

## RECORD IMPOUNDED

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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1279-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS PUMPHREY,

Defendant-Appellant.

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Submitted April 25, 2017 – Decided May 4, 2017

Before Judges Koblitiz and Rothstadt.

On appeal from Superior Court of New Jersey,  
Law Division, Somerset County, Indictment Nos.  
13-09-0544 and 14-09-0614.

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

Michael H. Robertson, Somerset County  
Prosecutor, attorney for respondent (James L.  
McConnell, Assistant Prosecutor, of counsel  
and on the brief).

PER CURIAM

A jury convicted defendant Thomas Pumphrey of third-degree  
endangering the welfare of a child, N.J.S.A. 2C:24-4; fourth-

degree criminal sexual contact, N.J.S.A. 2C:14-3(b); third-degree stalking, N.J.S.A. 2C:12-10; and fourth-degree contempt of court, N.J.S.A. 2C:29-9. He was found not guilty of second-degree attempted sexual assault, N.J.S.A. 2C:5-1 and 2C:14-2(c)(4). Defendant was sentenced to an aggregate term of nine years in prison, and now appeals from his October 7, 2015 conviction and sentence. He alleges the conviction was tainted by the teen victim's mention that she had thought of committing suicide as a result of the over-fifty-year-old defendant's continuous sexting. Defendant also complains that the judge used an improper aggravating factor in sentencing. We affirm the convictions, but remand for resentencing.

The evidence revealed that in 2013 the victim and defendant, who lived in Mississippi, communicated online, during which defendant repeatedly sent the victim at least twenty-one videos of himself masturbating as well as numerous pictures of his penis. Defendant admitted to the police that he knew the victim's age and sent the material to her, posing as a nineteen-year-old body builder. Defendant was arrested and after nine months in jail on those charges, was released on bail, conditioned on no contact with the victim. After his release in 2014, defendant stalked the victim online, thereby violating the bail condition. He was indicted a second time for the further offenses. Both indictments

were subsequently tried together in a single trial. Defendant did not testify and his attorney conceded the online behavior occurred, but argued to the jury that the sexting did not constitute proof of the elements of the crimes charged. In particular, defense counsel successfully argued that the behavior did not constitute attempted sexual assault.

Defendant raises the following issues on appeal:

POINT I: A.R.'S REFERENCE TO HER THOUGHTS OF SUICIDE WAS HIGHLY PREJUDICIAL, MANDATING THAT COUNSEL'S REQUEST FOR A MISTRIAL SHOULD HAVE BEEN GRANTED. THE JUDGE'S CURATIVE INSTRUCTION COULD NOT HAVE PROVIDED A FAIR COUNTERBALANCE TO THE SYMPATHY FOR THE COMPLAINANT TRIGGERED BY THE SUICIDE REFERENCE.

POINT II: DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

At the end of her direct examination, after explaining that defendant had reinitiated contact with her on her sixteenth birthday, the victim was asked "at its worst, how does this [a]ffect you?" She responded:

Um, like I said, it [a]ffected my grades. I couldn't sleep. I like, I never slept, and I was always tired during the day. Um, the night of this, I was thinking of committing suicide. Um, thank God [my boyfriend] was there though, because he stopped that, but —

Defense counsel sought a mistrial. After denying the defense motion, determining that the single comment in the context of the

victim's hours of testimony would not prejudice the jury, the judge gave the following curative instruction:

Right before the break, as you know, [the victim] was testifying, and she testified in response to a question about how she felt as a result of these events, that at some point she had considered committing suicide but her boyfriend, [], put an end to that. Close to her quote.

You are to completely disregard that statement. You are to give it no weight, no thought. It's not to enter into deliberations in any way. When you were selected for this case, and you took your oath, one of the concepts and one of the ideas that we discussed was the fact that these decisions that you'll be making in criminal courts have to be made without bias, prejudice, or sympathy. There's no room for emotion in determining a question of law which you will be determining in the case, ultimately.

So you may not, in any way, consider that statement, or give any empathy, emotion to it in making your decision on the verdict in this case.

Is there any one of you who could not follow my direction as I've just given it? If there is, would you raise your hand?

I have no hands, so I'm going to take it that you're all able to disregard that statement, not include it, as I've indicated, in your consideration, and I appreciate that. Thank you.

The curative instruction immediately provided by the trial judge was adequate to dispel any claim of prejudice. The instruction was appropriately swift and pointed. See State v.

Vallejo, 198 N.J. 122, 134 (2009) (mandating that curative instructions must be "firm, clear, and accomplished without delay"). The jurors are presumed to follow the court's instructions. See Verdicchio v. Ricca, 179 N.J. 1, 36 (2004); see also Williams v. James, 113 N.J. 619, 632 (1989) (recognizing that juries are "capable of following a curative instruction to ignore prejudicial matter"). The jury acquitted defendant of the most serious charge on a somewhat technical legal argument, further supporting the presumption that it followed the judge's strongly-worded curative charge. Thus, defendant's claim of prejudice is unfounded.

Defendant also alleges his sentence was excessive. Defendant was sentenced to five years in prison for endangering the welfare of a child and an eighteen-month concurrent sentence for criminal sexual contact. He received a consecutive four-year sentence for stalking and an eighteen-month concurrent sentence for contempt. "Appellate courts review sentencing determinations in accordance with a deferential standard." State v. Fuentes, 217 N.J. 57, 70 (2014). We are bound to affirm a sentence

even if [we] would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record. Assuming the trial court follows the sentencing guidelines, the one exception to

that obligation occurs when a sentence shocks the judicial conscience.

[State v. Cassady, 198 N.J. 165, 180 (2009) (quoting State v. O'Donnell, 117 N.J. 210, 215-16 (1989)).]


When imposing defendant's sentence, the court analyzed aggravating and mitigating factors pursuant to N.J.S.A. 2C:44-1. The court found mitigating factor seven, that defendant had no history of delinquency or criminal involvement. N.J.S.A. 2C:44-1(b)(7). The judge found aggravating factors two, three and nine. N.J.S.A. 2C:44-1(a)(2), (3) and (9). Before applying aggravating factor two, "the gravity and seriousness of harm inflicted on the victim," the judge explained at length that defendant "artfully manipulated" the victim who, as "an adolescent girl," should have been experiencing "a wonderful time of blossoming into womanhood" but instead was particularly vulnerable to defendant's online activity. As defendant points out, the victim's age was an element of both third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4 and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b).

The judge thus "double-counted" the victim's age as an aggravating factor. "When it assesses whether a defendant's conduct was especially 'heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that

establish the elements of the relevant offense." Fuentes, supra, 217 N.J. at 74-75. We are therefore constrained to remand for resentencing without consideration of aggravating factor two. The judge should resentence defendant on all charges to ensure that defendant's overall sentence is fair, considering appropriate mitigating and aggravating factors. See State v. Miller, 108 N.J. 112, 121 (1987).

Convictions affirmed. Sentence reversed and remanded for resentencing.

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

  
CLERK OF THE APPELLATE DIVISION