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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2984-11T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID BUESO, a/k/a YASMIN BUESO, DAVID ABEJAEL BUESO, YASMIN A. BUESO, YASMIN ABEJAEL BUESO, YASMIN ABIGAIL BUESO,

Defendant-Appellant.

Submitted April 9, 2014 – Decided April 22, 2014

Before: Judges Fuentes, Fasciale and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 09-09-00795.

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

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Meredith L. Balo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel; Kimberly L. Donnelly, Law Intern, on the brief).

PER CURIAM

Defendant David Bueso appeals from his convictions for first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(1); second-degree sexual assault, N.J.S.A. 2C:14-2b; and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4a.[1] The primary issue on appeal relates to the competency of the victim to testify at trial. We reverse and remand for a new trial.

Defendant was charged with committing these offenses against M.C. when she was between four and five years old. Defendant was tried before a judge and jury over a period of four days in February 2011. At trial, M.C.'s mother testified that Martha Luz Gomez ("Lucero") and Lucero's mother Amparo DeLeone babysat M.C. and her younger sister[2] at the house where Lucero and Amparo resided. Defendant, Lucero's boyfriend, resided with Lucero and Amparo and was sometimes present while they babysat. M.C.'s mother testified that on April 2, 2009,

[1] A grand jury indicted defendant on two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a(1) (Counts One and Four); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2b (Counts Two and Five); and two counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4a (Counts Three and Six). Counts One, Two, and Three related to an act defendant allegedly committed on March 28, 2009. Counts Four, Five, and Six related to an act defendant allegedly committed between January 3, 2008 and March 27, 2009. The jury found defendant guilty of Counts Four, Five, and Six.

[2] M.C. was born in 2004. Her sister was born in 2007.

M.C., who was five years old at the time, "said to me that [defendant] touched her colita" and "would suck her colita," M.C.'s word for vagina.

Detective Paul Han from the Union County Prosecutor's Office testified that he interviewed M.C. on April 8, 2009. A video recording and transcript of the interview were admitted into evidence without objection. During the interview, M.C. stated that defendant put his tongue in her mouth and in her "colita." She indicated that the last time defendant sexually assaulted her was on the day of Lucero's birthday party in March 2009; the first time occurred on a day when Lucero chipped her tooth. She later indicated that on the first occasion, defendant only put his tongue in her mouth. M.C. stated that the assaults took place in defendant's bedroom and that defendant told her not to tell anyone.

Lucero testified that she was out of the house on the day of her birthday party; Amparo was the person who babysat M.C. that day; defendant was out of the house most of the day; he went to the mechanic and then to M.C.'s house to prepare for the party. She testified that on the day she broke her tooth, she and defendant were in their bedroom, and M.C. and her sister were in the living room with Amparo. She never saw defendant go into a bedroom with M.C. and shut the door, and had never seen

defendant act inappropriately toward M.C. Amparo testified that when she babysat M.C., Lucero and defendant stayed in their bedroom. According to Amparo, the children were always in the living room with her; she never saw defendant alone with M.C. in the bedroom.

Jose Ancheta, an automobile repair shop employee, testified that on the day of the birthday party, defendant brought his car to the repair shop and stayed there until the work was complete. Ancheta brought a receipt for the repair work.

At the time of the trial, M.C. was seven years old. Before M.C. testified, the assistant prosecutor primarily inquired as to her understanding that she must tell the truth:

> [ASSISTANT PROSECUTOR]: Everything you do today in court, you have to tell the truth. Do you understand that?
>
> [M.C.]: Yes.
>
> [ASSISTANT PROSECUTOR]: So, is it good to tell the truth?
>
> [M.C.]: Yes.
>
> [ASSISTANT PROSECUTOR]: And is it bad to tell a lie?
>
> [M.C.]: Yes.
>
> [ASSISTANT PROSECUTOR]: And do you understand bad things happen if you tell a lie in court. Do you understand that?
>
> [M.C.]: Uh-un. No.

[ASSISTANT PROSECUTOR]: Do you understand that bad things happen if you tell a lie in school?

