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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5604-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

D.P.F.,

Defendant-Appellant.

Submitted January 8, 2018 – Decided April 13, 2018

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
13-08-1058.

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

Angelo J. Onofri, Mercer County Prosecutor,
attorney for respondent (Jennifer M. Eugene,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant D.P.F.¹ appeals from a July 8, 2016 judgment of conviction after a jury convicted him of criminal restraint, terroristic threats, aggravated assault, and four counts of endangering the welfare of a child. We affirm defendant's conviction. However, because of errors and omissions during sentencing, we reverse and remand for a new sentencing hearing.

I.

The following relevant facts appear in the trial record. V.M.E. (Vanessa) was married to defendant, and together had one child, K.A. (Kevin). Additionally, Vanessa had three children from a previous relationship. Vanessa and the four children lived together with defendant.

On August 31, 2012, the family was in their home, when the two youngest children, eleven months old and two years old at the time, began fighting. Defendant disciplined the two-year-old for the fight by striking him on the back with a belt, leaving him with a scrape.

Vanessa confronted defendant, threatening to call the police. When she walked away from defendant, he followed her, cursing, and pushed her, causing her to fall and hit a table. Vanessa then

¹ We use initials and pseudonyms to protect the identity of the victims and for ease of reference. By doing so we mean no disrespect to the parties.

went into the kitchen; defendant followed and "grabbed [her] around [her] neck and . . . then he come around towards the front . . . choking [her] against the refrigerator and spanking [her] in [her] face." He choked her with both hands, "[a]round [her] neck . . . digging his nails into [her] skin." Vanessa grabbed a knife, which defendant took from her, and then threw her to the ground.

Next, Vanessa and defendant went into the living room, where defendant told the children to go upstairs. Defendant put the three oldest children in one room, and Vanessa went into her bedroom with her youngest son. The room the three oldest children were in could be locked from the outside, but Vanessa did not know whether defendant locked the door. Further, the front door to the house could be locked so a key would be needed to exit the house, and defendant locked the door, took all keys, and took Vanessa's cell phone.

In the bedroom, Vanessa was sitting in a chair and holding her son when defendant entered the room. Defendant took the child out of her arms, saying "He ain't going to save you," and threw the child onto the bed, from which the child fell onto the floor, was picked up by defendant, and placed back on the bed. Defendant then resumed "smacking [her] in [her] face," "punched [her] on top of [her] head," and "came down . . . on [her] in [her] back." He continued to beat Vanessa for "a little while," and threatened

her, saying "I should kill you if you . . . leave I'm going to kill you, myself and the kids."

At some point, Vanessa urinated on herself, and defendant brought her to the bathroom to shower. She then returned to the bedroom, where he was sitting naked in a chair. Defendant then began to rub and touch her with his hands and his feet, scratching her in the vaginal area. She told him she didn't want to do anything, to which he replied "I'm your husband and you know I didn't want to do this. It's your fault." She did not fight him, and did what he told her to; she was afraid "he was going to kill [her] and the kids in the house . . . [b]ecause he said he would." Defendant then sexually assaulted her. After he was finished, both defendant and Vanessa washed up, and went to sleep. Vanessa testified she couldn't get up and go to wash on her own because her "body was traumatized[,] . . . had a lot of bruises[,] . . . was in a lot of pain[,] been [thrown] on the floor[,] . . . wrestling with him through the house. It just was too much."

The following day, Saturday, in an effort to get out of the house with the kids to get help, Vanessa told defendant she needed to go to the store. Defendant then walked with her and the kids around the corner to the liquor store. They all returned to the house, where defendant again locked the doors and took all of the keys and Vanessa's cell phone.

The next day, Vanessa was able to obtain her cell phone; she called her mother, who called the police. They arrived at the home shortly after.

When the police knocked on the door, defendant unlocked it, and Vanessa opened it and began speaking to the detectives. The police noticed she "had a black eye, she was a little disheveled, meaning her hair was out of place, . . . had scratches about her face, [and] looked relieved to see [the detectives]"; in the police report they stated her injuries appeared "minor." When the police entered the home, defendant was standing behind Vanessa, and the children were nearby. Vanessa informed the police that defendant had assaulted her by "punch[ing] her about the face and body." At this point, the police placed defendant under arrest and transported him to police headquarters.

The police asked Vanessa to come to headquarters to give a statement, but she declined because she had "childcare issues." Instead, she called her mother to come and watch the children so she could go to the hospital. When Joan saw Vanessa at the house, "[h]er eyes was bloody, her back was bruised up and black, her hair was disarray, her lip was swoll[en], and . . . she was limping on her leg." She then went to the hospital with Vanessa and the children.

