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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-2663-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WADIM SAKIEWICZ,

Defendant-Appellant.

Submitted July 6, 2017 – Decided July 18, 2017

Before Judges Yannotti and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Sussex County, Indictment No.
15-06-0265.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jack L. Weinberg, Designated
Counsel, on the brief).

Francis A. Koch, Sussex County Prosecutor,
attorney for respondent (Shaina Brenner,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Following a bench trial, defendant was found guilty of simple
assault, contrary to N.J.S.A. 2C:12-1(a)(1), a disorderly persons

offense. The court sentenced defendant to forty-five days in the county jail. Defendant appeals from the judgment of conviction dated January 22, 2016. We affirm.

I.

A Sussex County grand jury charged defendant with third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (count one); third-degree aggravated assault upon a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a) (count two); and fourth-degree attempted aggravated assault upon a person engaged in the performance of emergency first-aid, N.J.S.A. 2C:12-1(b)(5)(c) (count three). In addition, a summons was issued charging defendant with simple assault, N.J.S.A. 2C:12-1(a)(1).

In August 2015, while the jury was being selected, defendant pled guilty to count two of the indictment, which was amended to simple assault, N.J.S.A. 2C:12-1(a)(1), a disorderly persons offense. The State agreed to recommend one year of non-custodial probation and to dismiss the remaining charges. In October 2015, defendant filed a motion to withdraw the plea. On November 19, 2015, the court granted the motion.

Thereafter, the parties agreed to proceed to trial on the simple assault charge, and the State agreed it would not pursue the other charges. The matter was tried before a judge, sitting without a jury.

At the trial, Corporal Frank Schomp of the Sparta Township Police Department (STPD) testified that on September 1, 2012, he was on patrol when he encountered defendant at defendant's residence. Schomp took defendant into custody and placed him in the STPD's holding cell. One of defendant's hands was handcuffed to the processing bench. According to Schomp, defendant was upset because he had been arrested, and he was speaking erratically.

Schomp left the holding cell but later came back with another officer. Schomp observed defendant on the floor. Defendant was still handcuffed to the processing bench and appeared to be unconscious. Schomp said he shoved defendant with his foot. The other officer performed a "sternum rub," during which the knuckles are pressed against an individual's sternum. According to Schomp, a "sternum rub" is "a fairly painful stimuli," which is used "to awaken unconscious persons."

Defendant awoke and began screaming. He said he was diabetic and wanted medical attention. The officers called for medical assistance. Defendant remained on the floor until the emergency medical technicians (EMTs) arrived. Defendant then sat up on his own. Schomp noted that there was an overhead video camera in the holding cell, which faced the processing bench. The video camera records video but not sound. It was operating at the time. Schomp said defendant had been spitting the whole time he was in the

lockup, and they gave him a garbage can in which to spit "so there [would] not [be] a mess."

The video recording was played. The judge noted that on the videotape, defendant is shown falling on his face. Schomp enters the room and nudges defendant with his right leg. The other officer was standing over defendant. The judge could not determine whether defendant was speaking with the officers, but he noted that defendant's foot began to move. Defendant eventually got up on his own and appeared to be speaking with an officer while Schomp left the room.

Sergeant Joseph Pensado of the STPD also testified. Pensado said that on the afternoon of September 1, 2012, he was on duty at the police station. The patrol sergeant told Pensado to enter the holding cell with the EMTs to check on defendant. Three EMTs were present.

Pensado observed defendant's interaction with one of the EMTs. According to Pensado, defendant was being "completely uncooperative." Defendant engaged in "tumultuous behavior" toward one of the EMTs. Pensado said that defendant was antagonistic and refused to be treated. Pensado stood near defendant, as the EMT approached him.

Pensado testified that defendant was dissatisfied with the treatment, and the EMT was unable to get near defendant. The EMT

asked defendant some basic questions, but defendant would not answer without arguing. The EMT approached defendant to take his blood pressure, and Pensado stepped away from the processing bench. Defendant continued to be uncooperative. He was yelling and screaming at the EMT.

Defendant moved closer to the EMT and raised his hand in a threatening manner. Pensado reacted. He approached the processing bench and positioned himself between defendant and the EMT. Pensado placed his forearm against defendant's chest and pushed him away. Defendant began to fight.

Pensado said he attempted to gain control of defendant, but defendant resisted. Pensado testified that defendant was fighting and he was aggressive. Defendant did not make any statements. Pensado said defendant was "yelling and screaming." At some point during the encounter, defendant kneed Pensado in his testicles, which caused Pensado pain.

Pensado testified that he was in uniform at the time, and it was clear to defendant that he was a law enforcement officer. Eventually, Pensado was able to restrain defendant, with assistance from the EMT and another officer. They handcuffed both of defendant's hands to the processing bench. Defendant continued "name calling" and "his tumultuous behavior." Pensado tried to

calm defendant. He unsuccessfully attempted to get defendant to comply with his orders.

The videotape was played again. Pensado identified the persons shown on the recording. He said the videotape showed the EMT trying to evaluate defendant, and the EMT's attempt to take defendant's blood pressure. Pensado noted that the videotape showed him restraining defendant from making further contact with the EMT and defendant fighting. The videotape also showed defendant yelling at the EMT and the struggle to handcuff defendant.

Defendant testified that on the morning of September 1, 2012, he was suffering from jet lag. He was sixty-six years old at the time. He was tired, had not eaten breakfast, and his blood sugar level was very low. He stated that, while he was sitting in the holding cell, he felt very weak. He was shivering and lost consciousness. He denied that he pretended to lose consciousness.

At some point, defendant regained consciousness. He recalled that the officers kicked him. He said he was upset when the EMTs entered the cell. He expected the EMTs to check his blood sugar level, but instead they started to check his blood pressure.

Defendant claimed that one of the EMTs "virtually" put a trashcan over his head, and Pensado struck him against a wall. He said he might have raised his voice. He said the EMT had been abusive and treated him like a dog by putting the trashcan in his

face. Defendant denied threatening the EMT and said he did not knee Pensado in the testicles. He testified that he believed the EMTs were part of "a gang" with the officers to assault him. The videotape was played, and defendant provided his interpretation of what it depicted.

On cross-examination, defendant denied that he requested the trashcan so that he could spit in it. He was shown the videotape and asked to point out when an EMT abused him. Defendant said the abuse consisted of treating him "like an animal." Defendant also stated that the EMT abused him by placing the trashcan over his head. He said the EMTs were part of "a gang" to wrongly accuse and assault him.

A registered nurse at the Sussex County jail testified that she examined defendant on September 5, 2012. She stated that she observed swelling and bruising on defendant's posterior left tricep.

II.

The attorneys then provided closing statements. Defendant's attorney argued that the officers' testimony was not credible. She stated that Schomp had claimed he nudged defendant with his foot, but counsel asserted that Schomp kicked defendant while he was on the floor. Counsel denied that defendant was pretending to be unconscious. She said he had been in the holding cell for two-and-

one-half hours, without food, drink, or shoes when he passed out. Counsel said the officers waited four-and-one-half minutes before coming to defendant's aid.

Defendant's attorney further argued that defendant did not have the "mindset" to assault the police officers. She stated that defendant did not take any action which warranted Pensado to come over and take control of the situation. Defense counsel said Pensado slammed defendant against the wall and threw him down on the bench.

Counsel stated that the videotape did not show defendant kneeling Pensado in the testicles. She asserted that it did not show Pensado reacting to such an assault. She said the evidence does not rise to the level of a simple assault.

The assistant prosecutor responded by stating that defendant had acted out against the EMT, who had been providing assistance to him. The assistant prosecutor stated that defendant had been argumentative and confrontational. Defendant did not cooperate with the medical treatment, and he "clearly expressed his disdain" for the officers and the EMTs. Pensado tried to calm him down, but defendant struck Pensado and caused him pain.

The assistant prosecutor argued that the evidence established that defendant had committed a simple assault upon the officer. The prosecutor noted that the videotape showed defendant resisting

as two officers and the EMTs attempted to subdue him. Defendant tried to resist Pensado's control by moving his arms and legs. The prosecutor said Pensado's legs were straddling defendant's legs. They were "entangled" and "intertwined." Defendant disregarded the risk of causing injury to the officer. He continued to "flail about." Defendant's movements injured the officer.

The judge then placed his decision on the record. The judge found that the officers were performing their lawful duties in full uniform when they came into contact with defendant. On the videotape, defendant appeared to be "in a distressed state." He was handcuffed to the processing bench, and he was speaking erratically. Defendant was antagonistic. He was upset because he had been arrested.

The judge rejected defendant's claim that the officers mistreated him. The judge stated that he did not believe defendant's testimony. The judge said he believed what he had seen on the videotape, and it showed defendant engaging in tumultuous behavior.

The judge found that defendant "clearly kneed" Pensado in the groin area. He said that the officer did not fall down in excruciating pain, but this did not mean he had not kneed the officer in the groin area. The judge stated, "I saw it happen," and the officer said it happened. The judge said that he believed

the officer's testimony. The judge found defendant guilty "as charged."

Later, another judge sentenced defendant to forty-five days in the county jail, with six days of jail credit for time previously served. The judge also imposed appropriate penalties. The judge entered a judgment of conviction dated January 22, 2016. This appeal followed. On appeal, defendant argues:

THE STATE FAILED TO MEET ITS BURDEN OF PROOF THAT THE DEFENDANT COMMITTED A SIMPLE ASSAULT UPON SGT. PENSADO. THE COURT'S FINDINGS CANNOT BE REASONABLY REACHED ON SUFFICIENTLY CREDIBLE EVIDENCE PRESENT IN THE RECORD AS A WHOLE. THE COURT'S FINDINGS ARE SO CLEARLY MISTAKEN THAT THE INTERESTS OF JUSTICE DEMAND INTERVENTION AND CORRECTION.

III.

In an appeal from the judgment of conviction following a bench trial, we must determine whether the judge's findings "'could reasonably have been reached on sufficient credible evidence present in the record,' given the burden of proof, which is proof beyond a reasonable doubt." State v. Castagna, 387 N.J. Super. 598, 604 (App. Div. 2006) (quoting State v. Johnson, 42 N.J. 146, 161-62 (1964)).

We must defer to the trial court's findings if they were "substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a

reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161. We may not set aside the judge's factual findings unless they are clearly mistaken "and so plainly unwarranted that the interests of justice demand intervention and correction." Id. at 162.

Here, defendant was charged with simple assault under N.J.S.A. 2C:12-1(a), which provides that a person is guilty of assault if he "[a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another." Thus, the State was required to prove beyond a reasonable doubt that defendant attempted to cause or caused bodily injury to Pensado, and that he acted purposely, knowingly or recklessly in doing so.

"Bodily injury" is defined as "physical pain, illness or any impairment of the physical condition." N.J.S.A. 2C:11-1(a). Furthermore, a person acts "recklessly" when he or she

consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

[N.J.S.A. 2C:2-2(b)(3).]

On appeal, defendant argues that the trial judge's finding that he committed a simple assault is not supported by sufficient

credible evidence. He contends the judge's credibility findings are not supported by the record. He argues that the videotape shows the officers wrongly viewed him as person who was completely out of control. He contends the videotape does not support the officers' assertion that he spit on the floor of the holding cell. According to defendant, this shows that the officers' credibility is "suspect."

Defendant further argues that the State failed to establish that he acted purposely, knowingly or recklessly. He contends Pensado "aggressively moved in on" him when the EMT was attempting to take his blood pressure. He maintains the videotape shows his actions were in direct response to the officers' manipulation of his body while he was handcuffed to the bench. According to defendant, the videotape does not show that he kneed Pensado in the groin purposely, intentionally or recklessly.

Defendant claims that, at the time of the alleged assault, the officers were manhandling and pushing him around. He admits it is "possible" his knee came into contact with Pensado, but this was based on his movements and not on any purposeful, intentional or reckless action on this part. He claims that during the encounter, he had many opportunities to strike the officer. Defendant asserts that if he was in an aggressive mood, he could have spit at the officer's face "at very close range." He also

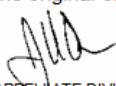
states that the videotape shows that his knee was between Pensado's legs a second time, but he did not strike the officer.

We are convinced that defendant's arguments are entirely without merit. The record fully supports the trial judge's factual finding that defendant assaulted Pensado by kneeling him in the groin. Indeed, as noted, defendant admits that his knee may have come into contact with the officer's groin area.

The testimony of the officers, which the judge found credible, established that defendant had been argumentative. He was angry that he had been arrested and dissatisfied with the EMTs attempt to evaluate him. Defendant resisted the officer's attempt to control the situation. The evidence was more than sufficient to support the judge's finding that defendant assaulted Pensado purposely, knowingly or recklessly.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION