Anna's statements were made for the purpose of medical diagnosis and treatment and constitute an exception to the hearsay exclusionary rule under N.J.R.E. 803(c)(4). Defendant opposed the State's motion contending Anna's statements were not made for the purpose of medical diagnosis and treatment because the identity of the individual who

infected Anna with HSV-2 is irrelevant to her HSV-2 diagnosis and treatment. Regarding the admissibility of Anna's statement under the tender years exception, defendant asserted an N.J.R.E. 104 hearing¹¹ was required to ascertain the reliability of her statement.

On June 27, 2019, the trial court rendered its decisions on the two motions in limine. Regarding admission of defendant's blood test results, the trial court found Anna tested positive for HSV-2 in 2016, and "despite a delay" in testing, defendant also tested positive for HSV-2, which is "probative of material issues in the case," including whether Anna was "sexually penetrated and if so, whether it was by defendant." The trial court explained there is a "logical connection" between Anna's "allegations, her symptoms and test results," and defendant's "delayed test results."

Although finding the evidence defendant tested positive for HSV-2 was "prejudicial to some degree," the trial court decided the probative value of the

¹¹ An N.J.R.E. 104 hearing may be conducted by the trial court to decide preliminary questions such as witness qualification, privilege, and admissibility of evidence. A court is required to conduct an N.J.R.E. 104 hearing on the admissibility of a statement under N.J.R.E. 803(c)(27). State v. P.S., 202 N.J. 232, 249 (2010); N.J.R.E. 803(c)(27)(a)-(c). The court did not conduct an N.J.R.E. 104 hearing on the State's proffered admission of Anna's statement under N.J.R.E. 803(c)(27), but we do not address the issue because defendant does not argue the court's decision not to conduct the hearing constituted error.

evidence is not "substantially or significantly" outweighed by the risk of undue prejudice, confusion of the issues, or misleading the jury, and the period of time between Anna's and defendant's test results actually "inures to defendant's benefit." For these reasons, the trial court granted the State's motion to admit defendant's HSV-2 test result at trial.

Regarding the State's motion to admit Anna's statements to Dr. Medina, the trial court determined the examination was for the purpose of diagnosis or treatment and not to gather evidence. The trial court reasoned that Anna's description of "how and where she was touched" was elicited for Dr. Medina to diagnose and treat the child, not to conduct an investigation. The trial court analyzed the factors under N.J.R.E. 803(c)(27) in determining whether Anna's statements were admissible.¹² The trial court concluded that under the "totality

¹² N.J.R.E. 803(c)(27) provides for "[s]tatements by a [c]hild [r]elating to a [s]exual offense" and provides:

A statement by a child under the age of [twelve] relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to [N.J.R.E.] 104(a), that

of the circumstances," Anna's statements were "reliable and trustworthy" because she was not "prompted" or "coerced" to speak to Dr. Medina. In addition, the trial court found Anna's behavior and description of inappropriate touching by defendant was "age appropriate;" she was "comfortable" with Dr. Medina; and Anna had "no apparent motive to fabricate." The trial court granted the State's motion to admit Anna's statements to Dr. Medina at trial and concluded an N.J.R.E. 104 hearing was unnecessary.

The Trial

Trial commenced on October 10, 2019. The State called Anna, Tracy, Janelle, Patel, Greer, Cetani, Detectives Johnson and Olsen, and Dr. Medina as witnesses. Defendant did not testify and did not present any witnesses.

In her opening statement, the prosecutor told the jury that defendant betrayed Anna's trust; "vaginally and anally penetrated her to satisfy his own

on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of N.J.R.E. 601.

sexual desires"; and "took advantage of her youth and her inexperience and for that she's going to live with genital herpes for the rest of her life." The prosecutor stated the alleged acts of sexual penetration were committed by defendant upon Anna when she was less than thirteen years old. The prosecutor also told the jury Anna told her grandmother that defendant "had put his privates on her privates in front and in the back" causing Anna pain in her butt. The prosecutor went on to say the grandmother, "who is a sex educator," checked Anna's private areas and "saw what she thought was genital herpes."

The prosecutor also told the jury that Anna was referred by the Division to Dr. Medina "whose specialty is actually pediatric sexual assaults." The prosecutor explained that Dr. Medina referred Anna for blood testing for STDs, which "resulted in the discovery that she had genital herpes." The prosecutor added that Anna's examination did not reveal any vaginal or anal tearing "because these acts happened in areas that are covered with glucosal membranes really and like the inside of your mouth when you bit[e] it, it heals quick."

The prosecutor then described to the jury:

You're going to get all the education that you need about genital herpes through Dr. Medina when she comes in and talks to you. You're going to learn that in sum and substance, genital herpes is only transferred through mucosal membranes, skin that's covered in that kind of stuff, so that's like the tip of the penis. On the

female genitalia, it's the inner lips of the vagina, it's the anal tissues on the anus. It gets transmitted through secretions, secretions like pre-ejaculate, ejaculate, saliva, those methods. It is not transferred through surfaces, hand-to-hand contacts or toilet seats. It doesn't like to live anywhere really besides in the genitalia.