At the hospital, Vanessa reported to the examining nurse she had been beaten, locked in the house, and abused all weekend. The nurse noted Vanessa presented with: ruptured blood vessels in her eyes, bruising "on her right forearm, left wrist and forearm, right shoulder, left upper back," and left eye area. "She also had scratches to her left neck, right eyebrow, and her right chest, and a lump . . . to the back of her neck." Vanessa reported being in acute but generalized pain all over her body, and was medicated with morphine.

Vanessa next was seen by a physician assistant, to whom she reported being sexually assaulted, as well as physically assaulted. At this point, a Sexual Assault Nurse Examiner (SANE) examined Vanessa. She documented Vanessa's injuries, taking 131 photographs, and taking swabs for DNA testing purposes from her head, and her vaginal, cervical, anal, and buccal areas. The nurse noted Vanessa had bruising on her left eye, neck, head, arms, wrists, and legs, and bruising and scratches on her shoulder. Further, Vanessa had injuries consistent with strangulation, and had "relatively minor" injuries to her vaginal area.

Kevin, who had fallen to the floor in the bedroom, did not receive medical attention because Vanessa "was in disarray [her]self, and . . . thought [Joan] would have took that role and did that."

Vanessa spoke to the police at the hospital, informing them of the assault. The police then transported her to headquarters, where she described the incident to another detective. The police did not take a formal sworn statement because she had just been released from the hospital and was on medications. She was asked to return to give such a statement, but this never transpired.

On August 16, 2013, a Mercer County Grand Jury returned an indictment against defendant for: five counts of first-degree kidnapping in violation of N.J.S.A. 2C:13-1(b)(1), 1(b)(2), and 1(c); one count of first-degree aggravated sexual assault in violation of N.J.S.A. 2C:14-2(a)(3); two counts of third-degree aggravated criminal sexual contact in violation of N.J.S.A. 2C:14-3(a) and 2C:14-2(a)(3); one count of third-degree terroristic threats in violation of N.J.S.A. 2C:12-3(b); one count of second-degree aggravated sexual assault in violation of N.J.S.A. 2C:12-1(b); and four counts of second-degree endangering the welfare of a child in violation of N.J.S.A. 2C:24-4(a).

Vanessa, her mother, the SANE nurse, an expert on strangulation injuries, and multiple detectives testified for the State at the jury trial. Defendant did not testify, but presented testimony from two police detectives.

During summation, the defense lawyer argued, "this is going to be an equation between what [Vanessa] is telling you and what

the objective evidence is telling you. And the objective evidence, it can't lie, it can't embellish, it can't exaggerate. The objective evidence doesn't have a motive to color the truth."

He asserted,

Now, I'm not saying that [Vanessa] came up here and lied. That's for you to decide. No one knows the answer to that except for you. Did she embellish during the facts? Is she somebody who just likes to exaggerate? Is she somebody who is trying to lie? That's your question to answer.

The assistant prosecutor, while summarizing the evidence presented, made the following statements in his own closing:

When people lie, they don't lie in detail. They especially don't lie in detail within that first 48 hours of being assaulted, not having any food because, remember, [Vanessa] tells the hospital staff she's extremely thirsty and extremely hungry. And they certainly don't create elaborate lies after being given the narcotic pain relievers morphine and some other drugs that [Vanessa] was given and there's documentation of those drugs in the hospital records.

. . . .

[U]nless [Vanessa] from the second this assault occurred said I am going to frame a sexual assault, I am going to frame an aggravated assault, then she's being truthful.

. . . .

[Vanessa's] credibility. [Vanessa] made sense. She was corroborated by the other evidence. No motive to lie. She's moved, she's remarried, she has not seen the

defendant since 2012. She moved on. Ask yourself, what would she have to gain by coming here and lying. Assess her demeanor when you're considering her credibility. She looked you in the eye, she was calm, she was believable, she didn't argue with the defense.

Neither party objected to the statements made in summation by the other. That same day, the judge charged the jury, and stated:

[Y]ou are the judges of the facts and, as judges of the facts, you are to determine the credibility of the various witnesses as well as the weight to be attached to their testimony.

You and you alone are the sole exclusive judges of the evidence and of the credibility of the witnesses and the weight to be attached to the testimony of each witness. Regardless of what counsel said or what I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts.

Arguments, statements, remarks, openings, and summations of counsel are not evidence and must not be treated as evidence. Although the attorneys may point out what they think is important in the case, you must rely solely upon your understanding and recollection of the evidence that was admitted during trial.

On February 23, 2016, the jury returned a verdict finding defendant guilty of third-degree² criminal restraint, guilty of

² The judgment of conviction reflects the degree of the charge as first-degree, however, this is an apparent clerical error, and should be corrected at any future sentencing. N.J.S.A. 2C:13-2(a).

third-degree terroristic threats, guilty of third-degree aggravated assault, and guilty of four counts of second-degree endangering the welfare of the respective children.

The judge sentenced defendant to an aggregate total of thirty-three years with no period of parole ineligibility. With respect to the child endangerment convictions, the judge imposed seven years for each, with no period of parole ineligibility to be served consecutively to each other and to the sentences for the other charges. Further, the judge did not orally impose the mandatory fines and penalties, though the judgment of conviction does properly set them out.

After defendant's motion for a new trial was denied, he filed the present appeal, where he raises the following arguments, neither of which was asserted below:

POINT I: THE PROSECUTOR COMMITTED MISCONDUCT IN SUMMATION BY IMPERMISSIBLY VOUCHING FOR THE TRUTHFULNESS OF THE COMPLAINING WITNESS'S TESTIMONY.

POINT II: THE SENTENCING IN THIS MATTER WAS FATALLY FLAWED IN NUMEROUS ASPECTS, MANDATING A REMAND FOR A NEW SENTENCING HEARING.

II.

Defendant argues remarks of the prosecutor during summation deprived him of his right to a fair trial and due process. Because this argument was not raised below, we consider it under a plain

error standard of review, and will reverse only if the error was "clearly capable of producing an unjust result." R. 2:10-2; State v. Macon, 57 N.J. 325, 337 (1971).

Counsel has broad latitude in giving summations, but these "must be restrained within the facts shown or reasonably suggested by the evidence adduced." State v. Bogen, 13 N.J. 137, 140 (1953); State v. Perry, 65 N.J. 45, 47-48 (1974). An attorney may make remarks that constitute legitimate inferences from the facts, and may not go beyond the facts before the jury. State v. Mayberry, 52 N.J. 413, 437 (1968); State v. Farrell, 61 N.J. 99, 103 (1972).

Additionally, "a prosecutor may argue that a witness is credible, so long as the prosecutor does not personally vouch for the witness or refer to matters outside the record as support for the witness's credibility." State v. Walden, 370 N.J. Super. 549, 560 (App. Div. 2004)(citation omitted); State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993). Credibility determinations are a matter solely in the wheelhouse of the jury. See State v. Kemp, 195 N.J. 136, 157 (2008).

Defendant argues the prosecutor impermissibly vouched for Vanessa's credibility, and that this was prosecutorial misconduct warranting reversal. Specifically, the prosecutor stated that Vanessa was "being truthful," "was believable," and had "no motive to lie."

To the extent these statements could potentially be prosecutorial misconduct, see, e.g., Walden, 370 N.J. Super. at 560, in assessing whether such alleged prosecutorial misconduct requires reversal, an appellate court should determine whether "the conduct was so egregious that it deprives the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999); State v. Loftin, 146 N.J. 295, 386 (1996). The court should look at such factors as whether defense counsel made a timely objection, whether the remark was withdrawn promptly, whether the trial judge ordered the remarks stricken, and whether the judge instructed the jury to disregard them. State v. Smith, 212 N.J. 365, 403 (2012) (citation omitted).

Here, defense counsel made no objections to the prosecutor's remarks, requested no changes to the jury instructions. "The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object also deprives the court of an opportunity to take curative action." Frost, 158 N.J. at 84 (citing State v. Bauman, 298 N.J. Super. 176, 207 (App. Div. 1997)).

While there were no jury instructions specifically tailored to the statements made in summation, the judge did properly instruct the jury on their role in determining the credibility of witnesses, how they were to accord no weight to credibility

determinations made by the parties, and how "arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence."

Furthermore, a prosecutor's comments may be harmless if they are only a response to remarks by opposing counsel. State v. DePaglia, 64 N.J. 288, 297 (1974); State v. Scherzer, 301 N.J. Super. 363, 445 (App. Div. 1997); Smith, 212 N.J. at 403-04. During its closing, the defense directly attacked Vanessa's credibility, insinuating the possibility of her lying, and emphasizing that the majority of the prosecution's case rested on her credibility.

Based on the foregoing, we cannot say, under a plain error standard of review, that the prosecutor's statements were prejudicial to defendant, or that his conviction should be set aside on that basis.

III.

Next, defendant argues the trial court erred during the sentencing phase, warranting a new sentencing hearing. Specifically, defendant argues the court erred by: (1) not imposing any fines or penalties during the sentencing hearing; (2) imposing consecutive sentences for the four convictions for the endangerment; and in the alternative (3) imposing consecutive

sentences for the two oldest children, who were not subjected to individual abuse, without making specific findings.

In reviewing a sentencing decision, an appellate court must not seek to substitute its judgment for that of the trial court. State v. Case, 220 N.J. 49, 65 (2014). The sentence should be modified only when the facts and law show "such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363-64 (1984); State v. Fuentes, 217 N.J. 57, 70 (2014).

Under N.J.S.A. 2C:44-5, a sentencing court has the sole discretion to impose consecutive or concurrent sentences. The relevant criteria were set out in State v. Yarbough:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely

in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors; [and]

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.

[100 N.J. 627, 643-44 (1985).]

In exercising discretion when sentencing, the factfinder must always apply correct legal principles. Roth, 95 N.J. at 363-64. A judge must state his or her reasons for the sentence imposed, Rule 3:21-4(e), and those reasons must be in the judgment, Rule 3:21-5. "When a sentencing court properly evaluates the Yarborough factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011) (citing State v. Cassady, 198 N.J. 165, 182 (2009)). Nonetheless, "if the court does not explain why consecutive sentences are warranted, a remand is ordinarily needed for the judge to place reasons on the record." Ibid. (citing State v. Abdullah, 184 N.J. 497, 514-15 (2005)); State v. Martelli, 201 N.J. 378, 385 (App. Div. 1985); State v. Sanducci, 150 N.J. Super. 400, 402-04 (App. Div. 1977).

Here, the trial judge imposed consecutive sentences for each of the endangering charges, totaling twenty-eight years, and made the following findings:

the Court has imposed varying consecutive terms of incarcerations on [Count's] 11 through 14 of the indictment to account for the harms suffered by each of the juvenile individually from the defendant's criminal behavior, more specifically, to account for T.A., born in 2009, and approximately three years old at the time of the incident, having been whipped by the defendant with a belt, causing a whip mark type of injury to his back, and to account for [Kevin], born in 2011, an infant approximately one year old at the time of the incident, having been ripped from his mother's protective arms during her victimization at the hands of the defendant[.]

. . . .

Consecutive terms of incarceration are also justified as a result of . . . the defendant victimizing [Vanessa] by restraining her . . . subsequently forced [Vanessa] upstairs, along with the children, forcing each into their respective rooms under lock and key[.]

[(emphasis added).]

Thus, despite the fact that two of the children did not suffer specific physical injuries, and were subjected to one act by being locked into their room together, the judge stated, "each of these instances described reflects separate acts of violence or threats of violence imposed upon each victim through the defendant's force

of will, with separate purposes, separate objectives and separate outcomes, despite the proximity to each in time and distance."

While "sentences can be upheld where the sentencing transcript makes it possible to 'readily deduce' the judge's reasoning . . . [these] cases are the exception, not the rule." Miller, 205 N.J. at 129-30 (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)) (citations omitted). "We can safely discern the sentencing court's reasoning when the record is clear enough to avoid doubt as to the facts and principles the court considered and how it meant to apply them. To go further, however, may involve speculation about what the sentencing court meant." Id. at 130.

The two children not specifically mentioned in the judge's reasoning were not subjected to separate acts or threats of violence, and locking all four children together in the same room did not have "separate purposes, separate objectives and separate outcomes." As such, without minimizing any injuries or harm suffered by these children, we cannot clearly deduce the judge's reasoning from the record, and the imposition of consecutive sentences was in error.

As a final point, it was error for the judge to omit the imposition of the statutory fines and penalties from his oral decision. These penalties are mandatory, and may not be waived.

See State v. Malia, 287 N.J. Super. 198, 208 (1996); see also, State v. Gardner, 252 N.J. Super. 462, 465 (Law Div. 1991) (finding that assessments defined as "penalties" are not revocable under N.J.S.A. 2C:46-3). The new sentencing hearing must include an appropriate assessment, on the record, of the mandatory penalties.

Defendant's conviction is affirmed, but we reverse and remand for the trial court to conduct a new sentencing hearing. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION