RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4935-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL W. WILLIAMS,
a/k/a WAYNE WILLIAMS, and
MICHAEL W. WILLIAMS, SR.,

Defendant-Appellant.

———————————————————

Submitted January 24, 2022 – Decided April 7, 2022

Before Judges Sumners and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 17-12-3458.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Rachel M. Lamb, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Tried by a jury, defendant Michael W. Williams was found guilty of two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); two counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1) and (2); third-degree terroristic threats, N.J.S.A. 2C:12-3(b); third-degree witness tampering, N.J.S.A. 2C:28-5(a)(2); and fourth-degree impersonating a law enforcement officer, N.J.S.A. 2C:28-8(b). Defendant was sentenced to an aggregate term of sixty-eight years' imprisonment with an eighty-five percent parole ineligibility period pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Before us, defendant through counsel argues:

> POINT I
>
> DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL N.O.V. BASED UPON INSUFFICIENCY OF THE EVIDENCE SHOULD HAVE BEEN CONSIDERED AND GRANTED.
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> > POINT IA
> >
> > The Defendant's Motion For Judgment Of Acquittal N.O.V. Should Have Been Granted With Regard To The Kidnapping Verdicts.
> >
> > POINT IB
> >
> > Because The Judgments Of Acquittal On The Kidnapping Counts Would Have Been Granted,

The Defendant's Motion For A Judgment Of Acquittal N.O.V. On The First-Degree Aggravated Sexual Assaults Should Likewise Have Been Granted.

POINT II

DEFENDANT'S APPLICATION FOR A BENCH TRIAL SHOULD HAVE BEEN GRANTED AND THE DEFENDANT WAS DENIED HIS RIGHT TO HAVE HIS CASE DECIDED BY THE COURT, THEREBY DENYING HIM THE RIGHT TO A FAIR TRIAL.

POINT III

THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL BECAUSE HE WAS PRECLUDED FROM ATTACKING THE CREDIBILITY OF THE ONLY EYEWITNESS.

POINT IV

DEFENDANT'S MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED WHEN THE JURY LEARNED OF HIGHLY PREJUDICIAL EVIDENCE WITH NO PROBATIVE VALUE, NAMELY THAT DEENDANT HAD SEXUAL INTERCOURSE WITH HIS BIOLOGICAL DAUGHTER.

POINT V

THE VERDICT MUST BE SET ASIDE AND DEFENDANT BE GIVEN A NEW TRIAL DUE TO THE FACT THAT ONE OF THE JURORS WAS COMPROMISED AND SHOULD HAVE BEEN RELEASED, AND THE ENTIRE JURY PANEL SHOULD HAVE BEEN QUERIED.

POINT VI

THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO THE COURT'S FAILURE TO CHARGE LESSER-INCLUDED OFFENSES DESPITE THE REQUEST BY DEFENDANT TO REFRAIN FROM SUCH INSTRUCTION. (Not Raised Below).

POINT VII

THE SENTENCE SHOULD BE VACATED AND REMANDED BECAUSE THE COURT USED AN INCORRECT RANGE OF SENTENCE ON THE EXTENDED TERM SENTENCE FOR KIDNAPPING.

POINT VIII

THE SENTENCE WAS EXCESSIVE BECAUSE THE COURT ENGAGED IN DOUBLE COUNTING OF DEFENDANT'S PRIOR RECORD IN SUPPORT OF AGGRAVATING FACTOR NUMBER THREE, THE EXTENT OF THE DEFENDANT'S PRIOR RECORD.

In a pro se supplemental brief, defendant also argues the following points that we have renumbered for clarity:

POINT IX

THE TRIAL COURT ERRED WHEN IT FAILED TO SUA SPONTE GIVE THE JURY AN INSTRUCTION ON THE DIFFERENCE BETWEEN LIMITED USE AND SUBSTANTIVE USE IN REGARD[] TO STATE EXPERT WITNESS ([SANE] EXAMINER) MARY SILVA.

POINT X

THE DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED WHEN THE STATE INTERFERED WITH A KEY DEFENSE WITNESS PRIOR TO TRIAL IN VIOLATION OF U.S. CONST. AMENDS V, VI, XIV AND N.J. CONST. ART. 1, PARAS 1, 9, AND 10.

POINT XI

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND NEW JERSEY CONSTITUTION, ART. 1, PARA 10.

POINT XII

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND NEW JERSEY CONSTITUTION, ART. 1, PARA 10.

POINT XIII

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND NEW JERSEY CONSTITUTION, ART. 1, PARA 10.

POINT XIV

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED

STATES CONSTITUTION AND NEW JERSEY CONSTITUTION, ART. 1, PARA 10.

POINT XV

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE ADMISSIBILITY OF PRIOR BAD ACT EVIDENCE, WHICH DETERRED DEFENDANT FROM EXERCISING HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE, VIOLATING HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL.

After careful review of the record and the applicable law, we are unpersuaded that defendant's convictions should be reversed.

I

In a superseding twenty-two count indictment, defendant was charged with a variety of offenses in connection with the alleged rape of S.S. (Sydney),[1] a neighbor in his apartment building. Before discussing the underlying facts and defendant's arguments arising from the jury trial and his sentence, we first address his challenge in Point II that he was deprived of a fair trial because the trial judge denied his request for a bench trial.

After defendant initially made a pro se oral application for a bench trial during jury selection and following the selection of the jury but prior to the start

[1] We use initials and pseudonyms to protect the privacy of the victim, family members, and witnesses. R. 1:38-3(c)(12).

of trial, defense counsel complied with the judge's direction to file a written motion under Rule 1:8-2(a) to waive a jury trial. In addressing the judge, defendant stated he wanted a bench trial because it was "the only way that [he] will get a fair and just trial" because the jurors had "preconceived notion[s] that if the police arrested and charged [him] with all of these [offenses], [he] must be guilty." Defendant argued the three-prong test set forth in State v. Dunne, 124 N.J. 303, 317 (1991), which must be applied in considering his motion, weighed in favor of his request. The State opposed the request.

The judge denied defendant's motion. In his oral decision, the judge weighed Dunne's three-prong test, which are:

> (1) determine whether a defendant has voluntarily, knowingly, and competently waived the constitutional right to jury trial with advice of counsel;
>
> (2) determine whether the waiver is tendered in good faith or as a stratagem to procure an otherwise impermissible advantage; and
>
> (3) determine, with an accompanying statement of reasons, whether, considering all relevant factors, including those listed below, it should grant or deny the defendant's request in the circumstances of the case.
>
> [Id. at 317.]

The third listed prong requires the judge to consider:

> [T]he gravity of the crime . . . the position of the State, the anticipated duration and complexity of the State's presentation of the evidence, the amenability of the issues to jury resolution, the existence of a highly-charged emotional atmosphere . . . , the presence of particularly-technical matters that are interwoven with fact, and the anticipated need for numerous rulings on the admissibility . . . of evidence.
>
> [Ibid.]

After considering his motion colloquy with defendant, the judge determined defendant's request was voluntarily made in good faith based on consultation with counsel and was not an effort to obtain a strategic trial advantage. Thus, prongs one and two weighed in defendant's favor. As for prong three, the judge, bearing in mind "all relevant factors," found that neither the anticipated two to three weeks of trial nor the complexity of the trial issues weighed in favor of a bench trial. The judge noted that the seriousness of the charges—eight first-degree offenses—weighed in favor of a jury trial. Because the extensive jury voir dire process dismissed many potential jurors who could not be impartial, the judge was unpersuaded by defendant's assertion that the jury would be biased against him because of the charges and the expected emotions expressed by the victim during her testimony. The judge was convinced the jury would be impartial, thereby making defendant's primary reason for a bench trial without merit.

Lastly, the judge determined that "[l]ike in Dunne, there is a concern that . . . [he] has viewed evidence of defendant's prior bad acts and has issued pre-trial rulings that the jury in this case potentially could never hear and it would be fairer for the jury to hear this case than . . . [him]."

We discern no abuse of discretion in the judge's ruling denying defendant's motion to waive a jury trial as fairness would be served by proceeding with a bench trial. See Dunne 124 N.J. at 314 (holding the trial judge must exercise discretion in considering a defendant's request for a bench trial) (citing State v. Fiorilla, 226 N.J. Super. 81, 88 (1988)). The judge properly considered "the competing factors that [were] argue[d] for or against jury trial" and provided "a statement of reasons" explaining how he exercised his "discretionary judgment." Id. at 315, 317. The judge also correctly recognized that defendant was facing eight first-degree charges, thereby weighing in favor of a jury trial. Id. at 314-15 ("we believe that the more serious the crime, the greater the 'gravity' of the offense . . . the greater the burden on the defendant to show why there should be a non-jury trial") (citation omitted). The record reflects that the judge thoroughly applied the Dunne factors in denying defendant's request for a bench trial. Moreover, defendant has presented no indication from the jury voir dire transcript that a fair and impartial jury was not empaneled.

II

As noted, defendants remaining arguments require a brief discussion of the trial testimony, a Rule 104 hearing, defendant's motion for acquittal, the jury's deliberation and verdict, and sentencing,

State's Case

Sydney testified that sometime between 11:00 p.m. and 11:30 p.m. on June 20, 2016, she had returned home and was about to take a shower when she heard someone knocking on her front door for approximately twenty minutes. After finally going to the door, she saw it was defendant holding up an envelope and asking if it was her mail, which she denied. When she tried to close the door, defendant pepper sprayed her. Defendant then forced the door open and dragged Sydney by her hair into the bathroom to wash out her eyes. He held a serrated knife to her neck then pointed it at her face, threatening to kill her if she "tri[ed] anything" and took her cell phone.

Stating his name was "Chris" and that his brother committed suicide, he claimed he also wanted to kill himself, but first he had to "do something [he] want[ed]." Defendant proceeded to push Sydney into her bedroom at knifepoint and told her to take her clothes off and get on the bed. He then raped her at knifepoint.

After defendant apologized and appeared to calm down as Sydney listened to him vent, he raped her again. Defendant subsequently apologized and said he had to kill her. She begged him not to kill her and promised not to call the police.

In an unsuccessful attempted escape, Sydney offered defendant a cigarette. After smoking the cigarette, defendant forced her to perform oral sex on him and raped her a third time at knifepoint. Thereafter, defendant fell asleep but she was still on top of him with his penis inside of her. When she moved, he woke up, grabbed the knife that was on the floor, and told her not to "try nothing." He then told her that his story about his brother was a lie he made up to get into her apartment. He revealed his true motive was to lure her next-door neighbor over, because the neighbor did something "really bad" to his daughter.

After defendant offered to be her boyfriend for a second time, Sydney told him they could "forget about all this and [they] can start over." Defendant came up with a plan: Sydney would say that, if he left her, she would "cry rape" in front of his daughter when she came to pick him up. He ordered her to take a shower while he scrolled through her cell phone, looking through her contacts and threatening to kill the victim's family if she tried anything.

