SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4815-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LAMAR G. FIELDS, a/k/a
LOMONT FIELDS,

Defendant-Appellant.

Submitted March 28, 2017 – Decided May 11, 2017

Before Judges Yannotti, Gilson and Sapp-Peterson.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 11-03-0404.

James R. Lisa, attorney for appellant.

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Eric P. Knowles, Assistant Prosecutor, on the brief).

PER CURIAM

A Hudson County grand jury returned Indictment No. 11-03-0404, charging defendant with eight counts of first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(4), and

numerous other charges arising from acts committed on September 3, 2010, and September 24, 2010. The charges were severed and tried separately. Defendant was convicted on numerous counts, and the court sentenced defendant to an aggregate term of life imprisonment, plus sixty years, with periods of parole ineligibility prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant appeals from the judgments of conviction dated May 15, 2013, and May 2, 2014. We affirm.

I.

Defendant was charged with first-degree aggravated sexual assault upon S.B., while armed with a weapon, N.J.S.A. 2C:14-2(a)(4) (count one); third-degree criminal restraint of S.B., with risk of serious bodily injury, N.J.S.A. 2C:13-2(a) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four); third-degree making terroristic threats to S.B., N.J.S.A. 2C:12-3(b) (count five); first-degree aggravated sexual assault upon S.B., while armed with a weapon, N.J.S.A. 2C:14-2(a)(4) (counts six, seven, and eight); first-degree aggravated sexual assault upon S.B., during the commission of a burglary, N.J.S.A. 2C:14-2(a)(3) (counts nine, ten, eleven, and twelve); second-degree burglary, N.J.S.A. 2C:18-2(a) (count thirteen); first-degree aggravated

sexual assault upon L.L., while armed with a weapon, N.J.S.A. 2C:14-2(a)(4) (counts fourteen, nineteen, and twenty-nine); third-degree criminal restraint of L.L., with risk of serious bodily injury, N.J.S.A. 2C:13-2(a) (count fifteen); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count sixteen); first-degree robbery, N.J.S.A. 2C:15-1(a)(1) (count seventeen); fourth-degree child abuse, cruelty, or neglect, involving L.L., N.J.S.A. 9:6-1 and 9:6-3 (count eighteen); third-degree criminal restraint of S.L., with risk of serious bodily injury, N.J.S.A. 2C:13-2(a) (count twenty); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count twenty-one); first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1) (count twenty-two); second-degree burglary, N.J.S.A. 2C:18-2(a)(1) (count twenty-three); third-degree making terroristic threats to L.L. and S.L., N.J.S.A. 2C:12-3(b) (count twenty-four); fourth-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-5(d) (count twenty-five); first-degree aggravated sexual assault upon L.L., N.J.S.A. 2C:14-2(a)(3) (counts twenty-six and twenty-seven); third-degree aggravated criminal sexual contact with S.L., during the commission of a burglary or robbery, N.J.S.A. 2C:14-3(a) (count twenty-eight); first-degree aggravated sexual assault upon S.L. during the commission of a burglary or robbery, N.J.S.A. 2C:14-2(a)(3)

(counts thirty and thirty-two); and first-degree aggravated sexual assault upon S.L., while armed with a weapon, N.J.S.A. 2C:14-2(a)(4) (count thirty-one).

The trial court severed the charges in counts one to thirteen, which pertained to S.B., and the charges in counts fourteen to thirty-two, which pertained to S.L. and L.L. The court conducted separate trials on the severed charges.

A. The Trial on Counts Fourteen to Thirty-Two

We briefly summarize the evidence presented at the first trial. On September 24, 2010, L.L. was in the kitchen of a single-family home in Jersey City, where she resided with her mother, S.L. L.L. was seventeen-years old at the time. She heard the rear screen door open, and she was confronted by a black male, who she described as about five feet, eleven inches tall.

L.L. began to scream. She wound up on the floor, with the intruder standing or kneeling above her, trying to stop her from screaming. The intruder grabbed a fork that L.L. was using to prepare food, and he raised it over her so she would stop screaming. S.L. was upstairs and heard L.L.'s screams. She came downstairs and entered the kitchen. S.L. was then sixty-five years old.

The intruder asked S.L. and L.L. for money, and L.L. gave him ten dollars. He took the money, but he was not satisfied. S.L.

offered to take him to a cash machine to withdraw more money. The intruder slapped S.L. in the face. He told her not to look at him or he would kill her if she did not do as she was told. He reached into his pocket. S.L. testified that it appeared as if he had a gun. The intruder ordered S.L. and L.L. to go to the living room, and made them remove their clothes. He placed his penis in S.L.'s mouth for several minutes. Then, he led S.L. and L.L. to the second floor of the house and directed them to L.L.'s bedroom. He had S.L. and L.L. lie down on their stomachs.

The intruder had S.L. and L.L. perform fellatio upon him, and he penetrated L.L.'s vagina with his penis. He also placed his fingers in S.L.'s vagina and he touched her breast. He apparently was unable to achieve sexual satisfaction and did not ejaculate. After he committed these acts, the intruder asked S.L. and L.L. if they had any televisions, cameras, or computers in the house. He took a laptop, camera, cellphone, and a canvas bag to carry these items. The intruder and the victims returned to the kitchen. He told S.L. and L.L. he would murder them if they told anyone what had happened.

The intruder left the house, and S.L. called 9-1-1. Officers from the Jersey City Police Department (JCPD) arrived, and the victims were taken to the hospital, where they were treated. A physical exam of L.L. noted cuts and tears to her vagina.

Investigators from the Hudson County Prosecutor's Office (HCPO) retrieved evidence from the scene, including five latent fingerprints from the door handle, a fork, a battery, a cardboard box, and the screen door. The State presented expert testimony, which indicated that defendant's fingerprint matched a latent fingerprint recovered from the scene.

The HCPO's investigators interviewed S.L. and L.L. They were each shown a photo array, which included defendant's photo. S.L. identified defendant as the perpetrator, but L.L. was not able to identify defendant. At the trial, S.L. provided an in-court identification of defendant as the individual who committed the sexual assaults and other offenses.

An officer from the JCPD contacted defendant's mother to ask about defendant's whereabouts. A warrant for defendant's arrest was issued, and on September 29, 2010, he was arrested in Brooklyn, New York. Defendant was thereafter returned to New Jersey. He told a detective from the HCPO that he did not rape anyone. Among other statements, defendant said, "[t]hese girls are just tricks that are mad because I fucked them and I didn't pay them."

Defendant did not testify on his own behalf but presented testimony from his mother, who had moved from Jersey City to Newark several years earlier. She said that her daughter still resides in Jersey City. She recalled seeing defendant in September 2010

because her daughter's birthday is September 23, 2010. She stated that she was not sure defendant attended the birthday party, but conceded that he might have been there.

The jury found defendant guilty on counts fourteen and twenty-nine (aggravated sexual assault upon L.L. while armed); sixteen (possession of a weapon for an unlawful purpose); seventeen (armed robbery); eighteen (child abuse); nineteen (aggravated sexual assault of S.L. while armed); twenty-two (armed robbery); twenty-three (burglary); twenty-four (terroristic threats); twenty-five (unlawful possession of a weapon); twenty-six, twenty-seven, and thirty (aggravated sexual assault upon L.L. in connection with the commission of a burglary or robbery); twenty-eight (aggravated criminal sexual contact with S.L. in connection with the commission of a burglary or robbery); thirty-one (aggravated sexual assault upon S.L. while armed); and thirty-two (aggravated sexual assault upon S.L. in connection with the commission of a burglary or robbery). The jury found defendant not guilty on counts fifteen and twenty (criminal restraint); and twenty-one (possession of weapon for an unlawful purpose).

The trial judge denied defendant's motion for a new trial, and granted the State's motion for imposition of an extended-term sentence pursuant to N.J.S.A. 2C:44-3(a) as a persistent offender. The judge sentenced defendant to an extended term of life

imprisonment on count fourteen, and consecutive twenty-year sentences on counts seventeen and nineteen, with periods of parole ineligibility as prescribed by NERA. The judge imposed concurrent sentences on the other counts.

The judge also ordered defendant to register as a sex offender pursuant to Megan's Law, N.J.S.A. 2C:7-1 to -23; ordered defendant to comply with Nicole's Law, N.J.S.A. 2C:14-12; imposed parole supervision for life; and required defendant to pay appropriate fines and penalties. The judge entered a judgment of conviction dated May 15, 2013. On June 12, 2013, defendant filed a notice of appeal.

B. The Trial on Counts One to Thirteen

We briefly summarize the evidence presented at the second trial. S.B. had been asleep in her basement apartment in Jersey City. She heard the bedroom door move and she went to investigate. A black male put a knife to her throat, put his hand over her mouth, and told her not to scream.

S.B. stated that the man pushed her onto her bed and tore her clothes off. He penetrated her vagina and anus with his penis. According to S.B., the man ejaculated in her vagina. He left the apartment, but S.B. remained in the bedroom. She was scared because he told her that if he saw her outside, he would kill her.

After the incident, S.B. visited the offices of the Division of Child Protection and Permanency (DCPP), and informed a caseworker that she had been raped. She said that someone had entered her basement apartment through a window. S.B. did not, however, see the face of the person who assaulted her. S.B. was taken to a hospital, where she was examined.

An officer from the JCPD responded to the hospital. S.B. described her attacker. She said he was five feet, two inches tall, and was wearing blue jeans and a white t-shirt. She did not know the person who attacked her. He came into the apartment, put a knife to her throat, threatened her, and sexually assaulted her. A detective from the HCPO went to S.B.'s apartment to investigate. The detective recovered three latent fingerprints from the window in the kitchen/living room area.

Another detective from the HCPO showed S.B. two photo arrays, one with defendant's photo and one without. S.B. was unable to identify defendant from the photo array with his picture. The State presented expert testimony indicating that defendant's fingerprint matched a latent fingerprint recovered from S.B.'s apartment. A physical examination of S.B. indicated that she had vaginal tearing.

The jury found defendant guilty on counts one and six (aggravated sexual assault while armed with a weapon); two

(criminal restraint); five (terroristic threats); nine and ten (aggravated sexual assault during the commission of a burglary); and thirteen (burglary).

The jury found defendant not guilty on counts three (possession of a weapon for an unlawful purpose); four (unlawful possession of a weapon); seven and eight (aggravated sexual assault while armed with a weapon); and eleven and twelve (aggravated sexual assault during the commission of a burglary).

The judge imposed concurrent twenty-year prison terms, with 85 percent periods of parole ineligibility, on counts one, six, nine, and ten, and ordered that the sentences be served consecutive to the sentences defendant was then serving. The judge also imposed a concurrent ten-year term, with a period of parole ineligibility as prescribed by NERA, on count thirteen. Concurrent five-year sentences were imposed on counts two and five.

The judge again ordered defendant to comply with registration under Megan's Law, required defendant to comply with Nicole's Law, and imposed parole supervision for life. Defendant was ordered to pay appropriate fines and penalties. The judge entered a judgment of conviction dated May 2, 2014, and defendant filed an amended notice of appeal on July 7, 2014.

On appeal, defendant raises the following arguments:

> Point I – The Court erred in refusing to allow Cross Examination of [Detective] Carlos Carames[.]
>
> Point II – The Defendant was deprived of a Fair Trial by Cumulative Error, including Prosecutorial Misconduct[.]
>
> Point III – The Denial of the Motion in Limine Was Improper[.]
>
> Point IV – The Sentence is Excessive[.]

II.

We first consider defendant's contention the trial judge erred by refusing to allow his attorney to cross-examine Detective Carames about certain texts.

Detective Carames was employed by the HCPO's Bureau of Criminal Identification, and the State presented him as an expert witness at both trials. At the first trial, Carames stated that he was a member of the recovery team of the Federal Bureau of Investigation (FBI), a member of the International Association of Fingerprint Examiners, and a member of the consulting team to the New Jersey State Police (NJSP) with regard to fingerprint examinations.

Carames had been provided with a latent fingerprint obtained from the residence where the offenses involving S.L. and L.L. were committed. He performed a manual comparison of the two prints and opined that the fingerprints were the same. On cross-examination,

Carames said he was familiar with a report issued by the FBI in June 2011 regarding fingerprint testimony.

Defense counsel asked Carames about the FBI report, which counsel said indicated that the FBI's fingerprint examiners are no longer allowed to testify that they are 100 percent certain that fingerprints match. The assistant prosecutor objected to the question, and the judge ruled the defendant's attorney could not question Carames about the report because it was not a recognized learned treatise on the subject.

It should be noted that earlier in the trial, the State had presented testimony from Sandra Knox, the acting assistant supervisor of the Automated Fingerprint Identification System (AFIS) unit in the NJSP. Knox was qualified as an expert in fingerprint analysis and identification. Knox testified as to her peer review of a latent fingerprint analysis performed by an examiner in the AFIS unit who had retired. Knox stated that the analysis showed that defendant's fingerprint matched a fingerprint recovered from the crime scene. She noted that there were fourteen characteristic similarities between the prints, and the NJSP uses ten characteristics as the threshold for a positive identification.

On cross-examination, defendant's attorney asked Knox if she was familiar with an article published in 2009 in the National

Academy of Sciences Journal (NASJ), entitled "Strengthening Forensic Science in the United States: A Path Forward." According to defense counsel, the article criticizes certain courts for "giving fuel to the misconception that the forensic discipline of fingerprinting is infallible[,]" and the Analysis Comparison, Evaluation and Verification methodology "does not guard against bias or produce repeatable or reliable results[.]" Knox said she was aware of the article, but she had not read it.

The assistant prosecutor objected to this line of inquiry, and the judge sustained the objection. The judge ruled that Knox did not recognize the article as a known treatise, and she said she had not read the article. The judge determined that the article could not be used for impeachment purposes.

On appeal, defendant argues that the judge erred by ruling that the FBI report and NASJ article were not learned treatises, and could not be used to impeach Detective Carames. Defendant contends that use of these texts was necessary to effectively impeach the State's experts with regard to the bias and reliability of the method used for fingerprint analysis. We disagree.

In general, "learned treatises are inadmissible hearsay when offered to prove the truth of the matter asserted therein because the author's out-of-court statements are not subject to cross-examination." Jacober v. St. Peter's Med. Ctr., 128 N.J. 475, 486

(1992). Although learned treatises are "inadmissible as substantive evidence, [they] may be used to impeach the credibility of witnesses on cross-examination." Ibid.

A learned treatise may be used for impeachment when the witness recognizes that the text is authoritative. DeGraca v. Laing, 288 N.J. Super. 292, 299 (App. Div.) (citing Jacober, supra, 128 N.J. at 498), certif. denied, 145 N.J. 372 (1996). However, if the witness does not accept the publication as authoritative, it may be shown to be a "reliable authority by experts other than the cross-examined expert, as well as by judicial notice." Jacober, supra, 128 N.J. at 409. Under Jacober, "a text will qualify as a 'reliable authority' if it represents the type of material reasonably relied on by experts in the field." Id. at 495.

In making a reliability determination, "[t]he focus should be on what the experts in fact rely on, not on whether the court thinks they should so rely." Id. at 495-96. If there is any doubt as to the reliability of the text, the court should conduct a hearing, either before or during the trial, "to determine whether the text qualifies as a learned treatise." Id. at 496.

The holding in Jacober was later reflected in N.J.R.E. 803(c)(18), which states that

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct

> examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.

As noted previously, at the first trial, Knox testified that she had not read the article published in the NASJ. Therefore, she did not acknowledge that the article was an authoritative text on fingerprint analysis. In addition, Carames did not acknowledge that the FBI report was an authoritative text on the subject of fingerprint analysis. Furthermore, defendant presented no expert testimony showing that the NASJ article or the FBI report were authoritative publications.

Because neither the NASJ article nor the FBI report qualified as a learned treatise under N.J.R.E. 803(c)(18), the trial judge correctly found that defense counsel could not cross-examine Carames using those texts. Moreover, there was insufficient testimony to raise a genuine issue as to the reliability of the article and report. Therefore, the judge was not required to conduct a N.J.R.E. 104 hearing to determine if either text qualified as a learned treatise under N.J.R.E. 803(c)(18).

III.

We next consider defendant's contention that his convictions should be reversed due to prosecutorial misconduct. Defendant argues that in both trials, the assistant prosecutor made inappropriate comments that denied him a fair trial. He further argues that he was denied a fair trial due to cumulative errors on the part of the trial judge.

When evaluating a claim of prosecutorial misconduct, the court must consider "the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 425 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). "[P]rosecutorial misconduct is not a grounds for reversal of a criminal conviction unless the conduct was so egregious as to deprive [the] defendant of a fair trial." Ibid. (citing State v. Chew, 150 N.J. 30, 84 (1997)).

In reviewing the record to determine whether a prosecutor's conduct warrants reversal of a conviction, the court "must consider several factors, including whether 'timely and proper objections' were raised; whether the offending remarks 'were withdrawn promptly,' and whether the trial court struck the remarks and provided appropriate instructions to the jury." State v. Smith, 212 N.J. 365, 403 (2012) (citations omitted) (quoting State v.

Frost, 158 N.J. 76, 83 (1999)), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013).

Here, defendant argues that in her summation in the first trial, the assistant prosecutor improperly referred to S.L.'s sexual assaults and other offenses as her personal 9/11/2001. Defendant maintains that by making this statement, the assistant prosecutor intended to inflame the jury. We note, however, that in her testimony, S.L. compared being subjected to the sexual assaults and other offenses to the events of 9/11/2001. Therefore, the assistant prosecutor's remark was a fair comment on the evidence presented at trial. See State v. Dixon, 125 N.J. 223, 259 (1991) (noting that in summation, a prosecutor may comment on the evidence and draw reasonable inferences from the proofs).

Defendant also contends that the assistant prosecutor improperly inserted her personal opinions into her summation. He points to the assistant prosecutor's remark regarding S.L.'s identification. Referring to S.L., the assistant prosecutor stated, "[t]his isn't somebody who doesn't deal with people of all races." The comment was not improper. The assistant prosecutor suggested that S.L. had the ability to identify defendant because she had resided for several years in a multi-racial neighborhood and worked in New York City. This was a reasonable inference based on S.L.'s testimony.

In addition, defendant contends the assistant prosecutor improperly attempted to have the jury believe that he was in New Jersey on September 23, 2010, the day before the offenses involving S.L. and L.L. were committed. However, the assistant prosecutor's remark was a fair comment on the evidence. As noted, defendant's mother had testified that defendant was in New Jersey in September 2010, and she indicated he might have been present at his sister's birthday party in Jersey City on September 23, 2010.

Defendant also argues that the assistant prosecutor made inappropriate remarks during the second trial. He asserts that the assistant prosecutor stated she might call defendant's mother as a rebuttal witness. Consequently, defendant's mother was not permitted to be in the courtroom during the testimony of other witnesses. Defendant asserts that the assistant prosecutor intended to bar as many of his family members from the trial as possible to give the jury the impression his family was not supporting him. However, this contention has no support in the record.

Defendant further argues that the assistant prosecutor improperly commented on the use of antidepressants. He notes that the assistant prosecutor had objected to a question that defendant's attorney asked on this subject. The assistant prosecutor withdrew her objection, but made a comment regarding

these drugs. However, the remark was made at sidebar, and could not have affected the jury's verdict in this case.

In addition, the record shows that S.B. became ill while testifying and had to leave the courtroom. During her re-direct examination of S.B., the assistant prosecutor noted that S.B. had become ill. Defendant argues that the prosecutor made an improper appeal for the jury's sympathy. We disagree. There was nothing improper about the comment.

Defendant also contends that the assistant prosecutor made improper remarks in her summation at the second trial and during the sentencing proceedings. These contentions are without sufficient merit to warrant discussion. R. 2:11-3(e)(2). We note, however, that the assistant prosecutor's comments were fair comments on the evidence, and the remarks at sentencing were not improper.

In addition, defendant argues that his conviction should be reversed due to the cumulative effect of the judge's "misplaced emphasis" on management of the jury rather than his right to a fair trial and the alleged improper remarks by the assistant prosecutor. He contends that the judge improperly moved the case at a rapid pace, and the assistant prosecutor's comments reflected a personal vendetta against him rather than the pursuit of justice.

We are convinced that these arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(2). The trial judge did not conduct the trial with undue haste. Moreover, as we have explained, the assistant prosecutor's remarks were fair comment on the evidence.

We therefore reject defendant's contentions that his convictions should be reversed due to alleged prosecutorial misconduct or cumulative error.

IV.

Defendant argues that the trial judge erred by denying his motion to compel the DCPP to produce S.B.'s medical records for an in camera review. Defendant asserts that a review of these records was warranted to determine if they would support his contention that if he had engaged in sexual activity with S.B., it was with her consent. Defendant argues that the court's denial of his motion to compel production of the records violated his right under the Sixth Amendment to the United States Constitution to confront adverse witnesses.

We note that records of the DCPP pertaining to abuse of children are confidential, but may be released if a court determines that "access to such records may be necessary for determination of an issue before" the court. N.J.S.A. 9:6-8.10(a)(6). When, as in this case, a defendant seeks the records

of a child protection agency like the DCPP, the court "must weigh the conflicting constitutional rights of criminal defendants to a fair trial and the confrontation of witnesses, against the State's compelling interest in protecting child abuse information and records." In re Z.W., 408 N.J. Super. 535, 536-37 (App. Div. 2009) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 59-61, 107 S. Ct. 989, 1002-03, 94 L. Ed. 2d 40, 58-60 (1987)).

Here, defendant sought the DCPP's records in an apparent effort to show that S.B. may have had a psychological condition called "disinhibition," which purportedly would lend credence to his claim that she engaged in sexual relations with him with consent. It appears that S.B. had some involvement with a case pending with the DCPP regarding a family member; however, it appears that the records at issue do not relate directly to the charges against defendant, and defendant's claim that S.B. consented to the sexual assaults due to "disinhibition" rests on speculation.

We conclude that in view of the strong public policy to ensure the confidentiality of the DCPP's records regarding children, the judge did not err by denying defendant's motion to compel production of the DCPP's records. We reject defendant's contention that the judge's ruling violated his right to confrontation under the Sixth Amendment.

V.

Defendant argues that his sentence is excessive. He contends the judge erred by imposing an extended-term sentence. He also contends the judge erred by failing to merge certain offenses for sentencing.[1]

Initially, we note that the scope of our review of the trial court's "sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We may not set aside a sentence unless (1) the trial court did not follow the sentencing guidelines; (2) the court's findings of aggravating and mitigating factors were not based upon sufficient credible evidence in the record; or (3) the court's application of the sentencing guidelines to the facts of the case "shock[s] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Defendant argues that the judge erred by granting the State's motion for imposition of an extended term sentence pursuant to N.J.S.A. 2C:44-3(a), on the ground that he is a persistent

[1] We note that in its brief, the State asserts that defendant's "ultimate" sentence is life plus forty years. However, the record shows that the sentence imposed after the first trial was life plus forty years, and a consecutive sentence of twenty years was imposed after the second trial. Thus, defendant's aggregate sentence is life imprisonment, plus sixty years.

offender. The trial judge correctly determined that defendant qualified for an extended-term sentence. We reject defendant's contention that an extended term should not have been imposed because his prior convictions were not for violent offenses. The statute imposes no such requirement.

Defendant also argues that the extended term of life imprisonment is excessive. Here, the judge found aggravating factors one, N.J.S.A. 2C:44-1(a)(1) (nature and circumstances of the offense, including whether or not it was committed in a heinous, cruel, or depraved manner); two, N.J.S.A. 2C:44-1(a)(2) (gravity and seriousness of harm to the victim); three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (extent of defendant's prior criminal record); nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law); and twelve, N.J.S.A. 2C:44-1(a)(12) (defendant knew or should have known that a victim was sixty years or older). The judge found no mitigating factors. There is sufficient credible evidence in the record to support the judge's findings. In view of the court's findings, the imposition of an extended term of life imprisonment was not an abuse of the trial court's sentencing discretion.

Defendant further argues that the judge erred by failing to merge certain offenses. He contends that count fourteen should

have merged with count twenty-six, and count twenty-nine should have merged with count thirty.

In count fourteen, defendant was charged with vaginal penetration of L.L. while armed with a weapon, and in count twenty-six, he was charged with vaginal penetration of L.L. during the commission of a burglary or robbery. In count twenty-nine, defendant was charged with an act of sexual penetration of L.L. (fellatio) while armed with a weapon, and in count thirty, defendant was charged with an act of sexual penetration of L.L. (fellatio) during the commission of a burglary or robbery.

Defendant notes that the sexual acts charged in counts fourteen and twenty-six, and those charged in counts twenty-nine and thirty are the same. He therefore argues that the offenses should have merged for sentencing. We agree. Imposition of separate sentences on all four counts, which involved two separate acts of sexual penetration, is inconsistent with the principle that "[i]f an accused has committed only one offense he cannot be punished as if for two." State v. Davis, 68 N.J. 69, 77 (1975).

We emphasize, however, that separate sentences were appropriate for the underlying offenses of unlawful possession of a weapon and burglary because the aggravated sexual assaults are "separate and distinct from the underlying offenses." State v. Cole, 120 N.J. 321, 332 (1990). We also note that the merger of

the offenses will not affect the aggregate term of incarceration imposed.

We reach the same conclusion with regard to the charges in counts nineteen and twenty-seven; counts thirty-one and thirty-two; and counts one and nine. In count nineteen, defendant was charged with an act of sexual penetration of S.L. (fellatio) while armed with a weapon, and in count twenty-seven, he was charged with an act of sexual penetration of S.L. (fellatio) during the commission of a burglary or robbery. In count thirty-one, defendant was charged with the digital penetration of S.L., while armed with a weapon, and in count thirty-two, he was charged with the digital penetration of S.L., during the commission of a burglary or robbery. We conclude that, because counts nineteen and twenty-seven involved the same sexual act, count nineteen should have merged with count twenty-seven. Similarly, count thirty-one should have merged with count thirty-two. Merger was not, however, required with the underlying offenses of unlawful possession of a weapon and burglary.

For the same reason, the court should have merged counts one and nine, and counts six and ten. Count one charged defendant with vaginal penetration, risk of serious bodily harm, upon S.B.; and count nine charged defendant with vaginal penetration, during the commission of a burglary. In addition, count six charged defendant

with anal penetration, while armed with a weapon, and count ten charged defendant with anal penetration, during the commission of a burglary. The sexual acts charged in counts one and nine, and in counts six and ten are the same. Therefore, the court should have merged counts one and nine, and six and ten for sentencing. Again, merger was not required with the underlying offenses of unlawful possession of a weapon and burglary.

Accordingly, we affirm defendant's convictions, and the sentences imposed, with the exception of the sentences imposed on counts nine, ten, twenty-six, twenty-seven, thirty, and thirty-two. We remand the matter to the trial court for entry of amended judgments of conviction merging the offenses in accordance with this opinion. We do not retain jurisdiction.