SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0736-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.B.,

Defendant-Appellant.

Submitted September 25, 2017 – Decided January 10, 2018

Before Judges Accurso, O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 13-06-1250.

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

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

PER CURIAM

Defendant R.B.[1] appeals from his conviction and sentence following a jury trial for aggravated sexual assault, sexual assault, endangering the welfare of a child and distribution of opiates. Having reviewed the record and the applicable law, we affirm in part, vacate in part and remand for further proceedings.

I.

The charges against defendant arose from allegations he drugged and sexually assaulted Barbara, the juvenile daughter of his long-term girlfriend Tonya. Defendant was charged in an indictment[2] with first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (count one); second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count two); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count three); fourth-degree child abuse, N.J.S.A. 9:6-1 (count four); first-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(3) (count five); fourth-degree child abuse, N.J.S.A. 9:6-1 (count six); third-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-

[1] We employ initials and pseudonyms for defendant, the juvenile victim and the victim's family members to protect the victim's privacy. See N.J.S.A. 2A:82-46(a).

[2] Prior to trial, the indictment was amended without objection. Count two was amended to allege the sexual assault was committed between "May 2010 through May 2012." Count five was amended to allege a violation of "N.J.S.A. 2C:24-4(b)(3)." Count seven, which originally alleged distribution of benzodiazepines and opiates, was amended to allege distribution of opiates.

5(a)(1) and N.J.S.A. 2C:35-5(b)(5) (count seven); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count eight); and fourth-degree child abuse, N.J.S.A. 9:6-3 (count nine).

Prior to trial, the court granted the State's motion to dismiss counts four, six, and nine, each of which charged fourth-degree child abuse. Defendant was tried before a jury on the remaining six counts.

The trial evidence showed that Barbara was born on May 20, 1999. Tonya and defendant started dating in 2000 and in 2008, defendant began staying at Tonya's apartment. Defendant and Tonya had two children together, Richard and Jamie. They lived in Tonya's apartment with Tonya and Barbara.

Defendant worked as a truck driver and was away during the week, but stayed in the apartment with Tonya and the three children on the weekends. Defendant had a room at his mother's house as well, but had a key to Tonya's apartment. Defendant went to the apartment each week late on Friday or early Saturday and left Sunday night or early Monday morning.

Tonya worked every other Saturday from 8 a.m. to 2 p.m. Barbara testified that when her mother was not home, defendant was "in charge." Richard testified that Tonya and defendant were "in charge" at home. Tonya explained that she and defendant made the

rules in the house and disciplined the children. She "normally handle[d] anything that [occurred] with the children" because defendant was not present during the week, but on the weekends, she and defendant shared those responsibilities. On the weekends, Tonya, defendant and the three children went out as a family to eat, to the shore, or to the movies.

Barbara shared a bedroom with Richard and Jamie, and Tonya and defendant slept in the apartment's other bedroom. Barbara shared a bunk bed with her sister Jamie, and Richard slept on a separate single bed.

Barbara testified that defendant had a history of giving her pills. Defendant gave her pills on the weekends "[e]very time he [came] home." Defendant told her the pills "prevent[ed] [her] from getting sick" and she believed they did. The pills made her feel dizzy or tired. Sometimes, the pills made her feel like she was "in a daze" when she woke up.

Barbara also testified that on one occasion when she was ten or eleven years old, she felt someone touching her as she slept in her bed. She opened her eyes and saw defendant lift up her panties, open her vagina, and take pictures. Barbara said, "What are you doing?" and defendant "darted out the room."

About a year later, when Barbara was eleven or twelve, she was in her bed sleeping when she realized defendant was on top of

her. She said, "Get off of me," and he told her, "Shhh" and to give him a kiss. She said, "Okay, just get off of me." He said, "If you give me a kiss and I'll get off of you." Barbara kissed defendant on the lips and he said, "Give me a hug," and she did. Barbara said "just get off of me." He said "give me one more kiss." She kissed defendant again and he left.

On the evening of Saturday, June 9, 2012, Tonya, defendant and the three children were at the apartment. Barbara, who turned thirteen three weeks earlier, sat at the computer in the living room. While Tonya was in her bedroom, defendant gave Barbara "four or five or six pills," which were many more than he normally gave her. He said, "Here, take these pills." Barbara took the pills and then felt tired. She recalled walking to her bed and next remembered waking up in an ambulance.

On Sunday morning, June 10, 2012, eleven-year-old Richard awoke and saw Barbara lying on the floor of their bedroom. Richard also saw defendant, who had just entered the room, lift Barbara from the floor and place her on Richard's bed. Richard went to Tonya's room and told her that something was wrong with Barbara. Tonya went to the children's bedroom and saw that Barbara was unresponsive. Defendant called 9-1-1.

Paramedics arrived and found Barbara unresponsive and secreting fluids from her mouth. They brought Barbara by ambulance to the Jersey City Medical Center.

Barbara was in critical condition upon her arrival at the hospital. She was later transferred to the pediatric intensive care unit at Newark Beth Israel Hospital where she remained for four days until her discharge. Tests performed showed she had opiates in her system. The Department of Child Protection and Permanency was called and Barbara reported to a caseworker that defendant had touched her inappropriately in the past.

A physician at Newark Beth Israel Hospital, who was qualified at trial as an expert in pediatrics and child abuse pediatrics, performed a complete physical examination of Barbara and took vaginal swabs to collect possible evidence of a sexual assault. She opined Barbara had suffered an overdose of opiates that changed her mental status and her respiratory functionality. She explained that opiates could cause a patient to be so mentally compromised that the patient is unaware of what is happening.

DNA from sperm cells found on the vaginal swabs was compared to defendant's and Barbara's DNA. A forensic scientist testified that Barbara and defendant could not be excluded as contributors to the DNA found. The expert also explained it was 18.3 million more times likely the DNA found was defendant's as compared to the

African-American population, 208 million times more likely as compared to the Caucasian population, and 26.2 million times more likely as compared to the Hispanic population. The analyst explained that "when you have a likelihood ratio greater than 1,000, that lends very strong support" that it is the person's DNA.

Barbara testified she had never had sex, and did not know how the sperm and DNA entered her vagina. She also testified defendant touched her on other occasions "when he came home from work on the weekend" but she could not recall how many other times it occurred or when the other occurrences took place. She did not, however, provide any facts concerning any other alleged inappropriate touching or assaults by defendant.

The jury found defendant guilty on the six charges in the indictment. Defendant did not file a motion for a new trial. See R. 3:20-2. The judge sentenced defendant to an aggregate custodial term of forty-five years, thirty of which were subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2. This appeal followed.

POINT I

THE CONVICTION UNDER COUNT 2 FOR SECOND-DEGREE SEXUAL ASSAULT UNDER [N.J.S.A.] 2C:14-2(b) MUST BE REVERSED BECAUSE THE JURY WAS ALOWED TO CONVICT DEFENDANT WITHOUT NECESSARILY FINDING THE ESSENTIAL ELEMENT THAT THE VICTIM

WAS "LESS THATN 13 YEARS OLD" AT THE TIME OF THE OFFENSE. (Not Raised Below).

POINT II

THE CONVICTION UNDER COUNT 1 FOR FIRST-DEGREE SEXUAL ASSAULT UNDER [N.J.S.A.] 2C:14-2(a)(2)(c) MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENT THAT DEFENDANT "WAS A FAMILY PARENT, A GUARDIAN, OR STANDS IN LOCO PARENTIS WITHIN THE HOUSEHOLD." (Not Raised Below).

POINT III

CONVICTION UNDER COUNT 5 FOR FIRST-DEGREE CHILD ENDANGERING UNDER [N.J.S.A.] 2C:24-4(b)(3) MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE THE ELEMENT THAT ELEVATED THE OFFENSE TO A FIRST-DEGREE CRIME: THAT DEFENDANT WAS THE CHILD'S "PARENT, GUARDIAN OR OTHER PERSON LEGALLY CHARGED WITH THE CARE AND CUSTODY OF THE CHILD"; AND BECAUSE THE COURT FAILED TO DEFINE "GUARDIAN." (Not Raised Below).

POINT IV

THE CONVICTIONS FOR SECOND-DEGREE CHILD ENDANGERING UNDER [N.J.S.A.] 2C:24-4(a)(1), CHARGED IN COUNT 3, AND UNDER [N.J.S.A.] 2C:24-4(a)(2), CHARGED IN COUNT 8, MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE THE ELEMENT THAT ELEVATED BOTH OFFENESES TO SECOND-DEGREE CRIMES: THAT DEFENDANT HAD A "LEGAL DUTY FOR THE CARE OF [THE] CHILD OR . . . HA[D] ASSUMED RESPONSIBILITY FOR [HER] CARE." (Not Raised Below).

POINT V

THE MATTER SHOULD BE REMANDED FOR A NEW SENTENCING HEARING BECAUSE THE SENTENCE OF [FORTY-FIVE] YEARS, [WITH TWENTY-FIVE AND ONE-

HALF] YEARS WITHOUT PAROLE, IS EXCESSIVE AND BASED ON IMPROPER AGGRAVATING FACTORS.

II.

Defendant first argues the State failed to prove an essential element of the second-degree sexual assault, N.J.S.A. 2C:14-2(b), alleged in count two: that Barbara was less than thirteen years old when the alleged assault occurred. Defendant claims because count two alleged defendant sexually abused Barbara from "May 2010 through May 2012," and Barbara turned thirteen on May 20, 2012, the jury's verdict on this count may not have been unanimous and the jury may have convicted defendant based on an incident occurring between May 20 and 30, 2012, when Barbara was over the age of thirteen. We find no merit in defendant's contention.

"The notion of unanimity requires 'jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Cagno, 211 N.J. 488, 516 (2012) (quoting State v. Frisby, 174 N.J. 583, 596 (2002)). "Ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict." Ibid. (quoting State v. Parker, 124 N.J. 628, 641 (1991)).

However, "[t]here may be circumstances in which it appears that a genuine possibility of jury confusion exists or that a

conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts." Id. at 516-17 (quoting Parker, 124 N.J. at 641). Such circumstances include when: "(1) a single crime could be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or marginally related to each other; (4) the indictment and proof at trial varies; or (5) there is strong evidence of jury confusion." Id. at 517; see also Parker, 124 N.J. at 635-36. Generally, "in cases where there is a danger of a fragmented verdict the trial court must upon request offer a specific unanimity instruction." Cagno, 211 N.J. at 517 (quoting Frisby, 174 N.J. at 597-98).

We do not find here any of the circumstances the Court in Frisby noted might require a specific unanimity instruction. The facts supporting the sexual assault charge were simple. Barbara could only recall, and only testified about, two incidents of sexual assault with defendant occurring prior to her May 20, 2012 thirteenth birthday. The first occurred when she was ten or eleven, and the second occurred a year later. There was no evidence that defendant assaulted Barbara at any time during the

three week period following her thirteenth birthday and prior to the June 2012 incident that was the subject of other charges in the indictment.

In addition, as part of its jury instructions on the sexual assault alleged in count two, the court explained that the State was required to prove beyond a reasonable doubt that Barbara "was less than [thirteen] at the time of the sexual contact." The court further instructed that

> [t]he second element the State must prove beyond a reasonable doubt is that [Barbara] was less than 13 years old at the time the sexual conduct occurred. The State must prove only the age of [Barbara] at the time of the offense beyond a reasonable doubt. It does not have to prove that the defendant knew or reasonable should have known [Barbara] was under 13.

The jury was also instructed its verdict on the charge must be unanimous. The judge told the jury that its verdict "must be unanimous as to each charge," which means that all jurors "must agree if the defendant is guilty or not guilty on each charge."

The record is devoid of any evidence showing a "genuine possibility of jury confusion" or that defendant's conviction of the second-degree sexual assault occurred "as a result of different jurors concluding that a defendant committed conceptually distinct acts." Cagno, 211 N.J. at 516-17; see also State v. T.C., 347 N.J. Super. 219, 243-44 (App. Div. 2002)

(finding there was no need for a specific unanimity instruction because "[t]here was but one theory of ongoing emotional and physical abuse over a period of time, which consisted of a number of 'conceptually similar acts committed by the defendant'").

The evidence supported the jury's determination that defendant committed a second-degree sexual assault prior to Barbara's thirteenth birthday and there was no evidence permitting a finding defendant sexually assaulted Barbara between May 20 and May 30, 2012. The court carefully and clearly instructed the jury that it must be unanimous and there was no objection to the instruction at trial. We presume the jury followed the instructions given by the court, see State v. Winder, 200 N.J. 231, 256 (2009), and defendant presents no evidence or argument supporting an abandonment of that presumption here. We therefore find no basis to reverse defendant's conviction for second-degree sexual assault under count two based on any purported error in failing to provide a specific unanimity instruction.

III.

Defendant next claims his conviction for first-degree aggravated sexual assault under count one should be reversed because the State failed to present sufficient evidence establishing an essential element of the crime: that he stood in loco parentis to Barbara when the June 2012 incident occurred.

See N.J.S.A. 2C:14-2(a)(2)(c). The State asserts the evidence established beyond any reasonable doubt that defendant stood in loco parentis to Barbara and, therefore, there is no basis to reverse defendant's conviction of the offense.

A claim the State failed to present sufficient evidence supporting defendant's conviction is not cognizable on appeal unless the defendant made a new trial motion before the trial court on that ground within ten days after the jury verdict. R. 2:10-1; R. 3:20-2. Thus, defendant's contention the evidence was insufficient to sustain his conviction for first-degree sexual assault "is procedurally barred because defendant failed to move for a new trial based on that ground as required by Rule 2:10-1." State v. Reininger, 430 N.J. Super. 517, 538 (App. Div. 2013). For that reason alone, we affirm defendant's conviction for first-degree sexual assault under count one.

Nevertheless, we have considered the merits of defendant's argument and are unpersuaded. "Faith in the ability of a jury to examine evidence critically and to apply the law impartially serves as a cornerstone of our system of criminal justice." State v. Faucette, 439 N.J. Super. 241, 269 (App. Div. 2015) (quoting State v. Afanador, 134 N.J. 162, 178 (1993)). A "conviction should not be disturbed on appeal 'unless it clearly appears that there was a miscarriage of justice under the law.'" State v. Jackson, 211

N.J. 394, 413 (2012) (quoting R. 2:10-1). Similarly, Rule 3:20-1 provides that a court "shall not . . . set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." There is no "miscarriage of justice" when "'any trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present.'" Jackson, 211 N.J. at 413-14 (quoting Afanador, 134 N.J. at 178). Applying these principles, we are satisfied there was sufficient evidence upon which a rational trier of fact could conclude the State proved beyond a reasonable doubt that in June 2012 defendant stood in loco parentis to Barbara.

Under N.J.S.A. 2C:14-2(a)(2)(c), "[a]n actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person" if "[t]he victim is at least 13 but less than 16" and "[t]he actor is a resource family parent, a guardian, or stands in loco parentis within the household."[3] "In loco parentis literally translated means 'in the place of a

[3] The State does not argue that defendant was "a resource family parent[] [or] guardian" of Barbara when the June 2012 incident occurred.

parent.'" Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 91 (2006) (quoting Black's Law Dictionary 803 (8th ed. 2004)). "Black's Law Dictionary further describes the phrase as 'relating to, or acting as a temporary guardian or caregiver of a child, taking on all or some of the responsibilities of a parent.'" Ibid. (quoting Black's Law Dictionary, at 803).

A person stands in loco parentis to a child when he or she "put[s] himself [or herself] in the situation of the lawful father [or mother] of the child with reference to the father's [or mother's] office and duty of making provision for the child." Cumberland Cty. Bd. of Soc. Servs. v. W.J.P., 333 N.J. Super. 362, 366 (App. Div. 2000) (quoting D. v. D., 56 N.J. Super. 357, 361 (App. Div. 1959)). Generally, the person "function[s] as a parent," including "'the responsibility to maintain, rear and educate the child,' as well as the duties of 'supervision, care and rehabilitation.'" Hardwicke, 188 N.J. at 91 (quoting Dale v. B.S.A., 160 N.J. 562, 602 (1999), rev'd on other grounds, 530 U.S. 640 (2000)).

Here, the court correctly instructed the jury in accordance with the Model Jury Charge, which is consistent with the Court's holding in Hardwicke, 188 N.J. at 91. The jury was instructed the State had to prove "that defendant is a guardian or stands in loco parentis within the household of [Barbara]," and explained that

> [an] in loco parentis relationship occurs when a person acts as a temporary guardian or caregiver of a child, taking on all or some of the responsibilities of a parent. One of the factors you may consider to determine whether the defendant stood in loco parentis during the relevant period or whether defendant took on the responsibility to maintain, rear, educate [Barbara], as well as the duties of supervision, care [ ] and rehabilitation of [Barbara].

The evidence showed that although defendant had a room available to him at his mother's home, he traveled during the week and, commencing in 2008 and continuing through the commission of the sexual assault upon Barbara in June 2012, he returned to Tonya's apartment each weekend. Barbara, Tonya, and defendant and Tonya's two children resided in the apartment. The evidence supports the reasonable inference that he resided with them when he was not travelling for work.

When defendant was in the home, he, Tonya and the three children functioned as a family unit, with defendant fulfilling the role of parental figure. They went out to eat, to the shore, and to the movies as a family. Defendant and Tonya disciplined the children, including Barbara, and the evidence showed that he and Tonya were "in charge" of the home and children. When Tonya worked on Saturdays, defendant stayed at the apartment with the children and solely cared for and supervised them. Tonya testified they shared responsibility for all of the children.

Defendant also portrayed himself to Barbara as a parental figure. For years, he routinely gave her pills under the guise of administering medications as her caretaker. He told her the pills would prevent her from becoming sick and she took the pills because he presented himself as her caregiver and, for that reason, she believed him.

Defendant was such a consistent presence in Barbara's life that she referred to him as her stepfather and described him as "another father in [her] life." She asked him for money when she needed it, and he gave her money when she requested it. Defendant was not a babysitter or an occasional or temporary caretaker. The evidence showed he consistently resided in the home over a period of years, functioned as an integral part of Barbara's family unit, and in various ways supervised, cared for and provided for Barbara.

There was sufficient evidence upon which a rational fact-finder could find beyond a reasonable doubt that defendant "[took] on all or some of the responsibilities of a parent" and "function[ed] as a parent." Ibid. And the jurors were permitted to use their personal experience and common sense to identify the characteristics of a parental relationship. See State v. Vick, 117 N.J. 288, 291-92 (1989). The jury's verdict on count one is supported by sufficient evidence, does not constitute a

miscarriage of justice, and is affirmed. See Jackson, 211 N.J. at 413-14.

IV.

Defendant was charged in count five with first-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(3), by causing or permitting Barbara to engage in a prohibited sexual act that defendant knew or had reason to know or intended would be photographed, filmed, reproduced or reconstructed. It was alleged the crime was committed between May 2010 through May 2012, when defendant took photographs of Barbara's vagina.

At the time the offense alleged in count five was committed, it constituted a first-degree crime only if it was committed by "a parent, guardian or other person legally charged with the care or custody to the child" victim. N.J.S.A. 2C:24-4(b)(3) (2012).[4] Otherwise, commission of the crime constituted a second-degree offense. Ibid.

On appeal, defendant does not challenge the sufficiency of the evidence proving he photographed Barbara's vagina or that he committed a second-degree crime under N.J.S.A. 2C:24-4(b)(3) (2012). Instead, he argues the State failed to prove he was "a

[4] In 2013, the statute was amended to make the proscribed conduct a first-degree crime regardless of the relationship between the child and the defendant. L. 2013 C. 136 §1; See N.J.S.A. 2C:24-4(b)(3) (2013).

parent, guardian, or other person legally charged with the care or custody of" Barbara and, therefore, the jury incorrectly determined he committed a first-degree offense.

Again, defendant's challenge to the sufficiency of the evidence is otherwise procedurally barred because he failed to make a new trial motion before the trial court. R. 2:10-1; R. 3:20-2; see also Reininger, 430 N.J. Super. at 538. However, because defendant also challenges the sufficiency of the court's jury instructions, we address the merits of his contentions. We note, however, that because the challenge to the jury charge was not raised to the trial court, we review for plain error, and "disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2).

N.J.S.A. 2C:24-4(b)(3) (2012) provides,[5]

> A person commits a crime of the second degree if he causes or permits a child to engage in a prohibited sexual act or in the simulation of such an act if the person knows, has reason to know or intends that the prohibited act may be photographed, filmed, reproduced, or reconstructed in any manner, including on the Internet, or may be part of an exhibition or performance.

[5] We quote the 2012 version of N.J.S.A. 2C:24-4(b)(3) under which defendant was charged.

Pertinent here is the portion of the statute that defines when the commission of the offense constitutes a first-degree crime. N.J.S.A. 2C:24-4(b)(3) (2012) further provides:

> If the person is a parent, guardian or other person legally charged with the care or custody of the child, the person shall be guilty of a crime of the first degree.

Thus, a conviction for a first-degree offense under the statute required the jury to determine if a defendant was a "parent, guardian or other person legally charged with the care or custody of the child." N.J.S.A. 2C:24-4(b)(3).

At trial, and again in its brief on appeal, defendant acknowledges he "was not a 'person legally charged with the care or custody of'" Barbara. Instead, the State contends defendant was properly convicted of the first-degree offense because he was either Barbara's parent or guardian.

Consistent with the State's position, the court instructed the jury that it should convict defendant of the first-degree offense if it found beyond a reasonable doubt that when defendant committed the offense he was Barbara's parent or guardian. More particularly, the court instructed the jury as follows:

> Here, the State alleges that defendant was [Barbara's] parent or guardian. If you find the State has proven beyond a reasonable doubt that defendant was [Barbara's] parent or guardian, then you must find defendant guilty

> of first degree endangering the welfare of a child.
>
> If you find the State has failed to prove beyond a reasonable doubt the defendant was [Barbara's] parent or guardian, then you must find the defendant . . . guilty of second degree endangering the welfare of a child.

Defendant argues the jury instruction was flawed because the terms "parent" or "guardian" were not defined. Defendant also argues that even if the terms were properly defined, the evidence was insufficient to support a finding he was Barbara's parent or guardian. We agree.

In State v. McAllister, 394 N.J. Super. 571, 572-74 (App. Div. 2007), this court considered whether the defendant, who was the mother's live-in boyfriend and had a de facto parental relationship with the victim, could be properly convicted for a first-degree offense under N.J.S.A. 2C:24-4(b)(3) as a "parent, guardian or other person legally charged with the care of custody of the child." We found the evidence did not support defendant's conviction of the first-degree offense. Id. at 576.

We observed it was "undisputed that defendant was not the victim's 'parent' or 'guardian,'" and determined the defendant was not an "other person legally charged with the care of custody of the child." Id. at 574. We reasoned that the plain language of the statute, which used the term "legally charged," meant "only a

de jure parental relationship with the victim will support a conviction for the elevated offense under N.J.S.A. 2C:24-4(b)(3)." Id. at 575.

The State argues our holding in McAllister is inapplicable because here it disputes whether defendant qualified as a parent or guardian and in McAllister we said it was not disputed that the defendant was not a parent or guardian. The State reads McAllister too narrowly. McAllister makes clear that under N.J.S.A. 2C:24-4(b)(3), the defendant must have a de jure status with the child as a parent, guardian or other person charged with the child's care to commit a first degree offense. Ibid. As we stated, "only a de jure parental relationship with the victim will support a conviction for the elevated offense under N.J.S.A. 2C:24-4(b)(3)." Ibid.

We reject the State's contention that the definition of "parent or guardian" under N.J.S.A. 9:6-8.21(a) should be used to define the elements of a first-degree offense under N.J.S.A. 2C:24-4(b)(3). N.J.S.A. 9:6-8.21 defines "parent or guardian" as follows:

> any natural parent, adoptive parent, resource family parent, stepparent, paramour of a parent, or any person, who has assumed responsibility for the care, custody, or control of a child or upon whom there is a legal duty for such care. Parent or guardian includes a teacher, employee, or volunteer,

> whether compensated or uncompensated, of an institution who is responsible for the child's welfare and any other staff person of an institution regardless of whether or not the person is responsible for the care or supervision of the child. Parent or guardian also includes a teaching staff member or other employee, whether compensated or uncompensated, of a day school as defined in section 1 of P.L.1974, c.119 (C.9:6-8.21).

N.J.S.A. 9:6-8.21 cannot be utilized to define the terms parent and guardian under N.J.S.A. 2C:24-4(b)(3) because, as noted, N.J.S.A. 2C:24-4(b)(3) requires a de jure relationship and N.J.S.A. 9:6-8.21 does not. McAllister, 394 N.J. Super. at 574-75; see also State v. McInerney, 428 N.J. Super. 432, 447-49 (App. Div. 2012) (rejecting an incorporation of Title Nine's definition of "parent or guardian" in N.J.S.A. 9:6-8:21 in interpreting "assumed responsibility for the care of the child" in N.J.S.A. 2C:24-4(a) and "cautioning against incorporation of Title 9's definitions of parent or guardian").

The court's jury instructions did not define the standard for finding defendant was a de jure parent or guardian under N.J.S.A. 2C:24-4(b)(3). In addition, the record is devoid of any evidence defendant had a de jure status as Barbara's parent or guardian. We therefore vacate defendant's conviction for first-degree endangering, N.J.S.A. 2C:24-4(b)(3), under count five, and remand

for entry of an amended judgment of conviction for a second-degree offense and for resentencing on count five.

V.

Defendant next argues the State failed to present sufficient evidence supporting his convictions for second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) and (2), in counts three and eight respectively. Under N.J.S.A. 2C:24-4(a)(1) and (a)(2), endangering the welfare of a child is elevated to a second-degree crime if committed by a "person having a legal duty for the care of a child or who has assumed the responsibility for the care of a child." Defendant claims there was insufficient evidence for his conviction of the second-degree offenses.

Defendant's argument there was insufficient evidence supporting his second-degree convictions under counts three and eight is procedurally barred because he failed to move for a new trial based on that ground before the trial court. R. 2:10-1; R. 3:20-2. Reininger, 430 N.J. Super. at 538.

In addition, based on our review of the record and for the reasons already explained, there was ample evidence permitting a rational fact-finder to find beyond a reasonable doubt that defendant assumed responsibility for Barbara's care. See Jackson, 211 N.J. at 413-14. A person who "has assumed responsibility" includes only "those who have assumed a general and ongoing

responsibility for the care of the child." State v. Galloway, 133 N.J. 631, 661 (1993). The elevation of the offense arises from "the profound harm that can be inflicted on a child by one who holds a position of trust." State v. Sumulikoski, 221 N.J. 93, 108 (2015).

The evidence established defendant assumed a regular, continuing and recurrent caretaking function over Barbara. As noted, for many years he, Tonya, Barbara, Richard and Jamie lived as a family unit; defendant had responsibility for the care and supervision of all of the children. Defendant also assumed the role of a caretaker to Barbara by consistently providing her with medications he said would avoid sickness and make her feel better. As such, there was sufficient evidence supporting defendant's second-degree convictions under counts three and eight.

VI.

Defendant also argues the court erred in imposing an aggregate forty-five year sentence. He contends the court incorrectly found certain aggravating factors under N.J.S.A. 2C:44-1(a), and his sentence is otherwise impermissibly excessive.

"Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). A trial

court's sentence must be affirmed "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based on competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

The court found aggravating factors one, two, three, six and nine. N.J.S.A. 2C:44-1(a)(1), (2), (3), (6), and (9). The court did not find any mitigating factors. See N.J.S.A. 2C:44-1(b). Defendant argues the court erred by finding aggravating factors one and two. We disagree.

Aggravating factor one, N.J.S.A. 2C:44-1(a)(1), requires that the court consider "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner." Factor one primarily requires consideration of the severity of the crime, as well as the safety of victims and the public and the consequences surrounding the event. Lawless, 214 N.J. at 609. However, "facts that established elements of a crime for which a defendant is being sentenced should not be considered as aggravating circumstances in determining that sentence." State v. Kromphold, 162 N.J. 345, 353 (2000). That is, courts may not

"double count" factors that constitute elements of the offense. Lawless, 214 N.J. at 608.

Aggravating factor one can include considerations such as the "cruel manner" of the attack, Roth, 95 N.J. at 367, the use of excessive force to accomplish a theft, State v. McBride, 211 N.J. Super. 699, 704 (App. Div. 1986), and the impact on the victim and others, Lawless, 214 N.J. at 609-10. "In appropriate cases, a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense." Ibid.

Here, the court's finding of aggravating factor one was supported by the record and did not constitute impermissible double counting. The court explained defendant gave Barbara a quantity of drugs that resulted in an opiate overdose, which nearly resulted in her death. None of those facts established elements of the crimes for which defendant was being sentenced. Rather, they showed "the extraordinary brutality" involved in defendant's aggravated sexual assault of Barbara. State v. Fuentes, 217 N.J. 57, 75 (2014).

Defendant argues that in finding aggravating factor one, the court engaged in impermissible double counting because he was convicted of distributing opiates in count seven and endangering the welfare of a child by giving Barbara opiates in counts seven.

However, as the sentencing court correctly determined, a finding of aggravating factor one did not constitute double counting because the dire and extreme consequences of defendant's distribution of opiates to Barbara, an overdose that nearly resulted in her death, did not constitute elements of the crimes charged in counts seven and eight. As the court found, aggravating factor one applied because of the "cruel manner" of the attack. Roth, 95 N.J. at 367.

Defendant also challenges the court's finding of aggravating factor two, N.J.S.A. 2C:44-1(a)(2), "[t]he gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim . . . was particularly vulnerable or incapable of resistance . . . or was for any other reason substantially incapable of exercising normal physical or mental power of resistance."

When considering the harm to a victim, a court "should engage in a pragmatic assessment of the totality of harm inflicted by the offender on the victim, to the end that defendants who purposely or recklessly inflict substantial harm receive more severe sentences than other defendants." Kromphold, 162 N.J. at 358. However, a court cannot "double count" facts that constitute elements of the offense. See State v. C.H., 264 N.J. Super. 112, 140 (App. Div. 1993) (court erred in applying aggravating factor

two because of the victim's age where that fact made the sexual assault a first degree crime); State v. Hodge, 207 N.J. Super. 363, 367 (App. Div. 1985) ("The age of the victim and the parental status are elements of the offense and thus cannot be aggravating factors."); but see State v. Taylor, 226 N.J. Super. 441, 453 (App. Div. 1988) (finding the victim's "extreme youth" was a proper aggravating factor).

The court's finding of aggravating factor two is supported by the record and did not constitute double counting. The court found defendant caused Barbara extreme harm by almost causing her death and also determined defendant knew she was incapable of resisting his sexual assault because he purposely rendered her incapable by drugging her before he sexually assaulted her.

We reject defendant's contention that the court erred by double counting Barbara's age, which is an element of the endangering and sexual assault offenses, because the court referred to Barbara as a "young victim" and "young girl under thirteen" in its discussion of aggravating factor two. The court's finding of aggravating factor two was not based on the victim's age. The record shows the judge found aggravating factor two based solely on the extreme harm defendant caused Barbara and because Barbara was wholly incapable of any resistance. Those

findings support the court's finding of aggravating factor two. See N.J.S.A. 2C:44-1(a)(2); Kromphold, 162 N.J. at 358.

Defendant also claims his sentence is excessive. Where we have determined the court properly found and weighed the aggravating and mitigating factors, we will reverse a sentence only where the judgment of the court is such that it "shock[s] the judicial conscience." Bolvito, 217 N.J. at 228. Defendant committed a series of very serious crimes warranting very serious punishment. He had three prior convictions for crimes committed against young children and here again victimized a child, this time by drugging and sexually assaulting her on two occasions. Under the circumstances presented, there is nothing in the court's "application of the [sentencing] guidelines . . . [that] makes the sentence clearly unreasonable so as to shock the judicial conscience."[6] Fuentes, 217 N.J. at 70.

Any of defendant's arguments that we have not addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

[6] Because we vacate defendant's conviction of first-degree under count five, defendant will be resentenced on that charge as a second-degree offense. We do not offer an opinion concerning the sentence that should be imposed on that charge.

Affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.