After she got dressed, they were on their way outside to execute his plan when he changed his mind, saying, "let me hit it again," meaning have sex again. Defendant raped her for a fourth time at knifepoint. When he finished, he proceeded to execute a variation of the plan: still at knifepoint, he made her exit her apartment building with him and kiss and hug him in front of the surveillance cameras to make them look like a loving couple. Defendant made her do this twice then he left. Once back inside her apartment, Sydney pushed the couch against the door, grabbed a knife, and proceeded to call her fiancée, his uncle, her supervisor, and her coworker before she finally called the police around 6:00 a.m.

During Sydney's direct testimony, the jury learned she was on probation for a felony committed in Pennsylvania but was allowed to move to New Jersey for a job promotion. On cross-examination, she admitted the felony was for insurance fraud involving a car accident injury claim, and that she was also convicted of a misdemeanor offense of retail theft of merchandise; both offenses occurred about five years prior to her trial. Applying N.J.R.E 609, the judge granted the State's objection to defense counsel questioning Sydney concerning

the details of the insurance fraud conviction, limiting her cross-examination to "the nature and degree of the crime."[2]

After the police arrived and took a report, Sydney was taken to the hospital where she was examined by sexual assault nurse examiner (SANE). The SANE nurse testified that she did not observe any evidence that Sydney was pepper sprayed, other than her eyes were reddened. She stated Sydney had no noticeable physical injuries but "copious" amounts of semen was found in her cervix. Subsequent DNA tests confirmed it was defendant's semen. The SANE nurse testified Sydney exhibited no physical injuries evidencing sexual assault, but noted there's usually no injury when "force or threat of violence" is involved because the victims are "compliant" and "don't put up a fight" during the sexual assault due to "fight, flight[,] and freeze."

About nine days after Sydney's reported assault, defendant was arrested on separate charges and detained when police believed he was Sydney's assailant and charged him with sexual assault and related offenses. During his detainment, defendant telephoned his daughter, Kayla Malone, and told her to make a three-way call to Sydney. On the call, defendant identified himself as

[2] It appears from the record that the jury was not directed to disregard Sydney's testimony that her insurance fraud conviction related to a car accident injury claim.

Detective Thomas Tomasetti from the Lindenwold Police Department and told Sydney that the charges against defendant were dropped because there was not enough evidence that he raped her.

Sydney then called the Lindenwold Police detective on her case, Arthur Wallace, crying as she told him she received a call purportedly from a Lindenwold Police detective telling her defendant had been released because the charges were dropped based on insufficient evidence. Detectives Tomasetti and Wallace both testified that no one from the Lindenwold Police Department made or was authorized to make that call.

Sergeant Eric Wren of the Camden County Prosecutor's Office investigated the phone call to Sydney. He told the jury that he concluded defendant used another inmate's pin to call Malone and have her call Sydney on three-way. When Sergeant Wren stated that defendant was Malone's biological daughter, defendant moved for a mistrial arguing the parties stipulated that they "wouldn't . . . mention she was his daughter" and "no evidence of their relationship was coming in" because Malone was "going to testify that she's in a relationship with [defendant]." Defendant also argued the testimony was irrelevant and was inadmissible under N.J.R.E. 403 because it was highly prejudicial and not probative of defendant's guilt or innocence.

The State denied there was such a stipulation. It only agreed that it would not present any evidence that defendant and Malone had a baby together. The State also argued their relationship was relevant because it helped identify defendant as the caller from the county jail, which connected him to the victim, Sydney. After reviewing the record of the court's proceedings regarding defendant's in limine motion, the judge was convinced there was no stipulation as defendant contended. Moreover, he found the testimony was relevant because it established defendant's identity on the phone call and was only brought into question by defendant's own decision to have Malone testify about their relationship.

During Malone's testimony, she confirmed that over a year after the alleged assault, she met with Sergeant Wren and gave a statement under oath. During the interview, Malone stated she saw Sydney around the apartment complex but never met her or saw her with her father. She also told Sergeant Wren that on the night of the alleged assault she saw her father with a knife, and he stayed downstairs in another apartment. She also revealed he told her to lie so that the charges against him would be dropped. Malone stated she feared her father because he threatened her life.

Defendant's Case

Malone testified on behalf of her father. Prior to her trial testimony, a Rule 104 hearing was conducted at the request of defense counsel to determine whether her testimony would open the door for testimony regarding evidence of her sexual relationship with defendant. Malone testified at the hearing that the day before the alleged sexual assault, she walked in on her father and Sydney engaging in consensual sex in Sydney's bedroom, and she joined them to have a sexual threesome.

Before the jury, Malone discussed defendant and Sydney's relationship. At the time of the alleged sexual assault, Malone said she and her son were living with defendant and his girlfriend Juanita Walker and her two sons in their apartment, which was on the same floor, three apartments away from Sydney's apartment. Malone stated that almost as soon as she moved in with defendant, Sydney would approach her when she was getting off the bus and tell Malone to "tell [her] dad to come downstairs" to Sydney's car. She also claimed she had seen defendant and Sydney hold hands and walking together down the apartment building's stairwell.

Similar to her testimony at the Rule 104 hearing, Malone testified before the jury that the day before the alleged assault, she was in Sydney's apartment

and walked in on defendant and Sydney having sex in the bedroom. This time, however, she stated that upon seeing them, she "immediately shut the door" because she was "not going to stand there and watch [her] dad and [Sydney] have sex." She also testified that the same day after "they [were] done," she heard defendant, upon finding fertility pills in Sydney's purse, accuse Sydney of trying to "trap" him by getting pregnant and having an unwanted child. He also threatened to tell Sydney's boyfriend about his sexual relations with her. Malone said she and Sydney spoke on the phone "shortly after" the argument, claiming that Sydney told her to get defendant to come to Sydney's apartment and if he did not, Sydney was "going to get him locked up." When defendant telephoned Sydney, she did not answer.

Overruling defendant's objection, the judge allowed the State to attack Malone's credibility by cross-examining on her prior Rule 104 hearing testimony in which she stated that, upon seeing Sydney and defendant having sex in Sydney's apartment, she joined them in a sexual threesome. The judge also found that the sexual threesome testimony did not involve a prior bad act requiring a Cofield[3] analysis under Rule 404(b) to determine its admissibility because defendant "ha[ving] sex with an adult, who happens to be his daughter,

[3] State v. Cofield, 127 N.J. 328 (1992).

is a moral judgment," not a crime. On redirect, Malone claimed the sexual threesome testimony was a lie.

During cross-examination, the State also questioned Malone about her statement to Sergeant Wren that "[e]verything [she told the police] [was] a lie" because she was forced to say it by Aaron Johnson, whom she knew from defendant. She testified that she feared him and he was the one who threatened to kill her, not defendant. She claimed on redirect that in her interview with Sergeant Wren, Johnson forced her to say defendant and Sydney walked their dogs together; defendant stayed downstairs in another apartment on the night of the alleged assault; and she saw defendant her with a knife the same night as the assault.

Dr. Leo Burns, admitted as an expert to render opinions on sexual assault examinations in emergency rooms, also testified for defendant. He opined the absence of genital or bodily injuries is inconsistent with forceful sexual assault, therefore Sydney injuries to her hand were more consistent with consensual sex. On cross-examination, Dr. Burns admitted there is "no [medical] certainty in this case one way or the other," and his report and opinion testimony was largely inconsistent with the studies on which he based his consensual sex opinion. The doctor also acknowledged that forcible rape does not mean force was used in

penetration, and that an important factor to consider would be whether a victim complied under threat, which would not lead to genital injury.

Jury Instructions

In the jury instructions prepared by the trial judge, lesser-included offenses were provided but defense counsel stated defendant did not want them. The State responded that it did not have a position at the time and wanted to research if there would be reversible error if the lesser-included offenses were not charged. Because there was a four-day break before the jury would be charged and recognizing his obligation to charge a lesser-included offense where "it's clear from the evidence that one is warranted" despite a request to give one, the judge allowed the State to consider its position and advise of its position the day before the jury would be charged.

When the parties retuned to court three days later, the State advised that it had no objection to defendant's request not to charge lesser-included offenses. When the judge asked defendant if he agreed with counsel's representation to have the jury consider any lesser-included offenses and understood the implications of his decision, defendant advised that he agreed with his attorney. Defendant stated, "I understand that. I'm just looking to—can they meet the burden of proof for what the charges are[] or not? If the burden of proof is not

met, I want to go home." He added, "[a] lesser[-included] offense, . . . I don't want it in, Your Honor," and that he had enough time to discuss whether to include them with his counsel. Based on the colloquy with defendant, the judge was satisfied defendant was making "a knowing and voluntary decision" which was "strategic," and decided not to instruct the jury on any lesser-included offenses.

Jury Deliberations

On the first full day of jury deliberations, juror number seven had to be voir dired because he thought he might have accidentally spoken to Sydney during lunch. The juror advised that when he went outside the courthouse to smoke a cigarette, he walked up to three people and upon noticing one of them, "some[one] who was oriental," had a cigarette in her hand, he asked her, "Hey, you got a light?" The juror used her cigarette to light his cigarette. He admitted that he spoke with jurors number two and number three about the incident. When the court separately voir dired those jurors, they each confirmed juror number seven's recitation of the events as he shared with them. At the conclusion of the voir dire, the State and defense agreed that juror number seven's contact with Sydney did not taint the jury's deliberations and would have

no bearing on the trial and, thus, voir diring the remaining jurors was unnecessary. Hence, the court allowed the three jurors to return to deliberations.

Nevertheless, the next day, because the judge did not recall explicitly asking juror number seven if he felt he could be fair and impartial despite the possible interaction he had with Sydney, the judge asked counsel whether juror number seven should be voir dired again. Defense counsel replied: "At this point . . . I think it would . . . be more harmful to [bring] it up."

Jury Verdict

The jury found defendant guilty of two counts of first-degree aggravated sexual assault, two counts of second-degree sexual assault, two counts of first-degree kidnapping, and one count respectively of third-degree terroristic threats, third-degree witness tampering, and fourth-degree impersonating a public servant or law enforcement officer. Defendant was acquitted of one count of first-degree aggravated sexual assault; three counts of first-degree aggravated sexual assault with a weapon, N.J.S.A. 2C:14-2(a)(4); one count of second-degree sexual assault; two counts of second-degree burglary, 2C:18-2(a)(1); two counts of fourth-degree unlawful possession of a weapon ("pepper spray" and "knife," respectively), N.J.S.A. 2C:39-5(d); two counts of third-degree possession of a weapon ("pepper spray" and "knife," respectively),

for an unlawful purpose, N.J.S.A. 2C:39-4(d); and two counts of first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:11-3(a)(1).

Defendant's Motion For Acquittal

Five weeks after the jury verdict, defendant moved for a judgment for acquittal under Rule 3:18-2. The motion was filed by newly assigned counsel who temporarily replaced trial counsel. Almost three months later, a different defense counsel filed a motion for a new trial under Rule 3:20-2. Both motions asserted that the court's failure to dismiss a tainted juror resulted in an unfair trial. The court denied the motion for a new trial but did not specifically rule on the judgment of acquittal motion.