[M.C.]: Yes.

[ASSISTANT PROSECUTOR]: So, just like if you tell a lie in school, if you tell a lie here in this place, the court, bad things happen. Do you understand that?

[M.C.]: Yes.

[ASSISTANT PROSECUTOR]: Okay. So, everything you talk about today has to be the truth. Do you understand that?

[M.C.]: Uh-huh.

[ASSISTANT PROSECUTOR]: Judge, I —

THE COURT: Any questions?

[DEFENSE COUNSEL]: No objection, Judge.

THE COURT: All right, let me just ask you a question. See that book there?

[M.C.]: Uh-huh.

THE COURT: If I told you that that book is round, would that be a truth or a lie?

[M.C.]: A lie.

THE COURT: Why?

[M.C.]: Because it's a rectangle.

THE COURT: Because it's a rectangle. Okay. So, you know the difference between telling what is and what isn't, right? What really is and what really isn't? A truth or a lie, right?

Okay. Thanks. You can proceed.

M.C. testified that defendant licked her in the "colita" more than four times, and kissed her "in [the] lips" more than four times. She stated that defendant told her not to tell anyone. M.C. testified that on the day Lucero's tooth broke, defendant took her into his bedroom, locked the door, and licked her in the "colita." She stated on cross-examination that this was the only time defendant did something to her and that nothing occurred on the day of the birthday party. On redirect, she stated that it occurred one time in addition to the day Lucero's tooth broke.

Defendant denied ever touching M.C. inappropriately. He testified that on the morning of the birthday party, M.C. was dropped off at his house and Amparo babysat her. Defendant stated that he left around 8:00 a.m., spent the morning getting a car repaired, and was never alone with M.C. He stated that on the day of the tooth incident, he and Lucero were in their bedroom and the children were in the living room with Amparo.

Dr. Gladibel Medina, an expert in the field of pediatric sexual abuse, testified that she obtained M.C.'s medical history and performed a physical examination of M.C. She testified that there was no sign of traumatic injury to M.C.'s genital tissues, but that this was not inconsistent with the type of sexual abuse M.C. had reported.

The jury found defendant not guilty of the alleged acts of March 28, 2009, the day of the birthday party (Counts One, Two, and Three), but found defendant guilty of the acts the day Lucero chipped her tooth (Counts Four, Five, and Six). Defendant filed a motion for a new trial, arguing that M.C.'s testimony was too inconsistent to support the conviction. The judge denied the motion, finding that there was sufficient evidence to support the jury's verdict and noting that "the reviewing court should not overturn the [jury's] findings simply because it may have found otherwise on the same evidence."

The judge sentenced defendant to a fifteen-year term of imprisonment on Count Four, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and a concurrent four-year term on Count Six. Count Five merged with Count Four.

On appeal, defendant argues the following points:

> POINT I
> THE TRIAL COURT ERRED BY FAILING TO ADEQUATELY DEMONSTRATE THAT M.C. WAS COMPETENT TO TESTIFY PURSUANT TO N.J.R.E. 601. (Not Raised Below).
>
> POINT II
> THE VERDICT IN THE INSTANT CASE WAS AGAINST THE WEIGHT OF THE EVIDENCE.
>
> POINT III
> THE DEFENDANT'S SENTENCE IS EXCESSIVE.

We begin by addressing defendant's argument that the court failed to sufficiently inquire into M.C.'s competence to

testify. Because we reverse on defendant's Point I, we do not reach defendant's remaining arguments. Where, as here, a defendant did not object at trial, the plain error standard applies. State v. Bunch, 180 N.J. 534, 541 (2004). We must disregard the trial court's error "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. We conclude that the trial court insufficiently inquired into M.C.'s competence, and that this oversight constituted plain error requiring a new trial.

It is well-settled that "to be competent to testify, a witness 'should have sufficient capacity to observe, recollect and communicate with respect to the matters about which [s]he is called to testify, and to understand the nature and obligations of an oath.'" State v. G.C., 188 N.J. 118, 131 (2006) (citation omitted). An oath is a reminder to the witness that there is a special obligation to tell the truth. Ibid. Regarding oaths by child-witnesses,

> [a]ny ceremony which obtains from an infant a commitment to comply with this [special] obligation [to speak the truth in court] on pain of future punishment of any kind constitutes an acceptable . . . oath. It is not necessary that an infant mouth the traditional litany nor comprehend its legal significance.
>
> [Ibid. (alterations in original) (citation omitted).]

In State v. Zamorsky, 159 N.J. Super. 273, 280, (App. Div. 1978), we explained the process for a judge to determine whether child-witnesses understand this special obligation:

> Interrogating a child offered as a witness, where the qualification of the child to testify is in issue, is a difficult task which cannot be performed in a pro forma or perfunctory manner. Since the goal is to ascertain the child's comprehension of the duty of a witness to tell the truth, it is first necessary to explore the child's conceptual awareness of truth and falsehood. The younger the child, the more searching the inquiry must be. When it has been established that the child understands the meaning of those terms, the next area of inquiry is not, as is so often the case, whether the child will tell the truth, but rather whether the child understands that it is his or her duty to tell the truth. This is the essence of moral responsibility. We perceive no need to dwell at length on how the witness'[s] expression of that duty is to be articulated or on what it should be founded. It matters not that the recognition of the duty to speak the truth may emanate from a source other than one's religious upbringing. It should suffice if the child understands that it is wrong to tell a lie and that one must always speak the truth. If the trial judge is satisfied from his interrogation that the child is sensitive to his or her obligation to tell the truth, we will not disturb his conclusion unless it is plainly unsupported by the evidence.
>
> [(Emphasis added).]

Here, the judge asked M.C. essentially only one question, whether saying a book was round would be the truth or a lie.

The judge delegated nearly the entire inquiry to the prosecutor, who asked M.C. mostly leading questions. The approach employed by the trial judge here is disturbingly similar to the perfunctory methodology we cautioned against in Zamorsky. This record did not establish that M.C. understood the moral responsibility to testify truthfully. Therefore, the judge's conclusion that M.C. was competent is "plainly unsupported by the evidence" in the record. Ibid.

The State's case against defendant was based entirely on M.C.'s account of events. The nature of the sexual assault described by M.C. does not produce physical evidence to corroborate what allegedly occurred here. The videotape depicting M.C.'s statements in response to the questions posed to her by the State's investigator shows an intentionally informal setting, designed to create a stress-free atmosphere appropriate to her age. We know far less, however, about the actual environment and circumstances that predominated when M.C. reported the abuse to her mother and other family members.

Our Supreme Court has cautioned all those involved in the prosecution of child sexual abuse cases that "the inculpatory capacity of statements indicating the occurrence of sexual abuse and the anticipated testimony about those occurrences requires that special care be taken to ensure their reliability." State

v. Michaels, 136 N.J. 299, 306 (1994). Here, M.C.'s testimony in open court required this seven-year-old child to describe what defendant allegedly did to her two years earlier when she was five years old. Unlike the informal environment that formed the context of her previous inculpatory statements, this time M.C. was required to testify in an intentionally formal setting, in a courtroom, before a judge and jury, while seated in the witness box.

Under these circumstances, the trial judge was obligated to question M.C. personally and directly "to ascertain the child's comprehension of the duty of a witness to tell the truth" and explore, through an age-sensitive yet probing inquiry, M.C.'s "conceptual awareness of truth and falsehood." Zamorsky, supra, 159 N.J. Super. at 280. Here, the prosecutor asked M.C. a limited number of questions, all of which were crafted in such a fashion that merely required the child to answer "yes" or "no." The judge asked one question that merely revealed the child's ability to distinguish between geometric shapes. This approach fell far short of what was required. Cf. G.C., supra, 188 N.J. at 126-27.

The trial judge's failure to carry out this singularly important responsibility was an error "of such a nature as to

have been clearly capable of producing an unjust result." R. 2:10-2.

Reversed.