SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5771-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BOLSANO M. MALDONADO, a/k/a
BULTRARO MARTINEZ, LUIS ORTEGA,
ROLSANO MALDONADO,

Defendant-Appellant.

Submitted January 25, 2017 – Decided March 23, 2017

Before Judges Accurso and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 12-12-2918.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Bolsano Maldonado was convicted of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1)(count two); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four); and third-degree possession of weapon for unlawful purpose, N.J.S.A. 2C:39-4(d) (count five). On August 3, 2015, defendant received an aggregate sentence of nine years and six-months imprisonment, subject to the No Early Release Act (NERA), requiring he serve eighty-five percent of his sentence before becoming eligible for parole. N.J.S.A. 2C:43-7.2(a). Defendant appeals and we affirm.

We derive the following facts from the trial record. In June 2012, defendant and A.T. were involved in a romantic relationship. They resided together in an apartment in Newark.[1] After defendant and A.T. ended their relationship, A.T. took up residence in a first-floor apartment at the same address.

On June 12, 2012, A.T. and Daniela Rosales (Rosales) attended a party on Mt. Prospect Avenue in Newark. After the party, Rosales walked A.T. home. As the two neared A.T.'s home, defendant emerged and approached A.T. saying, "[c]ome my love," and then proceeded to hug her. As defendant hugged A.T., he began stabbing her.

[1] Defendant was an undocumented alien having emigrated from Mexico.

Rosales called the Newark Police. Upon their arrival at the scene, the police called for an ambulance. A.T. was taken to the University of Medicine and Dentistry of New Jersey (UMDNJ) hospital in Newark where she underwent surgery for her wounds. She had been stabbed three times, causing nine puncture wounds in her intestines. A.T. was hospitalized for eight days. Shortly after her release, she was readmitted due to an infection.

While A.T. was recovering, Detective Miguel Aviles from the Newark Police, Special Victims Unit, went to the hospital to obtain statements from A.T. and Rosales. Rosales had obtained a "chip" from a cell phone that contained a photo of defendant, which she gave to the detectives. Both women later identified defendant as A.T.'s assailant and ex-boyfriend during their trial testimony.

At trial, Karen Reavis (Reavis), a physician's assistant from UMDNJ, was called as a witness by the State. Subsequent to her qualification as an expert, the judge provided the jury, during her testimony, with an instruction regarding expert witness testimony. The same instruction was not provided when the judge gave its final charge to the jury. There was no objection to the jury charge.

The presentence report prepared by the Essex County Probation Department did not credit defendant for thirty-seven days served from July 19 to August 24, 2012, or the sixty-one days served

following a municipal detainer.

At the time of sentence, the judge found aggravating factors three, the risk of future criminal conduct, N.J.S.A. 2C:44-1(a)(3); and nine, the need to deter defendant from violating other laws, N.J.S.A. 2C:44-1(a)(9). The judge found no mitigating factors.

On appeal, defendant raises the following points:

POINT I

> THE TRIAL COURT ERRED BY FAILING TO INSTURCT THE JURY AS TO HOW IT SHOULD WEIGH THE TESTIMONY OF THE STATE'S EXPERT WITNESS WHO WAS CALLED AS A WITNESS BY THE STATE TO PROVE SERIOUS BODILY INJURY, AN ELEMENT OF COUNT TWO CONTESTED BY THE DEFENSE. (Not Raised Below)

POINT II

> DEFENDANT'S SENTENCE WAS EXCESSIVE AND CONSTITUTED AN ABUSE OF DISCRETION, REQUIRING HIS SENTENCE BE VACATED AND THE CASE REMANDED TO THE TRIAL COURT FOR A NEW SENTENCE HEARING.

POINT III

> DEFENDANT'S CASE MUST BE REMANDED TO THE LAW DIVISION WITH AN ORDER THAT AN AMENDED JUDGMENT OF CONVICTION BE PRODUCED THAT ACCURATELY REFLECTS THE JAIL CREDIT AWARDED TO DEFENDANT AT HIS SENTENCE HEARING.

Defendant argues that the trial court erred by failing to instruct the jury how it should consider and weigh the testimony of Reavis, who was called by the State to prove serious bodily injury. We commence by noting that at trial, there was no

objection to the jury instructions. Consequently, we review the instruction under the plain error standard whereby we disregard error unless it is "clearly capable of producing an unjust result." R. 2:10-2.

Although Reavis was qualified as an expert witness, the judge limited the scope of her testimony to defining medical terms from A.T.'s medical reports. The judge did not permit Reavis to testify about causation, diagnosis, and whether A.T.'s injuries were life threatening. As such, despite her qualification as an expert, Reavis did not offer expert testimony. Consequently, the expert-witness charge was not required in the final jury instructions, as there was no expert testimony for the jurors to consider and weigh. It was therefore not error, that the judge did not provide the instruction.

Defendant next argues that the sentence was excessive and constituted an abuse of discretion. We review the trial court's sentencing decisions under an abuse of discretion standard. State v. Blackmon, 202 N.J. 283, 297 (2010). Pursuant to N.J.S.A. 2C:44-1, a trial court must consider statutory aggravating and mitigating factors. State v. Bieniek, 200 N.J. 601, 608 (2010). After a proper balancing of the relevant factors, "the trial court may impose a term within the permissible range for the offense." Ibid. However, the trial court must explain the reason underlying the

findings. R. 3:21-4(g).

In reviewing a sentence, "[a]n appellate court is not to substitute its assessment of aggravating and mitigating factors for that of the trial court." Bieniek, supra, 200 N.J. at 608 (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). "Appellate review of a sentence is restricted to whether the determination of the sentencing factors was appropriate, whether the determination was supported by competent evidence in the record, and whether the sentence is so unreasonable that is shocks the judicial conscience." State v. Paduani, 307 N.J. Super. 134, 148 (App. Div.) (citations omitted), certif. denied, 153 N.J. 216 (1998).

When reviewing the trial court's sentence, we must ensure that the trial court followed the sentencing guidelines promulgated in the criminal code. State v. Roth, 95 N.J. 334, 365 (1984). Specifically, we must (1) "require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence"; (2) "require that the factfinder apply correct legal principles in exercising its discretion"; and (3) modify sentences only when the facts and law show "such a clear error of judgment that it shocks the judicial conscience." Id. at 363-64.

The judge's finding of aggravating factors three and nine is

well-supported in the record. The judge found the risk of future criminal conduct was exacerbated by defendant's failure to admit responsibility and by his unwillingness to comply with the laws of our country based upon his three illegal entries. A sentencing judge's reference to a defendant's failure to admit his guilt does not warrant reversal unless there is evidence suggesting the failure to admit guilt enhanced the defendant's sentence. See State v. Poteet, 61 N.J. 493, 499 (1972).

On this score, we note the sentence imposed of nine years and six-months imprisonment subject to NERA falls within the sentencing guidelines. While, arguably, the sentence was "influenced" by defendant's failure to acknowledge his criminal conduct, we cannot conclude the sentence was "enhanced" on this basis.

Defendant next argues he is entitled to an additional ninety-seven days of jail credit. We disagree. The thirty-seven days defendant served from, July 19 to August 24, 2012, did not accrue due to his arrest but due to his pending deportation. R. 3:21-8 (credit for any time served in custody in jail or in a state hospital between arrest and imposition of sentence). Further, the immigration process is civil in nature and does not provide for credits against a criminal sentence. Harisiades v. Shaughnessy, 342 U.S. 580, 594, 72 S. Ct. 512, 521, 96 L.Ed. 586, 601 (1952).

Finally, the sixty-one days credit for which defendant claims entitlement from October 19 to December 19, 2012, is unsupported. In refutation of this claim, the record reflects the municipal detainer was lodged against defendant on December 20, 2012, and satisfied on December 31, 2012.

Affirmed.