Sentencing

The trial judge granted the State's motion for an extended term on first-degree kidnapping pursuant to N.J.S.A. 2C:44-3(a) as a persistent offender. In addition to identifying the two convictions that qualified defendant as a persistent offender, the judge recited defendant's twelve prior Superior Court convictions—detailing "the date of the offense, the nature of the offense, and the sentence to support [his] conclusion that defendant has no regard for the law and no regard for the consequences of his actions." The judge applied and gave

"great weight" to the following aggravating factors: three, risk of committing another offense; six, the extent and seriousness of prior criminal record; and nine, the need for deterrence. N.J.S.A. 2C:44-1(a)(3), -1(a)(6), and -1(a)(9).

> In determining the appropriate length of sentence, the [c]ourt finds that the extended term range is [thirty] years to life or [seventy-five] years. The . . . midway range is [fifty-two and one-half] years. Because the [c]ourt has concluded that it is clearly convincing that the aggravating factors substantially outweigh the mitigating factors, the length of the sentence should be above the mid-range.
>
> An additional [ten and one-half] years on top of the . . . mid-range for a total of [sixty-three] years is appropriate to account for defendant's extensive criminal history, the need for specific deterrence, and the interest of justice.
>
> The defendant is therefore committed to the custody of the Commissioner of the New Jersey Department of Corrections for a period of [sixty-three] years.

The judge meticulously analyzed why he did not consider any other aggravating factors nor mitigating factor eleven, excessive hardship to himself or his dependents, N.J.S.A. 2C:44-1(b)(11), which defendant argued should be applied.

Following merger, defendant was sentenced to two prison terms of twenty years subject to NERA for two counts of first-degree aggravated sexual assault;

thirty years subject to NERA for first-degree kidnapping; and eighteen months with nine months of parole ineligibility. These sentences, along with the extended prison term of sixty-three years, ran concurrently. In addition, defendant was sentenced to a consecutive term of five years with two and one-half years of parole ineligibility for third degree witness tampering.

III

In Point I, defendant contends through counsel that the trial judge erred in denying his motion for judgment of acquittal because the State failed to prove there was an "enhanced" risk to Sydney during the alleged kidnapping; failed to provide evidence of asportation; and that the kidnapping was not "merely incidental" to the underlying sexual assault offense. Defendant further asserts that since the two kidnapping convictions should be reversed, the State also failed to prove the aggravated sexual assault charges because "no reasonable jury could have reached the conclusion that . . . defendant was guilty of aggravated sexual assault beyond a reasonable doubt, and the defendant's motion for a [j]udgment of [a]cquittal . . . . on those counts should have been considered and granted." These contentions are procedurally and substantively deficient.

A defendant may obtain a judgment of acquittal under Rule 3:18-1 by successfully maintaining that the State has not proven each of the elements of a

crime. Viewing all the evidence in the light most favorable to the State, "as well as all of the favorable inferences which reasonably could be drawn therefrom," a motion for judgment of acquittal must be granted if no "reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458-59 (1967) (citing State v. Fiorello, 36 N.J. 80, 90-91 (1961)). Such instances of guilt may be based on circumstantial evidence. State v. Franklin, 52 N.J. 386, 406 (1968) (citing Fiorello, 36 N.J. at 86).

The Reyes standard applies to appellate review of the sufficiency of evidence. State v. Kittrell, 145 N.J. 112, 130 (1996). "In deciding whether the trial court was correct in denying [a Reyes] motion, we . . . take into account only the evidence on the State's case, unaided by what defendant later developed at trial." State v. Lemken, 136 N.J. Super. 310, 314 (App. Div. 1974).

Defendant's claim that his convictions for kidnapping and aggravated sexual assault convictions should have been reversed because the elements of the kidnapping crime were not proven "is not cognizable on appeal since no motion for a new trial on that ground was made in the trial court." State v. Perry, 128 N.J. Super. 188, 190 (App. Div. 1973) (citing R. 2:10-1). Yet, even if the claim was cognizable, we would reject it because the State provided sufficient evidence that defendant kidnapped Sydney.

In accordance with N.J.S.A. 2C:13-1(b)(1), "[a] person is guilty of kidnapping if he 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, . . . [t]o facilitate commission of any crime." We look no further than our Supreme Court's recent opinion in State v. Cruz-Pena, 243 N.J. 342 (2020) to confirm that Sydney's testimony clearly established she was kidnapped by defendant.

In Cruz-Pena, the Court pronounced:

> Holding a victim in captivity for a period of four to five hours, while sexually abusing and assaulting her, satisfies the "substantial period" requirement of the kidnapping statute—even if the length of the confinement is co-extensive with the continuous sexual and physical abuse of the victim.
>
> . . . .
>
> In our view, the sheer duration of the confinement combined with the crimes committed against her alone meet the "substantial period" requirement—even if the repetitive acts of sexual abuse and the physical assaults were co-extensive with the prolonged confinement. See N.J.S.A. 2C:13-1(b).
>
> [243 N.J. at 346, 360].

Like the situation in Cruz-Pena, Sydney testified defendant confined her to her apartment throughout the night while subjecting her to hours of torturous,

horrific sexual assaults and threats to kill her. Considering the State's evidence in the light most favorable to its position, the failure of the trial judge to grant defendant's motion was not error as the State carried its burden of producing evidence that a reasonable jury could find defendant guilty of kidnapping. Given that the State's proofs sustained the kidnapping charges, the argument that the aggravated sexual assault convictions should be reversed is without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

IV

In Point III, defendant contends he was denied a fair trial because the judge prevented him from questioning Sydney about her conduct that resulted in her insurance fraud conviction. Defendant maintains that her credibility as the only eyewitness to the alleged sexual assault was a crucial issue before the jury, therefore, he should have been able to question her regarding how she committed fraud. We are unpersuaded.

Citing State v. Weaver, 219 N.J. 131, 150-51 (2014), defendant argues that "defensive use of other bad acts evidence under N.J.R.E. 404(b) need not satisfy the more rigorous [Cofield] four-[prong] test for admissibility necessary when the State is the proponent." He maintains:

> When a defendant offers such evidence on his own behalf, prejudice to him "is no longer a factor, and

> simple relevance to guilt or innocence should suffice as the standard of admissibility," in part because "the defendant need only engender reasonable doubt of his guilt whereas the State must prove guilt beyond a reasonable doubt."
>
> [(quoting State v. Garfole, 76 N.J. 445, 452-53 (1978)).]

In contending Sydney's allegations of sexual assault were fabricated, defendant reasons he "should have been permitted to question [her] on the details of the methods she employed in [the insurance fraud] scheme."

N.J.R.E. 609(a)(1) allows a conviction to be admitted for the purpose of impeaching a witness's credibility. Defendants may introduce "similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt." Garfole, 76 N.J. at 453. "The defensive use of similar other-crimes evidence is sometimes referred to as 'reverse 404(b)' evidence." Weaver, 219 N.J. at 150. Nonetheless, even under this "more relaxed" standard, a trial judge "must still determine that the probative value of the evidence is not substantially outweighed by any of the Rule 403 factors." Id. at 150. Rule 403 permits a trial judge to exclude evidence "if its probative value is substantially outweighed by the risk of: (a) [u]ndue prejudice, confusion of issues, or misleading the jury; or (b) [u]ndue delay, waste of time, or needless presentation of cumulative evidence."

Although the record reveals the trial judge did not conduct a Rule 403 analysis to determine whether the details of Sydney's insurance fraud offense could be brought out in cross-examination, defendant has not shown that the judge abused his discretion in disallowing defendant's inquiry. By making the jury aware Sydney was convicted of a serious crime of dishonesty, it was able to consider that in determining the credibility of her accusation against defendant. Defendant's argument that the details of her offense are probative of whether she lied about defendant's conduct is unnecessary and focuses on irrelevant facts.

V

In Point IV, defendant contends that the trial judge erred in denying his motion for mistrial. He maintains mistrial was warranted because he was prejudiced when Sergeant Wren testified that defendant was Malone's father and the jury subsequently learned through the admission of Malone's Rule 104 testimony, which she recanted, that Malone had a threesome with defendant and Sydney. He argues the testimony violated the judge's pretrial ruling barring evidence that defendant is the father of Malone's child. Defendant also argues the testimony "was inadmissible [under Rule 403] because any probative value on evidence of [her] prior statement was outweighed by its clear prejudice to

prove only defendant's alleged propensity to commit offenses of moral turpitude." He maintains the testimony that defendant had sex "with his . . . daughter was offered solely to put the defendant in a negative light before the jury." We are unconvinced.

"Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.'" State v. Smith, 224 N.J. 36, 47 (2016) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)). We will not disturb the denial of a mistrial "unless there is a clear showing of mistaken use of discretion by the trial court," Greenberg v. Stanley, 30 N.J. 485, 503 (1959), or a manifest injustice would result, State v. LaBrutto, 114 N.J. 187, 207 (1989).

Similarly, a judge's decision to admit or exclude evidence is "entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment." Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016) (alteration in original) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). We reverse "an evidentiary ruling only if it 'was so wide off the mark that a manifest denial of justice resulted.'" Ibid. (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

Evidence is relevant if has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. "In

relevance determinations, the analysis focuses on 'the logical connection between the proffered evidence and a fact in issue.'" State v. Williams, 190 N.J. 114, 123 (2007) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004)). "The standard for the requisite connection is generous: if the evidence makes a desired inference more probable than it would be if the evidence were not admitted, then the required logical connection has been satisfied." Ibid. (citing State v. Davis, 96 N.J. 611, 619 (1984)).

Even if evidence is relevant, it "should be barred under N.J.R.E. 403 if 'the probative value of the evidence "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the" issues.'" State v. Santamaria, 236 N.J. 390, 406 (2019) (alteration in original) (quoting State v. Cole, 229 N.J. 430, 448 (2017)). "Inflammatory evidence 'must be excluded if other probative, non-inflammatory evidence exists.'" Ibid. (quoting Green, 160 N.J. at 500). "The party urging the exclusion of evidence under N.J.R.E. 403 retains the burden 'to convince the court that the [rule's] considerations should control.'" Id. at 406-407 (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2001)).

The trial judge allowed the admission of Wren's testimony that defendant was Malone's father to establish why defendant called Malone from jail and directed her to make a three-way call to Sydney. When Malone complied, defendant, impersonating a Lindenwold Police Detective Tomasetti, told Sydney that her rape charges were dismissed. This was probative and relevant to defendant's guilt. There was no undue prejudice. In addition, defendant failed to establish that the State had agreed not to present evidence of defendant and Malone's relationship. Thus, the judge did not abuse his discretion in allowing the evidence nor denying defendant's motion for mistrial.

Malone testified before the jury that upon seeing defendant and Sydney having consensual sex in Sydney's apartment, she shut the door and left because she did not want to "watch my dad and her have sex." This, however, conflicted with her prior Rule 104 testimony that she joined defendant and Sydney for a sexual threesome upon seeing them having consensual sex. The judge allowed the State to cross-examine Malone about her Rule 104 testimony because it conflicted with her trial testimony and was a legitimate attack on Malone's credibility. Although it was prejudicial because it put defendant in a bad light for having consensual sex with his adult daughter, it was not so unduly prejudicial that it outweighed the probative value of Malone's credibility. The

testimony did not violate the judge's pretrial ruling barring the State from presenting evidence that defendant was the father of Malone's son.

Given that Malone testified for the defense to establish that defendant and Sydney had consensual sexual relationship, it was proper to allow the State to attack her credibility, especially considering the conflicting statements she made under oath. Moreover, because Malone testified that she had a consensual sexual threesome with two adults, even though it included her father, the judge's reasoning that a Cofield analysis[4] was not needed to determine the admissibility of the evidence because the threesome was not a crime or a bad act under N.J.R.E. 404(b) is sound. The rule excludes evidence of other crimes or wrongs unless it is used to show "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2). The State did not offer the threesome testimony for any of these purposes. It was solely offered to impeach Malone's testimony.

[4] Under Cofield, evidence of other crimes or wrongs must pass the following four-factor test: (1) the evidence must be relevant to a material issue; (2) the evidence "must be similar in kind and reasonably close in time;" (3) the evidence proffered "must be clear and convincing;" and (4) "the probative value of the evidence must not be outweighed by its apparent prejudice." 127 N.J. at 338.

In sum, the record leads us to conclude the trial judge carefully weighed the parties' respective arguments and did not abuse his discretion in allowing the jury to consider Malone's conflicting testimony nor denying defendant's motion for mistrial.

VI

In Point V, defendant urges that, because juror number seven stated he might have spoken to Sydney during a recess asking her if she had a cigarette with no further conversation, the trial judge should have voir dired juror number seven and all other jurors whether they could "remain fair and impartial" because of "any conversations with the alleged victim," Sydney. Defendant maintains his Sixth Amendment right to a fair and an impartial jury was denied entitling him to a new trial. Defendant, however, agreed with the State that the jury was not tainted by juror number seven's simple request to a woman whom he was not sure was Sydney—if she had a light for his cigarette— and whom he had no further conversation. Thus, we must consider if invited error occurred.

Under the "invited error" doctrine, errors "that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). "[T]o rerun a trial when the mistake

could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." State v. Krivacska, 341 N.J. Super. 1, 43 (App. Div. 2001); see also Santamaria, 236 N.J. at 409 (holding that "even if it were [an] error [to admit evidence], a party cannot strategically withhold its objection to risky or unsavory evidence at trial only to raise the issue on appeal when the tactic does not pan out"). Only an invited error that "cut[s] mortally into the substantive rights of the defendant" will be reviewed on appeal. A.R., 213 N.J. at 562 (quoting Corsaro, 107 N.J. at 345).

Because defendant agreed the three voir dired jurors should not have been dismissed nor should the entire jury panel be questioned, he invited any error that may have occurred from the judge's ruling, and thus there is no basis to vacate his convictions and order a new trial. Even assuming juror number seven's contact was with Sydney, there was no impact on defendant's rights to a fair trial. It was evident from the voir dire that there was no contact or conversation that could affect the impartiality of juror number seven or the two jurors he confided in before they were voir dired about the incident. The judge did not abuse his discretion by allowing the three jurors to remain on the jury and not voir diring the remaining jurors. See State v. R.D., 169 N.J. 551, 558

(2001) (holding if a juror is possibly exposed to extraneous information during the trial, the trial judge must "use appropriate discretion to determine whether the individual juror, or jurors, 'are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court.'" (quoting State v. Bey, 112 N.J. 45, 87 (1988))). The possible interaction with Sydney was inconsequential and there was no need to dismiss any of the voir dired jurors from the panel nor question the remaining jurors concerning the contact.

VII

In Point VI, defendant argues that the trial judge committed plain error under Rule 2:10-2 by not including any lesser-included offenses in the jury charge regardless of his request that they not be provided. He contends "there was sufficient evidence" that the jury could have found him guilty of the lesser-included offenses of criminal restraint, N.J.S.A. 2C:13-2(a), or false imprisonment, N.J.S.A. 2C:13-3, which are lesser-included offenses of kidnapping. N.J.S.A. 2C:1-8(d)(1) and (3); State v. Savage, 172 N.J. 374, 398, 400 (2002); State v. Brent, 137 N.J. 107, 122 (1994).

An invited error is not a plain error. The judge's decision not to charge the jury on lesser-included offenses was invited error because defendant

demanded that there be no lesser-included charges. A.R., 213 N.J. at 561. Under oath, defendant advised the judge that based upon consultation with his counsel he did not want the jury to consider lesser-included offenses. The judge correctly determined defendant's decision was in furtherance of his trial strategy and complied with his request. The judge did not make an independent decision not to instruct the jury on lesser-included offenses. See State v. Jenkins, 178 N.J. 347, 360 (2004) (holding invited error is not applicable where the trial court "arrived at the decision not to instruct on lesser-included offenses independently of any invitation or encouragement by defendant"). Defendant cannot be granted a new trial by contending on appeal that the judge committed error by complying with defendant's strategic request. See Santamaria, 236 N.J. at 409. Defendant should not get the benefit of a trial do-over based on an explicit trial strategy decision—which turned out to be unsuccessful—that he only wanted the jury to consider with what he was charged.

VIII

In Points VII and VIII, defendant challenges his aggregate sentence of sixty-eight years subject to NERA is excessive. He contends the judge erred when "establishing the sentencing range that [he] was to consider when sentencing . . . defendant" to an extended term for kidnapping. Defendant also

contends the judge erred in double counting his criminal history when granting "a discretionary extended-term sentence and then using the same criminal history as a basis for finding aggravating factor three," the risk of committing another offense, N.J.S.A. 2C:44-1(a)(3).

Defendant does not dispute his eligibility for extended-term sentencing as a persistent offender or that his sentence falls within the permissible range. He contends the judge incorrectly determined the discretionary extended term sentence was not thirty years to life. The correct range was from fifteen years, the bottom of the ordinary sentence for a first-degree kidnapping charge, to the top of the extended term sentence, life, or seventy-five years. N.J.S.A. 2C:13-1(c)(1). He maintains "the range on the discretionary extended term sentence was [fifteen] years to life, and the mid-range of the sentence was [forty-five] years, not [fifty-two and one-half] years." Therefore, defendant concludes,

> the [judge] incorrectly added [ten-and-one-half] years on top of the [fifty-two and one-half] years (what the court incorrectly determined to be the middle of the range) and sentenced [him] to [sixty-three] years in prison. If the [judge] added the [ten] years [and] [six] months on top of the mid-range of [forty-five] years, the sentence would have been [fifty-five] years [and] [six] months. The [judge] overshot the sentence it felt was appropriate by [seven] years and [six] months.

Defendant cites no legal authority for his position. We conclude our governing legal standards warrant that his sentence should not be disturbed.

We review sentencing determinations in accordance with a deferential standard and "must not substitute [our] judgment for that of the sentencing [judge]." State v. Fuentes, 217 N.J. 57, 70 (2014). We determine whether "sentencing guidelines were violated;" whether "the aggravating and mitigating factors found" were "based upon competent and credible evidence in the record;" and whether "'the application of the guidelines to the facts of [the] case make[] the sentence clearly unreasonable so as to shock the judicial conscience.'" Ibid. (first alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

"Under N.J.S.A. 2C:44-3, the [judge] may, on application by the prosecutor, sentence a first-, second-, or third-degree offender to an extended term, but only if [the judge] finds that the defendant is either (1) a persistent offender, (2) a professional criminal, or (3) a hired criminal." State v. Dunbar, 108 N.J. 80, 87-88 (1987). After determining "whether a defendant's criminal record of convictions renders him or her statutorily eligible," the judge should consider "the range of sentences[] available for imposition, start[ing] at the minimum of the ordinary-term range and end[ing] at the maximum of the extended-term range." State v. Pierce, 188 N.J. 155, 168, 169 (2006). The judge

is not required to consider the bottom range of a sentence because he has the sound discretion to sentence the defendant within the full range of an extended term in light of the sentencing factors that are supported by credible evidence in the record. Id. at 169. Because there is "no longer [any] presumptive sentences as a starting point for a [judge's] sentencing analysis, so too there will not be a presumptive starting point for a [judge's] analysis within the broadened range encompassing the breadth of the original-term range and the available extended-term range." Id. at 170.

Even though the bottom of the extended term sentencing range for first-degree kidnapping was fifteen years, not thirty years, as the judge considered, the judge did not abuse his discretion in sentencing defendant to an extended term. Defendant's sixty-three-year sentence was within the extended term range and based on sentencing factors supported by credible evidence in the record. It does not shock our judicial conscience.

There is also no merit to defendant's argument that the judge erred in double counting the same criminal history for his extended term sentence for finding aggravating factor three. In State v. Tillery, the Court found "no error in the trial [judge's] reliance on defendant's criminal record both to determine defendant's 'persistent offender' status under N.J.S.A. 2C:44-3(a) and to support

the [judge's] finding of aggravating factors three, six, and nine." 238 N.J. 293, 327 (2019). Indeed, the Court confirmed that "the defendant's criminal record may be relevant in both stages of the sentencing determination" as "defendant's prior record is central to aggravating factor six, N.J.S.A. 2C:44-1(a)(6), and may be relevant to other aggravating and mitigating factors as well." Id. at 327-28. Likewise, in State v. McDuffie, 450 N.J. Super. 554, 576 (App. Div. 2017), this court rejected, "as lacking merit," a defendant's claim that "the court impermissibly double-counted his criminal record, when granting the State's motion for a discretionary extended term, and again, when imposing aggravating factor six."

This court explained that defendant's "criminal history was not a 'fact' that was a necessary element of an offense for which he was being sentenced." Ibid. The sentencing judge was not "required to ignore the extent of his criminal history when considering applicable aggravating factors," particularly where it was undisputed that defendant "had more than the requisite number of offenses to qualify for an extended term." Id. at 576-77.

Here, the record reflects the judge did not double-count the offense that triggered the extended term as an aggravating factor but rather found the aggravating factor based on competent credible evidence of defendant's criminal

history. The judge emphasized that nothing had deterred defendant's criminal behavior in the past, stating "[i]t appears the only time defendant is not committing crimes is when he is in prison." We conclude the judge did not abuse his discretion.

IX

To the extent that we have not addressed defendant's remaining arguments raised by counsel, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

X

As for the arguments raised in defendant's pro se supplemental brief, considering the record and relevant law, we conclude they are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(2). We do add, however, that defendant's ineffective assistance claims are more appropriately raised on a petition for post-conviction relief instead of direct appeal. State v. McQuaid, 147 N.J. 464, 484 (1997). See also State v. Preciose, 129 N.J. 451, 460 (1992) (recognizing a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because they generally require examination of evidence outside the trial record). Accordingly, we do address the merits of the claims raised in this appeal.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION