SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2784-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HUMBERTO GONZALEZ, a/k/a SANTOS SOLARES, JOSE ROBE, SANTOS HOMBERTO M., SANTOS JOSE R.,

Defendant-Appellant.

Submitted May 15, 2017 – Decided May 31, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 12-10-1028.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Amanda E. Nini, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On October 19, 2012, a Mercer County grand jury returned a ten-count indictment charging defendant Humberto Gonzalez with first-degree kidnapping, N.J.S.A. 2C:13-1(b) (count one); three counts of first-degree aggravated sexual assault while armed, N.J.S.A. 2C:14-2(a) (counts two, three, and four); three counts of first-degree aggravated sexual assault in the course of a kidnapping, N.J.S.A. 2C:14-2(a)(3) (counts five, six, and seven); third-degree criminal restraint, N.J.S.A. 2C:13-2(a) (count eight); fourth-degree possession of a weapon (knife), N.J.S.A. 2C:39-5(d) (count nine); and third-degree possession of a weapon (knife) for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count ten).

At the trial, the trial judge granted the State's motion to dismiss counts three, four, six, and seven of the indictment. At the conclusion of the trial, the jury found defendant guilty of first-degree kidnapping (count one); second-degree sexual assault as a lesser-included offense of aggravated sexual assault while armed (count two); first-degree aggravated sexual assault in the course of a kidnapping (count five); and third-degree criminal restraint (count eight). The jury found defendant not guilty of the two weapon possession charges under counts nine and ten.

On November 14, 2014, a different trial judge merged counts five and eight into count one and sentenced defendant to twenty-five years in prison, subject to the 85% parole ineligibility

provisions of the No Early Release Act, N.J.S.A. 2C:43-7.2. The judge sentenced defendant to a concurrent eight-year term on count two, ordered him to comply with all Megan's Law requirements, and imposed parole supervision for life. This appeal followed.

On appeal, defendant raises the following contentions:

> POINT I
>
> THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT DEFENDANT MOVED THE VICTIM A SUBSTANTIAL DISTANCE OR CONFINED HER FOR A SUBSTANTIAL PERIOD, REQUIRING REVERSAL OF DEFENDANT'S CONVICTIONS FOR KIDNAPPING AND SEXUAL ASSAULT IN THE COURSE OF A KIDNAPPING.
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> POINT II
>
> DEFENDANT WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO CHARGE THE JURY REGARDING THE PROPER ASSESSMENT OF THE STATEMENTS ALLEGEDLY MADE BY HIM. (Not Raised Below).
>
> POINT III
>
> THE PROSECUTOR'S IMPROPER BURDEN-SHIFTING IN SUMMATION VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS. (Not Raised Below).
>
> POINT IV
>
> THE 25-YEAR SENTENCE WITH AN 85% PAROLE DISQUALIFIER IS EXCESSIVE.

After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

We derive the following facts from the evidence produced by the parties at trial.

The victim, M.L.,[1] frequently used a bike path that was located about three or four blocks from her home to walk and ride. In the afternoon of May 22, 2005, M.L. and her husband, R.L., took a thirty-mile tandem bike ride along the path. That evening, she and her husband went to a dance recital.

When the couple returned home between 10:30 and 10:45 p.m., M.L. decided to take a walk by herself along the bike path, as she usually did twice a week "just to relax and unwind, especially when the weather was nice[,]" as it was on the evening of May 22. As she set out for her walk at approximately 11:00 p.m., M.L. anticipated that she would be away from home for about fifteen minutes.

However, as she waked along the path, M.L. suddenly heard a rustle from some bushes and a man came out and pushed her to the ground. M.L. testified that the man had a closed switchblade knife and told her "just do it or I'll hurt you." There were no lights on the bike path and M.L. was not able to see her assailant's face at that time.

[1] We use initials to protect the privacy of the victim.

M.L. screamed, "No, no, no." To silence her, the man pushed M.L. down on her knees, put his hands around her neck, and began dragging her on her stomach toward a playground.[2] Although M.L. estimated that the man only dragged her between ten to twelve feet, an agent from the Mercer County prosecutor's office later measured the distance as seventy-eight feet, six inches.

The man dragged M.L. off the bike path and into a fenced-in playground. Once he got M.L. off the path, the man threw her on a slide, showed her the knife, and placed it next to the right side of her head. M.L. testified that she caught a glimpse of her assailant as he began kissing her face. She believed the man was Hispanic because he kept saying, "Lo siento mama" to her in Spanish, which she understood to mean "I'm sorry mom."

The man pulled down M.L.'s tights and underwear and pushed her skirt up. He then penetrated her vagina with his penis. M.L. testified that the man penetrated her three different times, but did not ejaculate the first or second times he assaulted her. After he ejaculated after the third assault, defendant got off M.L. She stood and pulled her underwear and tights up. M.L. estimated that the assault lasted about twenty minutes, although "[i]t felt longer. It felt like forever."

[2] M.L. was fifty-three years old in May 2005. She was approximately five-feet, two inches tall and only weighed about 125 pounds.

M.L. had lost one of her shoes on the bike path as the man was dragging her to the playground. She asked him to help her find the shoe. The man went outside the gate "and down the path a little and he found [M.L.'s] shoe" and returned it to her. After she got the shoe, M.L. began to walk home slowly so she would not alert the man that she was going to immediately report the assault. The man left in the other direction.

About seven minutes later, M.L. got home and told her husband what had happened. R.L. immediately drove M.L. to the hospital emergency room. Later that evening, a nurse conducted a sexual assault examination, which included swabbing M.L.'s vagina for seminal fluid. M.L.'s clothes were also taken and preserved as evidence. The nurse's examination revealed that M.L. had vaginal tears and internal abrasions, as well as bruises and cuts on her knees, throat, buttocks, and back.

M.L. subsequently went to the police station on three occasions to attempt to identify her assailant from photographs. However, she was unable to do so. In January 2010, however, the police learned that the DNA found in the suspect's semen the nurse collected from M.L. matched defendant's DNA. At trial, the State presented the testimony of an expert forensic scientist confirming this match.

At trial, defendant asserted that he was seventeen years old in May 2005,[3] and was working fourteen hours a day as a cook in a restaurant. Defendant testified that he was walking home from work along the bike path around 11:00 p.m. on May 22, 2005 because he thought it was unsafe to walk on the nearby streets. As he walked, defendant stated that M.L. approached him and asked for a cigarette. Defendant asserted that M.L. then asked defendant where he was going and told him that "she wanted . . . to have sex with" him.

Defendant alleged he was reluctant to have sex with M.L., but she began to hug and kiss him. At that point, defendant stated that he and M.L. were already in the playground. They walked to the slide and defendant asserted that M.L. began unbuckling his pants. However, defendant stopped her, removed his own pants, and M.L. "took off hers." Defendant alleged that he had consensual sex with M.L. on the platform of the slide and that he ejaculated at least twice during the approximately fifteen-minute encounter.

[3] Defendant is not a resident of the United States. At trial, he asserted that he was born in 1987 and was seventeen years old in May 2005. In connection with two unrelated offenses with which he was charged in 2005, however, defendant gave authorities a 1984 date of birth. That would have made him twenty-one years old at the time of the May 22, 2005 assault. Defendant explained the discrepancy by asserting that he was "very drunk" when he originally told the police he was born in 1984 when he was arrested for the unrelated offenses.

At some point, defendant claimed that M.L. told him "to be quiet" because someone was walking along the bike path. About three or four minutes later, defendant told M.L. he had to leave. He testified that M.L. kissed him goodbye and they both left the playground. Defendant denied having a knife, threatening M.L., dragging her along the ground, or sexually assaulting her.

II.

"A person is guilty of kidnapping if he [or she] unlawfully removes another . . . a substantial distance from the vicinity where he [or she] is found" with the purpose "[t]o facilitate commission of any crime. . . ." N.J.S.A. 2C:13-1(b)(1). In Point I of his brief, defendant argues that "the State failed to present sufficient evidence that [he] moved the victim a substantial distance" and, therefore, he should not have been found guilty of kidnapping and sexual assault in the course of a kidnapping. We disagree.

As our Supreme Court has consistently held, the "substantial distance" element of N.J.S.A. 2C:13-1(b)(1) is not defined solely by "a linear measurement" of the distance a defendant moves the victim. State v. Jackson, 211 N.J. 394, 415 (2012) (quoting State v. Masino, 94 N.J. 436, 445 (1983)). Rather, the term "substantial distance" has been "defined . . . as one that 'isolates the victim

and exposes him or her to an increased risk of harm.'" Ibid. (quoting Masino, supra, 94 N.J. at 445).

For example, in Masino, the Court held that although the defendant did not move the victim very far, the "substantial distance" element was still met because the defendant isolated the victim by taking her clothing, thereby impeding her ability to "call attention to her plight." Masino, supra, 94 N.J. at 447. Similarly, in State v. Matarama, we upheld the defendant's conviction for kidnapping in a case where the victim was dragged twenty-three feet into an alley, which made it more difficult for the attack to be observed by passers-by. Supra, 306 N.J. Super. 6, 22 (App. Div. 1997), certif. denied, 153 N.J. 50 (1998).

Applying these principles here, there was clearly sufficient evidence in the record to support defendant's kidnapping and sexual assault in the course of a kidnapping convictions. Defendant dragged M.L. seventy-eight feet, six inches off a bike path into a fenced playground. Not only was this a "substantial distance" by any reasonably objective standard, defendant isolated his victim by moving her to a more secluded area, thus making it easier for him to complete his assault without being detected. Therefore, we reject defendant's contention on this point.

III.

As noted above, M.L. testified that defendant kept repeating "lo sienta mama" to her during the attack. In Point II of his brief, defendant argues that the trial judge erred by failing to give the jury a sua sponte Hampton[4] and Kociolek[5] charge concerning this statement. Again, we disagree.

Because defendant is raising this contention for the first time on appeal, he must establish that the error about which he complains rises to the level of plain error, that is, it had the capacity to result in the jury reaching a decision it might otherwise not have made. R. 2:10-2. Defendant has failed to meet this standard.

In Hampton, the Supreme Court held that when a defendant's confession is admitted in evidence, the judge shall instruct the jurors "that they should decide whether . . . the defendant's confession is true," and if they conclude that it is "not true, then they must . . . disregard it for purposes of discharging their functions as fact finders." Supra, 61 N.J. at 272. Here, defendant did not give a statement to the police and, therefore, a Hampton charge concerning the phrase he repeated to M.L. during

[4] State v. Hampton, 61 N.J. 250 (1972).

[5] State v. Kociolek, 23 N.J. 400 (1957).

the assault was not required. State v. Baldwin, 296 N.J. Super. 391, 398 (App. Div.) (holding that "a special cautionary instruction is not required when a defendant has allegedly made a voluntary inculpatory statement to a non-police witness without being subjected to any form of physical or psychological pressure"), certif. denied, 149 N.J. 143 (1997).

The trial judge also did not err by failing to give the jury a sua sponte Kociolek charge. The Kociolek charge pertains to the reliability of an inculpatory statement made by a defendant to any witness. Kociolek, supra, 23 N.J. at 421-23. As explained in Kociolek, the jury should be instructed to "'receive, weigh and consider such evidence with caution,' in view of the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." Id. at 421. However, a Kociolek charge need not be provided to the jury where "an alleged oral inculpatory statement was not made in response to police questioning, and there is no genuine issue regarding its contents, . . . because the only question the jury must determine is whether the defendant actually made the alleged inculpatory statement." Baldwin, supra, 296 N.J. Super. at 401-02.

Although our Supreme Court has directed the Kociolek charge to be given whether or not specifically requested by a defendant,

it has also determined that the failure to give this charge is not plain error per se. State v. Jordan, 147 N.J. 409, 428 (1997) (noting it would be "a rare case where failure to give a Kociolek charge alone is sufficient to constitute reversible error"). We have held that "[w]here such a charge has not been given, its absence must be viewed within the factual context of the case and the charge as a whole to determine whether its omission was capable of producing an unjust result." State v. Crumb, 307 N.J. Super. 204, 251 (App. Div. 1997) (finding "no reported case in which a failure to include a Kociolek charge has been regarded as plain error"), certif. denied, 153 N.J. 215 (1998).

Here, defendant did not make the statement in response to police questioning and there was no dispute as to the content of the statement at trial. In addition, defense counsel thoroughly cross-examined M.L. concerning her allegations, and the trial judge carefully instructed the jurors how to assess the credibility of the witnesses. In addition, the judge gave a "false in one, false in all" charge, and told the jurors that if "any witness . . . willfully or knowingly testified falsely to any material facts in this case with intent to deceive[,]" the jurors could "give such weight to his or her testimony as you may deem it is entitled. You may believe some of it or you may, in your discretion, disregard all of it."

Given the trial judge's extensive credibility instructions, we conclude that the issue of the reliability of defendant's statement to M.L. was "thoroughly and sufficiently placed before the jury." State v. Feaster, 156 N.J. 1, 73 (1998), cert. denied, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001). Thus, the judge's failure to give a Kociolek instruction was not plain error. Id. at 72-73 (finding no plain error even though the defendant's incriminating oral statements were "at the heart of the State's case against defendant").

IV.

Next, in Point III of his brief, defendant argues that the prosecutor's remarks during summation denied him a fair trial. This argument also lacks merit.

Prosecutorial misconduct is not a basis for reversal unless the conduct was so egregious that it deprived the defendant of a fair trial. State v. DiFrisco, 137 N.J. 434, 474 (1994), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996). Considerable leeway is afforded to prosecutors in presenting their arguments at trial "as long as their comments are reasonably related to the scope of the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999). When, as here, the defendant fails to object to the prosecutor's comments at trial, the allegedly "improper remarks . . . will not be deemed prejudicial." State

v. Timmendequas, 161 N.J. 515, 576 (1999), cert. denied, 534 U.S. 858, 122 S. Ct.136, 151 L. Ed. 2d 89 (2001).

Defendant first asserts that the prosecutor improperly attempted to shift the burden of proof to him by telling the jury in the portion of her summation where she discussed an abrasion to M.L.'s knee that "[t]here is no explanation as to how that cut got there, how the bruises and abrasions got there by the [d]efense." However, even though defendant's attorney did not object to the prosecutor's comment, the trial judge addressed it on his own motion and issued a forceful and comprehensive curative instruction to the jury at the conclusion of the summations.

The trial judge instructed the jury as follows:

> Ladies and gentlemen, at one point during her closing[,] [the prosecutor], in speaking about the cut on the knee, indicated that the [d]efense had offered no explanation, no contrary explanation to the cut on the knee. I simply want to instruct you at this point that the State has the burden of proving [its] charges beyond a reasonable doubt and that a defendant in a criminal case has no obligation to offer any proof whatsoever relating to his innocence.

The judge provided an additional instruction during his final charge to the jury on this point. The judge reminded the jury that "[t]he burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. The defendant in a criminal case has no

obligation or duty to prove his innocence or offer any proof relating to his innocence."

We presume that the jury followed the trial judge's comprehensive instructions on the State's burden of proof. State v. Smith, 212 N.J. 365, 409 (2012) (citing State v. Loftin, 146 N.J. 295, 390 (1996)), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). Thus, we discern no basis for disturbing the jury's verdict based upon the prosecutor's brief comment.

Defendant also complains that the prosecutor made the following comment to the jury during her summation:

> Defendant's version of what happened on May 22[,] 2005 does not make sense because it is a story. It is a fabrication. It is a lie. A lie that was made up in desperation by a man whose DNA was found five years after this brutal attack, this rape of this woman. How could he explain the evidence? How could he explain the DNA? The answer is clear. He has to convince you, the jury[,] that the sex was consensual.

However, the prosecutor's remarks challenging defendant's account of the incident were not improper. Rather, they constituted appropriate comment on defendant's testimony and the defense's overall strategy of attempting to portray the incident as a consensual sexual encounter initiated by M.L. in which defendant

was a reluctant participant. Therefore, we reject defendant's contention on this point.

V.

Finally, in Point IV of his brief, defendant argues that his sentence was excessive. We disagree.

Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65; State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984).

We are satisfied that the sentencing judge made findings of fact concerning aggravating and mitigating factors[6] that were based

[6] In a supplemental letter brief submitted pursuant to Rule 2:6-11(d), defendant cites the Supreme Court's recent decision in State v. Zuber, 227 N.J. 422, 448 (2017). In that case, the Court held that before imposing a sentence upon a juvenile that is "the practical equivalent of life without parole," the judge must

on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines enunciated in the Code. Case, supra, 220 N.J. at 65; O'Donnell, supra, 117 N.J. at 215-16. Accordingly, we discern no basis to second-guess the sentence.

Affirmed.

consider the defendant's "youth and its attendant characteristics" as set forth in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Here, however, the sentencing judge considered defendant's purported age at the time of the offense, and also did not impose a sentence that was the "practical equivalent of life without parole." Ibid.