SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4573-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JULIO C. MARCELO a/k/a
JUAN MARTINEZ, and JULIO MORCELO,

Defendant-Respondent.

Submitted October 5, 2016 – Remanded October 25, 2016
Resubmitted August 21, 2017 – Decided September 7, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 11-03-0367.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark H. Friedman, Assistant Deputy Public Defender, of counsel and on the briefs).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Lillian Kayed, Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

This case returns to us after our remand on two points. One has been resolved.[1] The other is whether there was a factual basis for the trial court's finding of an aggravating factor during defendant's sentencing proceeding. Based on the remand record, we affirm defendant's sentence.

A jury found defendant guilty of three counts of first-degree robbery and one count of second-degree possession of a weapon for an unlawful purpose, and a judge sentenced him to an aggregate, extended prison term of twenty-five years. On appeal, we remanded the case to have the court, among other things, explain certain aspects of its sentencing decision. State v. Marcelo, No. A-4573-13 (App. Div. Oct. 25, 2016).

The facts the State developed at trial are detailed in that opinion, id. (slip op. at 5-7), and need not be recounted in their entirety. Significant to this appeal, the jury convicted defendant of the gunpoint robbery of a salon. Present during the robbery were the salon owner, her son, and two Universal Beauty Products (UBP) employees. Id. (slip op. at 5). During the robbery, "[a]fter taking money from the cash register, defendant grabbed

[1] The trial court had substituted a juror after deliberations began, but there was no record of the substitution or the court's instructions to the jury after the substitution occurred. We remanded this matter so the court and the parties could reconstruct the record. The transcript was located. The issue is moot.

the salon owner's son and struck him on his chest, arm and head with the handle of the gun. The salon owner fainted for a brief period." Ibid. Law enforcement officers apprehended defendant shortly after the robbery. Id. (slip op. at 5-6).

As previously noted, the jury found defendant guilty of three counts of first-degree robbery and one count of second-degree possession of a weapon for an unlawful purpose. At sentencing, on one robbery count, the court sentenced defendant to an extended twenty-five-year custodial term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On the other two robbery counts, the court sentenced defendant on each count to a twenty-year custodial term subject to NERA, the sentences to be served concurrently to each other and to the twenty-five-year sentence imposed on count two. The court merged the weapons offense. Id. (slip op. at 4). During defendant's sentencing proceeding:

> [t]he court determined defendant was extended-term eligible as a persistent offender; found the aggravating factors enumerated in N.J.S.A. 2C:44-1(a) (1) (nature and circumstances of the offense), (3) (risk of re-offense), (6) (extent of prior criminal record and seriousness of offenses), (9) (need for deterrence), and (12) (victim was a person who defendant knew or should have known was sixty years of age or older, or disabled); and sentenced defendant to a twenty-five year prison term on one of the first-degree robbery counts.
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> [Id. (slip op. at 15).]

We concluded the trial court had not violated the sentencing guidelines and the sentence did not shock the judicial conscience. Nonetheless, we remanded the matter in part, explaining:

> Here, it does not appear the trial court violated the sentencing guidelines, and defendant's sentence does not shock the judicial conscience in light of the record. The trial court did, however, find one aggravating factor that does not appear to be supported by the record, namely, N.J.S.A. 2C:44-1(a)(12) (defendant knew or should have known a victim was age sixty or older).[2] Although in the absence of mitigating factors this may be a meaningless error, in view of the extended term sentence and the court's reasoning for imposing the sentence, we remand for the court to amplify the record by explaining the basis for its finding.
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> If the court's finding of aggravating factor twelve has no basis in the record, the issue needs to be addressed. On remand, the court shall amplify the record by explaining the basis for finding aggravating factor twelve. If there is no support in the record for this finding, the court shall explain what effect, if any, the oversight had on the court's sentencing analysis. If resentencing is appropriate, the court shall resentence defendant.
> [Id. (slip op. at 16-17).]

[2] The State appends to its brief a police report containing the age — sixty or older — of one of the victims. We assume the State obtained this document from the pre-sentence report. The trial court, however, did not reference the document when sentencing defendant. Assuming the document was the basis for the court's finding, the court did not explain either how defendant knew the victim was age sixty or older or why defendant should have known the victim was age sixty or older.

We retained jurisdiction.

The trial judge explained his reason for finding aggravating factor twelve as follows:

> I recall from the trial that one of the victims was clearly over 60. I recall that from her appearance. I don't remember who it was.
>
> I don't remember whether it was the owner of the salon or another woman who was present during the robbery. And I don't have any real way of telling who it was. But, I know that one of the victims was clearly -- a woman -- was clearly over 60. And the robbery itself was not a two minute ordeal. I don't remember exactly how long the robbery was. I guess the videotape shows it. But, it was a rather prolonged event.
>
> . . . .
>
> The victims were not wearing stockings or masks. And it had to be apparent to the defendant that one of the women -- and again, I'm not sure which one she was -- was clearly over 60. You could tell by looking at her, both in the video and her age at the time of trial was such that at the time of the robbery she was -- she couldn't look that much different. She clearly was over 60. That was the basis for it. Does anybody have a transcript of the sentencing?
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> MS. CIANCIMINO: Judge, I do.
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> THE COURT: Did the prosecutor bring that up? Did the prosecutor ask -- because I have seen a transcript of the sentencing, and I haven't listened to the CourtSmart for it. Did the prosecutor ask me to find Aggravating Factor 12?
> MS. CIANCIMINO: Judge, I believe that -- it

> seems too that Mr. Gaulkin submitted something in writing asking Your Honor to consider those aggravating factors. There was reference to something that was probably submitted to the Court.
>
> THE COURT: Okay. And there -- was something said out loud though at the sentencing by the assistant prosecutor about that?
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> MS. CIANCIMINO: Yes. Judge, Mr. Gaulkin did -- it looks like he noted in his brief to the Court, he was asking Your Honor to find Aggravating Factor 1. And then also three, six, nine and 12. And he references, as were noted on Page 2 of my letter memorandum. But, he did not go into detail regarding Aggravating Factor 12.[3]

Indisputably, "the aggravating and mitigating factors found by the sentencing court [must be] based upon competent and credible evidence in the record[.]" State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)). The issue before us, really, is what constitutes competent and credible evidence in the record; or, more specifically, what constitutes competent evidence of a victim's age for purposes of aggravating factor number twelve. Mindful that appearances can be deceiving, it is arguable that one's appearance per se can never be considered competent evidence of aggravating factor twelve. On the other hand, it may be that an elderly person's appearance is such that

[3] Contrary to our assumption in our original opinion, see n.2, supra, the police report was not part of the trial or sentencing record.

no one could reasonably dispute that the person is sixty years old or older.

Here, at sentencing, the trial court did not explain the basis for its finding of aggravating factor twelve. On remand, in addition to explaining its reasons, the trial court noted: "But, . . . she was clearly, most obviously over [sixty], not just at the time of the trial, but at the time of the robbery also. You could just see that. In fact, it was so obvious probably that's why I didn't identify her, and probably that's why . . . the assistant prosecutor didn't mention . . . which one it was."

Because there was no proof at trial concerning any of the victims' ages, and because the court at sentencing relied solely on its perception of the victims' age, the better practice would have been for the judge to discuss the issue with counsel at sentencing before making a decision. Doing so would have given defendant the opportunity to address the issue if he thought, contrary to the court's view on remand, that one could not conclude solely from the victim's appearance that she was at least sixty years old.

Having said that, we note defendant did not object to the court's finding of aggravating factor twelve at sentencing. Defendant, who was represented at trial by the same attorney who represented him at sentencing, did not contest the judge's finding

of aggravating factor twelve or dispute that the victim was obviously sixty years old. Consequently, we review the argument for plain error, that is, error clearly capable of reaching an unjust result. R. 2:10-2.

As we noted in our original opinion, the trial court found no mitigating factors when it sentenced defendant. Marcelo, supra, No. A-4573-13, (slip op. at 17). Moreover, the attorney who tried the case did not contest the court's finding of aggravating factor twelve at sentencing, and appellate counsel has submitted on the appellate record no evidence to the contrary, despite the trial court's reference to a video. For those reasons, we cannot find plain error in the trial court's finding of aggravating factor number twelve. We therefore affirm defendant's convictions and sentence.

Affirmed.