Also I mentioned the secretions. I don't want to forget that the secretions can also be through an active lesion or a blister that's occurring on an infected party. The liquid from the inside of those lesions can also transmit it.

And you'll learn other things, you know, like that the virus, it lies dormant and then when it's activated, that's the only time it's transmitted and it goes back and forth, active, dormant, active, dormant. When it's active, it's transmittable. Dr. Medina's going to give you the information you'll need to know about that.

Defense counsel did not object to any of the prosecutor's opening remarks.

Detective Johnson testified she carried out a court order to effectuate a blood draw sample from defendant, which occurred on February 20, 2019, in her presence. Detective Johnson testified Greer drew the blood for herpes simplex virus. Greer confirmed this during her testimony and explained the process for testing blood for HSV-2. Cetani authenticated defendant's blood test results and testified his HSV-1 test was normal, but his HSV-2 test was positive. Cetani and Dr. Medina both testified that defendant also tested positive for HSV-2 on June 22, 2018, without giving any explanation as to how or why the earlier

HSV-2 test was done. Patel testified about his findings that Anna tested positive for HSV-2 and negative for HSV-1.

When Anna testified, she was nine years old. Defendant argues her testimony was "very limited." Anna said it has been a "long time" since she has seen defendant, and she is "angry" with him "[b]ecause of the stuff that he did to [her]." She testified she understood the meaning of the words "butt," "vagina," and "penis." She claimed defendant "touched" her butt with his "private part" at least five times and he "touched" the "front part of [her] private" with his hand more than once.

Anna testified it "hurt" when defendant touched her butt with his "private part." After Anna stated how many times defendant touched her private part with his hand, the prosecution stated, "[o]kay," "[i]t's okay," and "[y]ou're doing good." Anna did not testify defendant touched her private part with his private part as she had told Detective Olsen. Anna did not testify as to any penetration by defendant.

Anna claimed she did not "tell on [her] dad" when the alleged sexual abuse occurred because she "thought [she] was going to get in trouble." Anna testified she was living in an apartment with her parents when these incidents took place in the "living room." Anna testified she told her grandmother Tracy about what

her father—defendant—did to her. Anna described her meeting with Dr. Medina. Anna's statement to Dr. Medina was inconsistent with her unrecorded statements that she did not have sores, and she did not explain when the incidents occurred, other than they took place while she was living with defendant. In contrast to her prior statements, Anna did not testify that defendant penetrated her. Anna also did not testify that defendant touched her "private" with his "private," as she told Detective Olsen. In sum, Anna provided some inconsistent and conflicting statements concerning the sexual assaults the State alleged defendant committed.

Tracy testified that she is a certified sexual health educator, drug counselor, certified home health aide, and certified medication aide. Tracy testified that Anna "cried" when she described what defendant did to her and claimed, "it always happens when mommy is not around," which Tracy interpreted to mean when Janelle was at work.

In terms of Tracy's examination of Anna's private area, Tracy was instructed not to use the word "herpes" during her testimony but did not heed the instruction. Tracy testified what she saw "look[ed] like, . . . herpes." Following a sidebar conference, the trial court struck Tracy's testimony from the record on this issue because she is not a medical expert and is not qualified to

diagnose any type of disease, such as herpes. Defense counsel moved for a mistrial, which was denied. The trial court then gave a curative instruction to the jury as follows: "The witness [Tracy] is not a medical expert. The witness is not here to diagnose any type of disease. You are to disregard it [Tracy's answer] and not consider it further, concerning today or [in] your deliberations."

Tracy also testified that Anna's demeanor was "sad" after Tracy examined her private parts. Tracy did not "suggest" to Anna that anything of a sexual nature happened to her. According to Tracy, she observed Anna being "anxious and afraid" as if "she thought that somebody was going to do something bad to her." Tracy described Anna's inappropriate "grinding" on her baby sister and frequent bedwetting. On cross-examination, Tracy testified she was cut off from visiting her granddaughters for a period of time. Tracy stated she called the Division in 2015 regarding Anna's allegations of sexual contact by defendant.

Janelle testified that defendant had no "access" to Anna until she was three years old. According to Janelle, defendant was involved in Anna's life from December 2012 until March 2015, when Janelle and defendant ended their relationship. Janelle testified defendant lived with her, Anna, and Jacqueline during that time. Janelle testified that Anna told her about what defendant did to her and never named anyone else. Janelle stated that she and Anna had not

spoken to defendant since March 2015.

Janelle testified she never observed any blisters, sores, or lesions on Anna's genitalia. Janelle explained that Anna had to be retested after her HSV-2 test came back positive. The second HSV-2 test was also positive. According to Janelle, Anna knows she has to take medicine—Acyclovir¹³— because she has a "condition," but she "doesn't know she has an STD." Janelle also testified Anna went to counseling. Janelle testified she never observed "any strange sexual behavior" with Anna. During her pregnancies, Janelle testified she was tested for STDs but was never diagnosed with genital herpes up to and including the time of trial.

On cross-examination, Janelle testified she had unprotected sex with defendant. Janelle admitted Anna walked in on the two of them having sex at least once. Janelle testified she took Anna to an emergency room for an evaluation after the disclosure was made for bedwetting and a "rash forming around her mouth," which turned out to be eczema.

On re-direct examination, Janelle testified she was never prescribed

¹³ Acyclovir is an antiviral drug that is used to treat herpes virus infections. This medication does not cure herpes but may prevent herpes sores or blisters. MEDLINEPLUS, <https://medlineplus.gov/druginfo/meds/a681045.html> (last visited Aug. 28, 2023).

Acyclovir. During prenatal care for both daughters, Janelle testified she was tested for STDs. Janelle testified she did not have genital herpes during her pregnancies or presently. On re-cross, Janelle confirmed she never noticed any oozing or sores on Anna's private areas. Janelle also testified she was tested for HSV-2 in 2015 and 2016, and both test results were negative.

Detective Olsen testified about her forensic interview of Anna, which was recorded. The matter was referred to Detective Olsen by the Division. She did not speak to Tracy. Detective Olsen testified she asked Anna developmentally appropriate questions and did not attempt to lead or otherwise be suggestive with Anna.

On October 23, 2019, following opening statements, but before Dr. Medina testified, the defense moved to bar her from testifying about the nature and transmission of HSV-2, its dormancy period, or any specifics about the virus. Defense counsel sought to limit Dr. Medina's testimony to the confines of her report—identifying and treating a sexually abused child and generally how an STD may be relevant to diagnosing child abuse. Defense counsel also belatedly requested that the term "genital herpes" not be used during the course of the trial because no evidence was presented defining genital herpes, only HSV-2.

After conducting a N.J.R.E. 104 hearing about the scope of Dr. Medina's testimony that day, and eliciting testimony from her at the hearing, the trial court issued an order limiting Dr. Medina's testimony to:

1. Her physical examination, the report memorializing her findings, and the recommendation for treatment;
2. [T]he materials contained in her report and [she can] give an opinion regarding whether or not the injuries she observed were consistent with the manner in which the assault occurred;
3. [H]er recommendations concerning STD testing and why testing was appropriate;
4. [T]he need for STD testing as a tool for diagnosing and treating sexually abused children;
5. [T]he test was performed for STD and that the result was the presence of the herpes virus.

The trial court highlighted "any additional testimony concerning the herpes virus or STDs is barred;" however, if "defendant inquires into the nature of the herpes disease or its transmission, the State shall have an opportunity to address [Dr. Medina's] responses as appropriate on redirect examination."

The State moved for reconsideration. The trial court denied the State's motion for reconsideration, but clarified its decision, adding Dr. Medina "can discuss her report, she can discuss that the [STD] test was issued, and the test came back positive indeed, certainly the inference is . . . it came back for . . .

herpes. That's the limit." The trial court added the State "cannot take it a step further and ask if . . . herpes is an STD." The trial court ruled that in fairness to the defense "in terms of proper notice, to have the doctor come in and talk more broadly about the disease, how it's transmitted, . . . is outside the scope and is inappropriate." Defense counsel argued the State could not mention in summation that HSV-2 is an STD but only that there was an "inference" that Anna tested positive for herpes. Defense counsel reiterated that the State did not proffer a hematology expert, or any expert qualified to testify about blood or antibodies in the context of HSV-2 transmission.

On October 24, 2019, the State filed a motion for leave to appeal the trial court's orders on the scope of Dr. Medina's expert testimony. On October 28, 2019, we denied the State's motion for leave to appeal. In the supplemental part of our order, we permitted Dr. Medina "to testify to the findings in her report, including that [HSV-2] is an [STD]."¹⁴

¹⁴ Before Dr. Medina testified, the State highlighted to the trial court this "supplemental finding" in our ruling. However, the trial court emphasized that the State's motion for leave to appeal was not "granted in part" and that our ruling was a "summary of what [the trial court's] order states" and "simply stated that the order stands." The State objected, noting that it read our ruling "differently."

Dr. Medina was qualified to testify as an expert witness in the diagnosis and treatment of child sexual abuse without objection. Dr. Medina explained she elicited a medical history from Janelle regarding Anna. Dr. Medina testified Anna's medical history revealed she was toilet trained at age two, and had bedwetting episodes. Dr. Medina testified that, according to the medical history, Anna was not taking any medications on a regular basis. Dr. Medina explained how Anna demonstrated on an anatomically correct doll "penis contact of the front private part of the doll and then turned over and put the penis of the boy doll on the back, the buttocks region . . . and says that is how she was touched by her dad."

Dr. Medina testified Anna did not complain of pain or bleeding or discomfort in urinating or defecating. Dr. Medina gave Anna a "head to toe" examination, including her anal/genital area. The doctor concluded Anna's examination was "completely normal," including her genital areas. Dr. Medina did not feel her physical findings were inconsistent with what Anna told her. Dr. Medina recommended Anna undergo an STD screen because of the "high risk of infection" that can result from "penis to genital contact." Dr. Medina testified Anna's first STD test result taken on March 2, 2016, was positive for

HSV-2. Dr. Medina sent Anna for a second confirmatory HSV-2 test, which also tested positive.

The prosecutor then questioned Dr. Medina about defendant's HSV-2 test results taken on two separate occasions. The prosecutor asked Dr. Medina if defendant's blood test results and Anna's blood test results were consistent with a finding of sexual contact. Defense counsel objected, and the trial court conducted a sidebar conference. The trial court sustained defense counsel's objection and ruled Dr. Medina could testify as to why STD testing is useful in diagnosing child sexual abuse but could not opine as to whether HSV-2 was transmitted from defendant to Anna simply on the basis of their positive HSV-2 test results.

On cross-examination, Dr. Medina testified that bedwetting can result from stressors including changes in residence and the people with whom you live. Dr. Medina testified Anna's ability to position the two dolls in a sexual manner was beyond the knowledge of a child of her age, and Anna could have "mimick[ed]" an act that she had seen. On re-direct, Dr. Medina reiterated that Anna "didn't have any signs that she has an STD" but you can still have an STD "without any findings there."

Defendant's motion for acquittal was denied. The jury found defendant guilty on counts one and two, first-degree aggravated assault, and count four, endangering the welfare of a child. This appeal followed.

II.

Defendant argues the State failed to present any evidence to rebut the possibility that Anna contracted HSV-2 by means other than defendant; about how or under what circumstances HSV-2 can be transmitted; falsely accused HSV-2 is only contracted sexually; and the symptoms of HSV-2. Defendant also argues the State failed to present any testimony to address the fact Janelle tested negative for HSV-2 on four separate occasions, including in 2015 and 2016, despite having unprotected sex with defendant during that time frame. Defendant asserts the State inaccurately claimed defendant could have avoided giving HSV-2 to Janelle by having sex with her when he was not infectious. According to defendant, the State's representation that Anna's sores were consistent with HSV-2 were inappropriate and unsubstantiated by any expert evidence. Defendant argues the unexplained HSV-2 test results and Anna's "challenged credibility" led to an unjust result requiring reversal.

On appeal, defendant contends the State's unsupported and inaccurate claims about HSV-2 were not fair comments on the evidence and require

reversal regardless of the prosecutor's intention to make the comments in good faith. Defendant argues the prosecutor's comments were unsupported, largely inaccurate, and constituted clear misconduct, thereby depriving defendant of his due process rights.

Defendant argues the prosecutor's unsupported opening and closing statements were prejudicial to him because the forecasted but unproduced evidence was a crucial part of the prosecutor's case, and any potential prejudice could not be overcome with a limiting instruction. State v. Walden, 370 N.J. Super. 549, 559 (App. Div. 2004). In defendant's view, the prosecutor's unsupported statements about HSV-2 transmission were crucial to the State's case and could have affected the jury's verdict.

Defendant argues the lack of a specific curative instruction on the prosecutor's statements about HSV-2 in all likelihood prejudiced defendant because the jury credited the prosecutor's statements in light of her authoritative position. See State v. Land, 435 N.J. Super. 249, 269 (App. Div. 2014); see also State v. Greene, 242 N.J. 530, 551 (2020) ("A conviction that is the product of an unfair trial will not be saved because the prosecutor acted in good faith."). Here, defendant contends that even if the prosecutor did not intend to mislead the jury, her claims that HSV-2 cannot be spread by "innocent exposure, "

"through surfaces," or "hand-to-hand contacts," but mostly through genitalia were inaccurate, misleading, and contrary to what Dr. Medina testified to during the N.J.R.E. 104 hearing.

Because the State relied on the challenged comments about HSV-2 transmission without proffering forensic evidence to support its theory, defendant claims the State failed to sustain its burden of proof. See State v. Loyal, 386 N.J. Super. 162, 170 (App. Div. 2006). Defendant maintains the prosecutor's entire theme about HSV-2 at opening and summation violated his right to a fair trial by pressing arguments and conclusions that were untrue and unsupported by forensic evidence.

Specifically, defendant argues the prosecutor commented that HSV-2 is only transmitted through sex; Tracy observed sores in Anna's genital area consistent with HSV-2; and/or defendant could have avoided transmitting HSV-2 to Janelle despite infecting Anna in the absence of expert testimony. In addition, defendant also claims it was unduly prejudicial for the prosecutor to repeatedly refer to HSV-2 as "genital herpes" during the trial. Defendant claims that individually and collectively, the prosecutor's statements concerning HSV-2 and its transmission that are unsupported by any evidence constituted

prosecutorial misconduct deprived him of a fair trial, and his conviction should be reversed.

When considering claims of prosecutorial misconduct, courts "must weigh 'the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial.'" State v. Williams, 244 N.J. 592, 608 (2021) (quoting State v. Wakefield, 190 N.J. 397, 437 (2007)). "A prosecutor may comment on the facts shown by or reasonably to be inferred from the evidence." State v. Carter, 91 N.J. 86, 125 (1982). We will reverse a conviction "on the basis of prosecutorial misconduct only if 'the conduct was so egregious as to deprive defendant of a fair trial.'" Williams, 244 N.J. at 608 (quoting Wakefield, 190 N.J. at 437).

In determining whether a prosecutor's misconduct was sufficiently egregious, an appellate court "must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred." State v. Marshall, 123 N.J. 1, 153 (1991). "Specifically, an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Frost, 158 N.J. 76, 83 (1999).

"Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." Ibid. (citing State v. Ramseur, 106 N.J. 123, 323 (1987)). "The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made." Id. at 84. "The failure to object also deprives the court of an opportunity to take curative action." Ibid. (citing State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997)).

If defense counsel did not object at trial, "defendant must demonstrate plain error to prevail [on appeal]." State v. Timmendequas, 161 N.J. 515, 576 (1999) (citing State v. Irving, 114 N.J. 427, 444 (1989)). "Plain error is 'error possessing a clear capacity to bring about an unjust result and which substantially prejudiced the defendant's fundamental right to have the jury fairly evaluate the merits of his defense.'" Id. at 576-77 (quoting Irving, 114 N.J. at 444).

The State's Opening Statement

First, defendant asserts the prosecutor made statements concerning HSV-2 during opening arguments that were both inaccurate and improper because the State did not have a reasonable basis in what it knew was its anticipated evidence to support them. For example, the prosecutor asserted that Anna only could have contracted HSV-2 through sex despite the fact that the State had not

identified any expert witness that it intended to qualify to provide evidence to that effect. For the same reasons, defendant similarly argues the prosecutor exceeded the bounds of proper advocacy by stating in her opening and closing statements that HSV-2 is only transmitted through sex; Tracy observed sores in Anna's genital area, which were consistent with HSV-2; and defendant could have avoided transmitting HSV-2 to Janelle despite infecting Anna.

We agree with defendant that the State did not present any expert testimony from an infectious disease expert—or any other qualified expert—on the issues of how HSV-2 is transmitted, including whether it is primarily transmitted through genitalia. The State also failed to present expert testimony on causation, that is how defendant could have transmitted HSV-2 to Anna. No expert witness testified that HSV-2 cannot pass through "hand-to-hand contact" or that it is primarily transmitted through genitalia. In other words, the prosecutor claimed defendant must have sexually assaulted Anna because he tested positive for HSV-2 years after she did, but the claim is unsupported by any competent evidence presented by the State or which the State could have reasonably anticipated it would present at trial.

As defendant points out, almost a year transpired between Anna's last contact with defendant and her HSV-2 test, and more than three years passed

before defendant was HSV-2 tested. And, Janelle testified she tested negative for HSV-2 even though she had unprotected sex with defendant.

HSV-2 is an infectious disease, the transmission of which did not fall within the areas of expertise for which the State chose to qualify Dr. Medina as an expert witness at trial.¹⁵ Although Dr. Medina was certainly qualified to testify as to her diagnosis of Anna's sexual abuse and what may or may not be an indicator of sexual abuse based on her expertise in the areas the State offered as a witness, the State did not seek to qualify her as an expert in the areas of the specific characteristics of HSV-2, how it is transmitted, or its dormancy characteristics—the extent to which it can lay dormant without causing noticeable symptoms. In sum, the State failed to present evidence establishing Dr. Medina's training and experience rendered her qualified to offer an opinion regarding how Anna contracted HSV-2.

Having failed to qualify or offer Dr. Medina as an expert as to those issues, the State improperly tried to elicit testimony from Dr. Medina to support a theory that defendant infected Anna with HSV-2 when he allegedly had sexual contact

¹⁵ We offer no opinion on the areas for which Dr. Medina may be qualified as an expert. We observe only the State did not seek to qualify Dr. Medina as an expert concerning the transmission of HSV-2 and, as such, the trial court was not required to decide, and did not decide, that issue.

with her. The prosecutor improperly tried to rely on the temporal proximity the alleged sexual contact between defendant and Anna and establish causation through the prosecutor's own theories about HSV-2 in her opening and closing statements that were never established by expert testimony, or any other evidence, at trial. Moreover, the prosecutor presented no expert testimony or other evidence supporting her statements during her opening statement to the jury that contact through a person's mucous membranes or a break in the skin with fluids of another individual may cause a person to become infected with HSV-2. Under these circumstances, we conclude the record contained insufficient evidence to support the prosecutor's claims Anna must have contracted HSV-2 from defendant because Anna tested positive for HSV-2 and defendant tested positive three years later.

We recognize defense counsel did not object to the prosecutor's opening comments that Anna could have only been infected with HSV-2 through the alleged sexual assaults. Based on this record, we are persuaded the prosecutor's opening comment misled the jury with issues and conclusions outside the expert testimony proposed to be presented by Dr. Medina. And, without any basis in the evidence the State could reasonably have anticipated it would present at trial, the prosecutor wrongfully asserted in her opening remarks to the jury: "You're

going to get all the education that you need about genital herpes through Dr. Medina when she comes in and talks to you." The prosecutor misstated the evidence expected to be presented at trial. These comments were purely conjectural and are not supported by the record.

The scope of Dr. Medina's testimony was ordered to be limited to the four corners of her report—her evaluation of Anna for sexual abuse, Anna's medical history, and "the usefulness of diagnosing STD's in sexually abused children as a tool for identifying and treating sexual abuse," based on our order. The prosecutor's opening remarks improperly conveyed the inaccurate impression that Dr. Medina was an expert in HSV-2 and could opine as to causation. This assertion was not based upon any facts or reasonable inferences that would be established by the evidence the State knew it would present, and would not present, at trial.

In addition, during her opening statement, the prosecutor stated Tracy believed Anna had genital herpes after she examined her. Defense counsel interposed an objection, which the trial court sustained and ruled that Tracy was not qualified to give expert testimony but could testify as a lay witness and gave a curative instruction. The prosecutor also stated in her opening that Anna will have "to live with genital herpes for the rest of her life." The prosecutor's

opening statements were never supported by any expert witness testimony or other evidence presented at trial and, in our view, ultimately tainted the jury's understanding of the evidence, resulting in prejudice to defendant.

The State's Closing Statement

During her summation, the prosecutor argued to the jury that because Anna tested positive for HSV-2, and defendant years later also testified positive, defendant must have committed the alleged sexual assaults. Indeed, the prosecutor claimed the testing established that no one other than defendant could have infected Anna because Anna claimed only defendant had engaged in sexual acts with her. The prosecutor stated:

You have not heard one shred of evidence to support that idea that [HSV-2] is spread through some kind of innocent exposure because it's sexually transmitted. That's how it's transmitted. It speaks for itself.

. . . .

I wanted to talk about some other side issues that were addressed by [defense] counsel. The fact that [Janelle] doesn't have [HSV-2], yet she testified that she had sex with [defendant] . . . during this time period. They must not—because they had sex and he didn't have it, then he must not have had it or she doesn't have it, he must not have had it during the time frame, right? That's the allegation, really. It's more likely that defendant is smart enough not to have sex with [Janelle] when he is infectious. But [Anna], she doesn't know

the difference about that, so it doesn't matter if he wants to have sex with her.

There was also talk that . . . defendant, the victim didn't test positive until March of 2016 and . . . defendant took a test in 2018 and then in 2019 and then shows up positive and nothing in between there as if maybe, you know, somebody else could have done it to her, infected her. Nobody else could have infected her with that because she never identified anybody else having sex with her. It was always [d]addy.

[(Emphasis added).]

Prosecutors are accorded considerable latitude in summing up the State's case forcefully and graphically. State v. Tilghman, 345 N.J. Super. 571, 575 (App. Div. 2001). Nevertheless, prosecutors also have an "overriding obligation to see that justice is fairly done." Ibid. Thus, while prosecutors "may strike hard bows, [they] [are] not at liberty to strike foul one." Ibid. (quoting Bergen v. United States, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to sue every legitimate means to bring about a just one.")). A prosecutor's comments must remain fair and tethered to the evidence presented. Frost, 158 N.J. at 83.

Based on this record, we are persuaded that the prosecutor's closing comments that "you have not heard one shred of evidence to support the idea

the [HSV-2] is spread through some kind of innocent exposure because it's sexually transmitted . . . [i]t speaks for itself," and "[n]obody else could have infected [Anna] because she never identified anybody else having sex with her . . . corroborates what she said happened" because she was a "non-sexually active child," were "foul blows," which "exceeded the parameters of permissibly forceful advocacy." See State v. Munoz, 340 N.J. Super. 204, 217 (App. Div. 2001). The prosecutor's comments were based on supposition and speculation, and improperly included assertions concerning medical causation that were not supported by any competent evidence and upon which the State's theory of defendant's culpability was primarily based—that Anna's positive HSV-2 test established defendant sexually assaulted her. Moreover, the comments presented assertions of medical and science-based causation spun from thin air that were highly prejudicial because the State's case against defendant otherwise rested solely on the testimony of a young victim who had provided scant details about the alleged assaults and inconsistent statements about what the State alleged occurred.

Thus, we are convinced that these prosecutorial excesses in opening and summation had the clear capacity to cause an unjust result and were so flawed

and egregious that defendant was denied a fair trial and constitutes reversible error. We express no opinion on the merits of the issues in this case on remand.

Anna's Testimony and Defendant's Blood Draw

Defendant also maintains the prosecutor's opening and closing statements improperly bolstered Anna's testimony by arguing she was telling the truth, replaying her recorded out-of-court interview, opining on her family members' credibility, and labeling defendant as guilty. Defendant contends the strength of the State's case rested on Anna's credibility. According to defendant, Anna's credibility was undermined by her inconsistent stories, such as whether defendant penetrated her as Anna claimed in her out-of-court statements, or whether he only "touch[ed]" her as she testified at trial. Defendant asserts Anna's credibility was both "essential" and "highly vulnerable to doubt."

Defendant also maintains that the prosecutor improperly bolstered Anna's credibility by playing ten video excerpts from her recorded interview with Detective Olsen in summation. Multiple excerpts from the recorded interview showed Anna accusing defendant of penetrating her. Defendant contends the video recordings in essence constituted a "second trial" emphasizing only "the evidence most favorable to the State," and not merely an "aid incidental" to the prosecutor's summation. The prosecutor told the jury to focus on Anna's

recorded statement rather than her less favorable trial testimony where she did not accuse defendant of penetration.

Defendant also contends Anna's credibility was bolstered when the prosecutor told the jury in summation that Anna "had time to develop shame about what's happened to her" since the recorded interview, which caused her "to limit her testimony." Defendant also argues the court failed to conduct an N.J.R.E. 104(a) hearing before allowing the prosecutor to play the video-recorded statements for the jury in her summation as required by State v. Muhammad, 359 N.J. Super. 361, 381 (App. Div. 2003).

The prosecutor told the jury in summation:

If you believe that [Anna] lied to [g]randma and then lied to her mom and then lied to Dr. Medina and then lied throughout the forensic interview, then he's not guilty, and looked at you in the face and lied to you some more, and the herpes test could not corroborate the acts at all, then you would have to say . . . that he's not guilty. But those things didn't happen.

Defendant also claims the prosecutor inflamed the jury in her summation by stating Anna was not influenced by Tracy or Janelle, and the child was subject "to a lifetime of mental torment that she accused her father of something that didn't happen." Defendant contends the prosecutor's statement amounted to an

improper comment on not only Tracy and Janelle's credibility, but Anna's credibility as well.

Defendant also contends the prosecutor bolstered Anna's credibility by eliciting opinion testimony from Detective Olsen and Dr. Medina about the child's believability. Specifically, defendant asserts the prosecutor relied on the fact that Dr. Medina diagnosed Anna with "child sexual abuse," which indirectly supported and endorsed Anna's allegations as credible even in the face of Dr. Medina's testimony that Anna was unable to describe the details or frequency of defendant's actions and mentioned it was not "painful or uncomfortable." Defendant also claims the prosecutor violated defendant's due process rights by eliciting testimony from Detective Olsen and Dr. Medina that they believed Anna based on their expertise, and the court believed Anna leading to the issuance of an order to draw defendant's blood for STD testing.

Defendant also points out that Detective Olsen's comments regarding being "proud" of Anna and advising her to tell the "truth" if anything bad "happens again" also improperly bolstered Anna's credibility. Lastly, defendant contends the prosecutor erred in telling the jury at least seven times that defendant's blood was drawn pursuant to a court order. Since defendant has

raised these improper bolstering issues for the first time on appeal, we review for plain error. R. 2:10-2.

Credibility is an issue of fact for the jury to determine. State v. Frisby, 174 N.J. 583, 594-95 (2002). The State should not provide witnesses to "bolster[]" the credibility of a witness. Id. at 595. As our Supreme Court noted in State v. R.K., the general rule is that "other witnesses are prohibited from giving their opinions about [another witness's] credibility." 220 N.J. 444, 460 (2015).

"A prosecutor may argue that a witness is credible, so long as the prosecutor does not personally vouch for the witness or refer to matters outside the record as support for the witness's credibility." Walden, 370 N.J. Super. at 560. "A prosecutor may not express a personal belief or opinion as to the truthfulness of [their] witness's testimony." State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993). Furthermore, a prosecutor's comments may be harmless if they are only a response to remarks by opposing counsel. State v. DiPaglia, 64 N.J. 288, 297 (1974).

Here, the prosecutor's remarks about Anna's credibility during summation were in response to defense counsel's attacks on Anna's credibility, thereby rendering the prosecutor's responsive comments harmless. DiPaglia, 64 N.J. at

297. In her summation, defense counsel stated:

So what's the takeaway from [Anna] besides the fact that she is like the cutest kid ever, right? Okay. I get it. She testified before you October 17, 2019. What did she say? She, herself, didn't say much. Hardly answered [the prosecutor's] questions. [The prosecutor] was the one interjecting the facts and the questions because all you were getting here was the shrugs of the shoulders and maybe bits and pieces.

She may have got out a yes to the private touch the butt and was asked did it hurt. Of course, she says it hurt when asked that question. She wasn't asked how did it feel. She says more than five times? Yes. [The prosecutor's] trying to put [ten] fingers up. She can't answer. She shrugs her shoulders. She says something about her hand, the hand being touching her front, but she's not really answering any of the questions. It was a very short period of time that she was on the stand. But then you have Detective Olsen's statement.

And in Detective Olsen's statement which was March of 2016, you have private touch butt and she went back and forth a little bit. There was a period of time where she said front and back, then she corrects Detective Olsen to say, no, it wasn't the front, it was only the butt. And she gets rewarded for correcting her. It's back, it's forth, who knows what it is. What it is not is it is not credible proof, that's what it is.

[(Emphasis added).]

Defense counsel also asserted Tracy had a motive to lie because she wanted defendant "out of the picture."

The prosecutor stated in her summation that "[n]o child makes up penetration. No child makes up vaginal penetration. Not on their best day, not the most creative child." Defendant had the ability to impeach Anna's credibility and cast doubt on her trial testimony, the accuracy of her recollection of events, the truthfulness of her testimony, and any possible motives she had. The prosecutor's comment in summation that "no child, including Anna, could make up the claims at issue" was not evidence and was not prejudicial.

We briefly address defendant's contention that the prosecutor was required to disclose she was going to replay portions of Anna's video recorded statements and interviews for the jury during summation. Defendant relies on our decision in Muhammad in support of his argument. Defendant also claims the court erred in not conducting an N.J.R.E. 104(a) hearing on this issue.

In Muhammad, we declined to adopt a per se rule barring the State from playing portions of videotaped testimony of State witnesses during summation but held an attorney who intends to play portions of videotaped trial testimony should inform the court and all other counsel at the earliest possible time. 359 N.J. Super. at 380. We suggested the intention should be disclosed prior to summation or at the charge conference. Id. We also directed that an N.J.R.E. 104(a) hearing be conducted in all such cases, unless the proponent identifies

the excerpts to be played and opposing counsel, with knowledge of those excerpts to be played, waives a hearing with the court's approval. Id. This procedure was not followed here.

On remand, we direct counsel and the court to abide by our holding in Muhammad if videotape or other playbacks are requested to be used by counsel in their summations. In light of our decision to remand for a new trial, we do not consider whether the video excerpts were taken out of context or distorted any of the witnesses's testimony. We offer no opinion as to the potential use of the video excerpts by either counsel as an aid in presenting their arguments on remand and leave that issue to the court to determine.

Cumulative Impact

For sake of completeness, we briefly address defendant's additional argument that the cumulative impact of the trial court's errors warrants a new trial. Cumulative error occurs when errors that would not require reversal by themselves, together "cast doubt on [the] verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018). See also State v. Jenewicz, 193 N.J. 440, 473 (2008).

Although we have found the separate errors emanating from the prosecutor's improper opening and closing remarks that independently warrant

a new trial, considered cumulatively, they certainly "undermined defendant's right to a fair trial" and "raise serious questions about whether the outcome was just, particularly in light of the strength of the evidence presented." Sanchez-Medina, 231 N.J. at 469 (finding lack of jury instructions on how to assess identification of defendant and provocative evidence about defendant's immigration status undermined defendant's right to a fair trial where the State's evidence against defendant was not overwhelming); see also State v. Sui Kam Tung, 460 N.J. Super. 75, 103-04 (App. Div. 2019) (concluding prosecutor's out of bounds statements during closing combined with other errors, including an inadequate jury charge, deprived defendant of a fair trial).

The problems caused by the prosecutor's inculpatory and unsupported opening and closing statements about HSV-2 test results, giving medical opinions about HSV-2 test results, giving medical opinions about HSV-2's transmissibility, symptoms, stating it was only spread through sexual contact, and the court's failure to follow our holding in Muhammad and conduct a N.J.R.E. 104(a) hearing on the prosecutor's intent to utilize portions of Anna's recorded interview in her summation substantially prejudiced defendant. The harm caused by the cumulative effect of the prosecutor's misconduct could not

have been cured with the court's general instruction that what the attorneys stated was not evidence. Defendant is entitled to a new trial.

Defendant's conviction is reversed, his sentence is vacated, and the matter is remanded for a new trial. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION