SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4283-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANNY C. FLORES, a/k/a
DANNY C. PORTILLO,

Defendant-Appellant.

Submitted October 24, 2017 – Decided January 2, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 15-06-0974.

Murphy Peluso, LLC, attorney for appellant (William Scott Murphy, on the brief).

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

PER CURIAM

After entering a guilty plea to first-degree aggravated sexual assault, defendant Danny Flores was sentenced to a prison

term of fifteen years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Before us, defendant argues:

> POINT I
>
> THE PLEA ALLOCUTION WAS INSUFFICIENT TO ESTABLISH A FACTUAL BASIS FOR A GUILTY PLEA TO AGGRAVATED SEXUAL ASSAULT (Not Raised Below).
>
> POINT II
>
> THE SENTENCE SHOULD BE VACATED AND THE CASE REMANDED FOR RESENTENCING BECAUSE THE COURT FAILED TO PROVIDE ITS ANALYSIS OF THE RELEVANT SENTENCING FACTORS ON THE RECORD.

Having considered these arguments in light of the record and applicable legal standards, we affirm.

The record reveals the following. On July 15, 2014, after studying in a coffee shop in West New York, a twenty-five-year-old woman (the victim) departed around 9:00 p.m. to go home. Defendant saw the victim leave and approached her from behind as she was walking down a flight of stairs bordered by bushes. He grabbed her from behind, covered her mouth, and pulled her into the bushes, where he told her he was going to rape her and threatened to kill her if she yelled for help. Defendant then threw the victim to the ground and proceeded to digitally penetrate her vagina. In an unsuccessful attempt to persuade defendant to stop, she told him she was a sixteen-year-old virgin. He then lifted up her shirt, kissed her on the lips, and kissed and licked

her breast. Defendant demanded she perform fellatio on him. He then rubbed his penis on her chest and face, and ejaculated on her chest. When a group of juveniles walked up the stairs, defendant again threatened to kill the victim if she called for help. As they exited the bushes, walked up the stairs and down the block, defendant told her to act like his girlfriend and he then ran away.

With the aid of the group of juveniles, the victim went to the police station to report the assault to the police. She was later taken to the hospital where she was administered a sexual assault kit. Lab tests later determined that the DNA samples collected from the victim matched defendant.

In accordance with his agreement with the State, defendant pled guilty to aggravated sexual assault in exchange for the State's dismissal of other charges and recommendation to the judge that defendant receive a fifteen-year sentence subject to NERA. The following plea colloquy occurred:

> Defense counsel: On July 15, 2014[,] you run into [the victim] and you initially tried to take her away from where she was, kind of the steps by the community pool; is that correct?
>
> Defendant: Yes.
>
> Defense counsel: And you took her over by the field near to where the steps were; is that correct?

Defendant: Yes.

Defense counsel: And you committed an act of sexual penetration on her on July 15, 2014; is that correct?

Defendant: Yes.

Defense counsel: Could you tell the Judge Specifically what that act of penetration was?

Defendant: I touched her on her private part, put my finger inside of her.

Defense counsel: And when you mean you put your finger inside of her, you're talking about her vaginal area; is that correct?

Defendant: Yes.

Defense counsel: And there were other attempts at either contact or penetration, but there's no doubt in your mind that that act of penetration actually, you placed yourself inside of her vagina with your finger; is that correct?

Defendant: Yes.

Defense counsel: And that was on July 15, 2014; correct?

Defendant: Yes.

Defense counsel: And there was no relationship, there was no defense, there was no claim that you can make where this was something that was consensual in nature; is that correct?

Defendant: Yes.

Defense counsel: In other words, Danny, you had no idea who [the victim] was until the

moment you decided to do this to her; is that correct?

Defendant: Yes.

Defense counsel: And you are pleading guilty to that aggravated sexual assault because in fact you did what you just told the Judge in open court that you did on July 15[,2014]?

Defendant: Yes.

Defense counsel: Your Honor?

Prosecutor: If I could just ask on follow up question?

CROSS-EXAMINATION BY PROSECUTOR:

Prosecutor: When you attempted and did remove her from the stairs, your purpose was to take her a substantial distance or confine her for a substantial period of time so that you could commit this act against her?

Defendant: Say that again, sorry.

Prosecutor: That's okay. When you removed her from the stairs, your purpose in doing so was to take her a substantial distance from where you found her or to confine her for a substantial period of time so that you could commit this act against her?

Defendant: Yes.

Defendant contends that his plea should be vacated because it did not satisfy the definition of first-degree aggravated sexual assault. Since the argument is raised for the first time on appeal, we review it under the plain error standard to determine

if the error that was "clearly capable of producing an unjust result." R. 2:10-2.

To sustain a plea to a criminal offense, the plea colloquy must address "each element of the offense." State v. Campfield, 213 N.J. 218, 231 (2013). "The factual foundation may take one of two forms; defendant may either explicitly admit guilt with respect to the elements or may 'acknowledge[] . . . facts constituting the essential elements of the crime.'" Ibid. (alterations in original) (quoting State v. Sainz, 107 N.J. 283, 293 (1987)).

To be guilty of aggravated sexual assault, an actor must commit "an act of sexual penetration with another person . . . during the commission, or attempted commission, whether alone or with one or more other persons, of . . . kidnapping." N.J.S.A. 2C:14-2(a)(3) (emphasis added). A kidnapping occurs where a person "unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period . . . . (1) [t]o facilitate commission of any crime or flight thereafter." N.J.S.A. 2C:13-1(b)(1) (emphasis added).

Defendant contends that he did not commit sexual assault during the commission of a kidnapping to make the offense first-degree aggravated assault because he did not remove the victim a

"substantial distance" from the vicinity of the stairs where he first encountered her, and did not confine her for a "substantial period of time." Defendant also argues his plea failed to establish that he removed or confined the victim beyond that which was merely incidental to the underlying crime. We disagree.

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

For example, in Masino, the Court held that although the defendant did not move the victim very far, the "substantial distance" element was still met because the defendant isolated the victim by taking her clothing, thereby impeding her ability to "call attention to her plight." Masino, 94 N.J. at 447. In State v. Purnell, 394 N.J. Super. 28, 53 (App. Div. 2007), we held the "substantial distance" requirement was satisfied where the defendant removed the victim up an additional flight of stairs to sexually assault her, thereby exposing the victim to an increased risk of harm. Similarly, in State v. Matarama, we upheld the

defendant's conviction for kidnapping in a case where the victim was dragged twenty-three feet into an alley, which made it more difficult for the attack to be observed by passers-by. 306 N.J. Super. 6, 22 (App. Div. 1997).

Applying these principles, there was clearly sufficient evidence in the record to support defendant's plea that he committed sexual assault in the course of kidnapping the victim in order to satisfy the elements of first-degree aggravated sexual assault. Defendant grabbed the victim while she was walking down a flight of stairs, covered her mouth, forced her into the bushes to rape her, and threatened to kill her if she was not quiet. Defendant's actions satisfied the substantial distance and substantial confinement elements of kidnapping by removing the victim from the stairway because it concealed his horrific conduct from public view.

Alternatively, we find the record established defendant confined the victim for a "substantial period." N.J.S.A. 2C:13-1(b). Addressing this element, our Supreme Court held that

> one is confined for a substantial period if that confinement "is criminally significant in the sense of being more than merely incidental to the underlying crime," and that determination is made with reference not only to the duration of the confinement, but also to the "enhanced risk of harm resulting from the [confinement] and isolation of the victim

> [or others]. That enhanced risk must not be trivial."
>
> [State v. La France, 117 N.J. 583, 594 (1990) (alterations in original) (quoting Masino, 94 N.J. at 447).]

Here, defendant's actions were more than incidental to any underlying offense; rather, kidnapping was the underlying offense. As discussed, by removing the victim from the stairs and forcing her behind the bushes to sexually assault her, defendant enhanced her risk of harm.

We therefore conclude defendant's plea colloquy established a factual basis that he committed two elements of N.J.S.A. 2C:13-1(b), and discern no basis to find the judge committed plain error in accepting defendant's guilty plea.

Lastly, we address defendant's challenge to his fifteen-year NERA sentence that was in accord with his plea agreement. Defendant argues that the judge provided minimal insight into its reasoning behind rejecting and accepting each factor. Defendant further contends that aggravating factor number one, N.J.S.A. 2C:44-1(a)(1), was an erroneous double counting, and that the sentencing court failed to explain how his digital penetration of the victim was "more cruel and depraved" than other aggravating sexual assaults. Defendant asserts aggravating factor one is an

element that is already accounted for in the underlying offense. We are unpersuaded.

Our review of sentencing is limited. Appellate courts are bound to review sentencing decisions for an abuse of discretion. State v. Blackmon, 202 N.J. 283, 297 (2010). A sentence will be affirmed, unless,

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

"When the [sentencing] court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court may remand for resentencing." Ibid.

Here, the State asked the judge to find aggravating factors three and nine. N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense); -1(a)(9) (need to deter defendant and others from violating the law). The judge agreed with the State regarding aggravating factor nine, but declined to apply aggravating factor three, and instead found aggravating factor one. N.J.S.A. 2C:44-1(a)(1) (cruelty and

depravity of the offense). The judge did apply mitigating factor seven. N.J.S.A. 2C:44-1(b)(7) (no prior recent criminal history).

In considering the aggravating and mitigating factors, the judge reasoned:

> After a review of the statements made here today, the letters, as well as the pre-sentencing report, the [c]ourt finds aggravating factors . . . [nine], the need to deter the defendant and others from violating the law. The [c]ourt will find, regarding aggravating factor . . . [three], . . . the Avenel report, . . . does not show that [defendant] has a compulsive, competitive behavior. It says, "[g]iven the absence of a clear finding of compulsive sexual behavior, [defendant] is not eligible for sentencing under the purview of the New Jersey Sex Offender Act."[1]
>
> The [c]ourt will find, however, aggravating factor . . .
>
> . . . .
>
> . . . [one], the cruelty or depravity. So [one] and [nine] and the [c]ourt is weighing heavily on factor . . . [nine], more so the need for deterring the defendant and others from violating the law.
>
> The [c]ourt will find mitigating factor . . . [seven], no prior or recent criminal history. The [c]ourt cannot find . . . aggravating factor . . . [twelve] -- as a mitigating factor . . . for the reasons stated by the State[.] . . . But after weighing the aggravating and the mitigating factors, the [c]ourt is clearly convinced that the aggravating factors substantially outweigh the mitigating factor.

[1] N.J.S.A. 2C:47-1 to -10.

Based upon our review of the record, defendant's sentence is supported by credible evidence and does not shock our judicial conscience.

Affirmed.