RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2594-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PORFIRIO A. NUNEZ-MOSQUEA,

Defendant-Appellant.

Submitted March 29, 2017 – Decided August 24, 2017

Before Judges Accurso, Manahan and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 12-08-1139 and 12-08-1142.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Joie Piderit, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

On March 30, 2012, twenty-year-old Y.S. was walking in downtown New Brunswick to catch a bus for work, when a man, later identified as defendant Porfirio A. Nunez-Mosquea, approached her with a gun and forced her into his van. Although it was only a few minutes after 6:00 a.m., two witnesses saw the struggle and called the police. One of the witnesses reported seeing a Hispanic or light-skinned black male, aged nineteen to twenty, wearing a pullover polo shirt and jeans, wrestling with a young, Muslim woman, whom the witness recognized from her morning routine. The other saw the man forcing the woman through the sliding door of a red minivan, and managed to glimpse the first three characters of the license plate, "G40."

Y.S. testified at trial that after forcing her into his van, defendant drove her at gunpoint to a house not far away. On the way, defendant told her that her cousin paid him to do it, and he would shoot her if she screamed or did "anything crazy." Y.S., a recent immigrant from Egypt, told him she had no cousins, although that statement was not true. When defendant directed her to get out of the van, still at gunpoint, he told her not to do anything that would draw attention to the two of them. Y.S. did as she was told, leaving her purse but taking her phone, a white iPhone in a pink bunny case.

Defendant led her to a dark basement where he made her kneel on the floor facing a wall. After directing her to remove her headscarf, defendant tightly tied Y.S.'s hands behind her back with it. He gagged and blindfolded her and used scissors to cut through the tank top she was wearing underneath her cardigan. He touched her breasts underneath her bra, and made her stand as he pulled her jeans, leggings and underwear down below her knees. He told her he wanted to take pictures of her to embarrass her.

When she was again made to kneel on the floor, she heard plastic ripping and a zipper, leading her to think he was putting on a condom. When defendant made her stand again and touched her vagina, she began to scream uncontrollably. Defendant came from behind her, putting his hand over her gagged mouth and holding a gun to her head. She scratched at his thighs and felt his penis through the condom. When she would not stop screaming, defendant placed a heavy plastic bag over her head and held it against her mouth, preventing her from breathing.

Defendant kicked at her feet, making her fall to the floor on her back. He had one hand between her legs and was using the other one to hold her down. She testified the bag was still on her head, making it impossible to breathe, but she was so scared

she could not stop screaming even as he threatened to kill her. She testified she was choking and started to kick her feet in an effort to get air. When she could finally get herself to stop screaming, defendant removed the bag from her head. Saying he needed to wash her hands because she had scratched him with her nails, he walked her to a sink in another room.

As he sprayed something on her hands, still tied behind her back, and brushed her nails, he asked her if there was a reason she could not have sex with him. She told him she could not have sex before marriage, that her family would kill her, and that he would ruin her whole future. He responded that he would have to "pass [her] out so he could have sex with [her]." She testified that she "started saying no, please no, please," and started screaming again.

He told her to calm down and led her back to kneel again on the floor, and said, "let me go talk to him. . . . I'll be back." When defendant returned, he told her "he wants to jerk off." Y.S. did not understand. When defendant explained, she started screaming again. He told her to stop and that he would "talk to him." Defendant again left the room briefly. When he returned, he told Y.S. he was "trying to make him let [her] go," and that defendant "didn't know he's such a psycho." Defendant told her he was trying to "get [her] out of [there]" and asked

if she trusted him. Believing that defendant might let her go, she told him she trusted him and asked him to help her.

After several more rounds of defendant leaving and coming back, he told her he was going to let her go. He pulled up her pants and tried to cover her with her scarf and what remained of her shirt. He untied her and removed her gag and blindfold. As he led her out, she looked at him. Still holding the gun, he told her not to look at him, and that there were "five other guys out there" that would shoot her if she did anything. He walked her up the stairs and down the street and left her, telling her not to look back.

Y.S. ran into the nearest business and asked the woman behind the counter to call the police. The 911 call was played for the jury and the prosecutor played it again during her summation. When the police arrived, Y.S. walked them back to the place she believed she was held captive, where they recovered her headband, condom wrappers, the plastic bag defendant put over her head, as well as scissors and a rag. The owner of the house advised that defendant had lived in the basement and still had keys.

Going to defendant's new address, the police found a maroon dodge Caravan outside with a license plate beginning "G40." Looking through the window, they saw a woman's handbag, later

identified as belonging to Y.S. Defendant was sleeping naked when the police roused him. When he got out of the bed, officers noticed scratches on both his thighs. DNA recovered from under Y.S.'s nails revealed that defendant and his paternal male relatives could not be excluded as possible contributors to the sample.

From defendant's apartment and van, police recovered a blue shirt, jeans and a striped jacket that Y.S. identified as the same ones worn by her attacker, as well as her purse, her college I.D., and her iPhone and bunny case. They also recovered a gun, which defendant's stepfather identified as one stolen from him a few weeks earlier. Although Y.S. identified her attacker's clothes and identified defendant as her attacker at trial, she did not pick him out of a photo array shortly after his arrest.

Y.S. was examined by a Sexual Assault Response Team Coordinator, who testified at trial that Y.S. reported "headache, body ache, upper arms and shoulders and left inner aspect of the left elbow, pain." The witness testified she found dried blood on Y.S.'s headscarf and injuries in her mouth, on her face, wrist and elbow:

> [T]he inner aspect of her — her left upper cheek was cut. She had dried blood on the crack where the upper lip meets the lower

> lip and she had an abrasion on her lip. And then she had stated that her hands were bound behind her back and there was a, approximately a half a centimeter red scratch on her right, right wrist.
>
> A bruise the size of about a quarter which was . . . purple and that's where she had — was complaining that she had pain prior in the report. . . . The inner aspect of the left elbow.

Y.S. testified to those physical injuries and to a bruise on her back from when defendant made her fall. She also described the emotional harm she suffered as well.[1] When asked how her abduction and assault made her feel, she responded that she "thought [she] was going to die."

> I felt insecure, helpless. I wasn't in control of myself or anything. It affected my relationship with my parents. I thought I was going to die. I'm so unconfident. I just — weak. I can't focus at school. I — I can't concentrate, and that's not me. I'm, like, a good student. It's affected me — it's affected my entire life. I don't feel like I'm the same person.

At the charge conference, defendant requested a modification of the model charge for first-degree kidnapping. Relying on State v. Sherman, 367 N.J. Super. 324 (App. Div.), certif. denied, 180 N.J. 356 (2004), overruled in part on other

[1] The trial judge excluded the State's evidence that Y.S. was taking prescribed anti-depressant and anti-anxiety medications because the information had not been provided to defense counsel in advance of trial.

grounds, State v. Dalziel, 182 N.J. 494, 504 (2005), defendant requested the court modify the model charge to distinguish between the type of harm occurring in every kidnapping from the harm the State must prove to secure a conviction. He asked that the charge include that "minimal or insubstantial injuries are insufficient to establish physical harm. The harm component must be distinguished from the type of harm inherent in every kidnapping. Inherent means involved in the essential character of something." Defendant contended that language in Sherman acknowledged a difference between emotional and psychological harm sufficient to satisfy the statute and "the type of harm inherent in every kidnapping," he argued that distinction should apply to all harm, not merely psychological harm.

Judge Pincus denied the request, finding a defendant is entitled to a jury instruction on first-degree kidnapping that makes clear the State is required to prove the defendant knowingly caused emotional, physical, or psychological harm, or knowingly released the victim in an unsafe place, but is not "entitled to an instruction that the harm component must be distinctive from the kind of harm inherent in every kidnapping." The judge accordingly delivered the model charge on first-degree kidnapping in effect at the time of trial, with no alterations.

The jury convicted defendant of two counts of first-degree kidnapping, N.J.S.A. 2C:13-1b; second-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2a; third-degree attempted aggravated criminal sexual contact, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-3a; third-degree terroristic threats, N.J.S.A. 2C:12-3b; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a; second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b; and third-degree criminal restraint, N.J.S.A. 2C:13-2. The jury acquitted him of attempted murder, two counts of invasion of privacy and receiving stolen property. Following the verdict, defendant pled guilty to a second-degree certain persons offense, N.J.S.A. 2C:39-7b, charged in a separate indictment. As to the "unharmed release" element of first-degree kidnapping, the jury found defendant released Y.S. in a safe place prior to apprehension, but also found he knowingly harmed her.

Defendant moved for a new trial, arguing he was entitled to the modification to the instruction on kidnapping he had requested, and that the State had failed to prove the "unharmed release" element elevating kidnapping to a first-degree offense. Judge Pincus denied the motion. She found:

> In this case, Y.S. was removed from the street at gun point by defendant, who was a stranger. Brought to the basement of an

unknown isolated residence. Bound, gagged and blindfolded. Had her clothes ripped off, her breasts and vaginal region touched, and was threatened with a gun throughout the course of this ordeal.

Y.S., fearing that defendant was about to sexually assault her as a result of hearing him unzip his pants and rip open a condom, began to scream. To stop her from screaming, defendant took a thick plastic bag, put it over her head with his hand on top of the portion of the bag that was over her mouth so that she could not breathe.

He continued to tell her to stop screaming, and when she did not comply he kicked her feet out from under her which caused her to fall on her back. The plastic bag was still on her head and defendant's hand was between her legs as he held her down.

Y.S. was kicking and screaming because she could not breathe. She — there was blood on the area of her head as a result of being — as a result of the defendant's actions, and she suffered other injuries, including cuts to her mouth and wrist, and bruises to her elbow.

The defendant argues that Y.S. suffered only minimal and insubstantial injuries . . . . And just to be clear, the defendant's argument that she suffered only minimal and insubstantial injuries which would be insufficient to prove physical harm is clearly contradicted by those facts.

Y.S.'s injuries were neither minimal nor insubstantial. Clearly, based on these facts, the jury could have found that Y.S. suffered physical injuries which would satisfy the element of first-degree

> kidnapping in that Y.S. was not released unharmed.

The judge distinguished a recent unpublished decision from our court in which we held the testimony regarding the victim's emotional state following the defendant's confinement of her in her own apartment was insufficient evidence of harm to support defendant's conviction for first-degree kidnapping. In that case, Judge Pincus noted

> the victim knew the defendant and did not suffer any physical injuries whatsoever. While in our case the defendant, who was a stranger to Y.S. and a situation in which Y.S. was physically harmed, in that she was bound, gagged, blindfolded, suffocated, smothered, kicked, had cuts on her mouth and wrist, scratches on her hand, bruises to her elbow and back, and was knocked to the ground, and there was bleeding in the area of her head.
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> There is no requirement that the State prove Y.S's injuries through medical evidence. And the jury could have reasonably come to the determination that Y.S. suffered physical harm based on her testimony as to what transpired during the kidnapping.
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> Consequently there was no requirement for the jury to be given the instruction that the harm must exceed that which is inherent in every kidnapping. And this court is not addressing Y.S.'s psychological or emotional trauma as it is not necessary for the purpose of this motion, but I do recognize that Y.S. testified she felt like she was going to die. Her relationship with her parents suffered. She felt insecure and

> helpless. She lost her ability to concentrate at school.

The judge concluded the charge both conformed to the holding in Sherman and followed the model charge, and that the jury applied the law as instructed and determined defendant knowingly harmed Y.S. She found the jury's verdict finding defendant guilty of first-degree kidnapping was not against the weight of the evidence and did not result in a manifest denial of justice under the law and thus denied the motion.

Following appropriate mergers, Judge Pincus sentenced defendant to twenty-five years in State prison for first-degree kidnapping subject to the periods of parole ineligibility and supervision required by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; to a consecutive seven-year NERA term for second-degree attempted aggravated sexual assault subject to parole supervision for life pursuant to N.J.S.A. 2C:43-6.4; a concurrent seven-year term for second-degree unlawful possession of a weapon subject to three years' parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6c; and to a consecutive seven-year term on second-degree certain persons not to have weapons subject to five years' parole ineligibility pursuant to N.J.S.A. 2C:39-7b.

Defendant appeals, raising the following issues:

POINT I

THE TRIAL JUDGE'S ERROR IN FAILING TO PROPERLY INSTRUCT THE JURY ON THE HARM ELEMENT OF THE FIRST-DEGREE KIDNAPPING CHARGE DEPRIVED NUNEZ-MOSQUEA OF HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS.

POINT II

NUNEZ-MOSQUEA WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE REFUSED TO DECLARE A MISTRIAL AFTER THE JURY TALKED, DURING AND AFTER DELIBERATIONS, ABOUT THE FACT THAT NUNEZ-MOSQUEA'S LAWYER WAS APPOINTED BY THE PUBLIC RATHER THAN PRIVATE, AND THE EXPENSE OF THE TRIAL.

POINT III

THE SENTENCING JUDGE ERRED IN APPLYING AGGRAVATING TWO BY DOUBLE COUNTING THE HARM THAT ELEVATED THE KIDNAPPING OFFENSE TO THE FIRST-DEGREE LEVEL, RESULTING IN A MANIFESTLY EXCESSIVE TWENTY-FIVE-YEAR NERA TERM.

He adds the following points in a pro se brief.

POINT I

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND FAIR TRIAL GUARANTEED BY THE FIFTH, SIX[TH] AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEREBY, THE TRIAL COURT FAILED TO PROVIDE THE JURY WITH A COMPLETE IDENTIFICATION CHARGE. SPECIFICALLY, THE CROSS-RACIAL IDENTIFICATION LACKED THE MOST ESSENTIAL COMPONENTS OF THE STANDARD MODEL CHARGE.

POINT II

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND FAIR TRIAL GUARANTEED BY THE FIFTH,

SIX[TH] AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEREBY, STATE FAILED TO PROVE CRITICAL ELEMENT OF "SEXUAL PENETRATION" REQUIRED BY THE CHARGE OF SECOND-DEGREE ATTEMPTED AGGRAVATED ASSAULT PURSUANT TO N.J.S.A. 2C:5-1 AND N.J.S.A. 2C:14-2A COUNT FOUR.

POINT III

IMPOSITION OF DEFENDANT'S SENTENCES BEYOND THE STATUTORY MAXIMUM BASED ON JUDICIAL FACT-FINDING OF AGGRAVATING FACTOR WHICH WAS NEVER ADMITTED TO BY DEFENDANT OR SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT VIOLATED BOTH HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF RENDERED THE TRIAL UNFAIR.

Having considered defendant's arguments in light of the facts and the applicable law, we affirm.

The grading provision of the kidnapping statute, N.J.S.A. 2C:13-1c(1), provides, as pertinent here, that "kidnapping is a crime of the first degree . . . [but i]f the actor releases the victim unharmed and in a safe place prior to apprehension, it is a crime of the second degree." There is no question but that harming or failing to release the victim is an element the State must prove in order to secure a conviction for first-degree kidnapping. State v. Federico, 103 N.J. 169, 174 (1986); State

v. Casilla, 362 N.J. Super. 554, 566-67 (App. Div.), certif. denied, 178 N.J. 251 (2003).

We construed the "unharmed release" provision in Sherman, a case involving the kidnapping of a six-year-old child for ransom. 367 N.J. Super. at 332. After abducting the child and holding her at his mother's home for nearly twenty-four hours, where he built her a "fort" from cushions, fed her Cheerios, yogurt and apple juice, let her watch cartoons and provided her with a book and a game when he left her alone for ten minutes to make a ransom call, the defendant had a change of heart and decided to return the child to her parents. Id. at 332-33. He dropped her at a shopping mall shortly after it opened with instructions "to run to the first adults she saw and tell them the police were looking for her." Id. at 333.

The child quickly happened upon a school teacher, who reported her as "composed and not in any distress." Ibid. Although an examination of the child revealed her "in good condition, with no sign of physical injury or emotional distress," and she reported that "the man that took her treated her nicely," she subsequently experienced nightmares, anxiety, and a fear of again being kidnapped and was diagnosed with post-traumatic stress disorder. Id. at 333-34.

Although we reversed the defendant's first-degree kidnapping conviction, based on the denial of his in limine motion to modify the jury charge to reflect the State's obligation to prove unharmed release beyond a reasonable doubt, we rejected his argument that the child's anxiety, nightmares and fear constituted only minimal emotional or psychological harm insufficient to support first-degree kidnapping. Id. at 330-31, 342. We held that the "harm" in the unharmed release provision of N.J.S.A. 2C:13-1c, includes emotional or psychological harm suffered by the victim. Id. at 330. We also held that "disproving unharmed release is a 'material' element of the crime of first-degree kidnapping, requiring the State to prove that a defendant 'knowingly' harmed or 'knowingly' released the victim in an unsafe place." Ibid. We concluded that

> the "harm" component of the unharmed release provision contained in N.J.S.A. 2C:13-1c focuses on the conduct of the kidnapper during the purposeful removal and holding or confining of the victim, as distinguished from the type of harm inherent in every kidnapping. Therefore, when a victim is released in a safe place prior to the kidnapper's apprehension, as [in Sherman], in order to prove that the kidnapper is guilty of first-degree kidnapping, the State must prove beyond a reasonable doubt that the kidnapper knowingly caused physical, emotional or psychological harm to the victim.

[Sherman, supra, 367 N.J. Super. at 330-31.]

In reaching that conclusion in Sherman, we relied on our opinion in State v. Tronchin, 223 N.J. Super. 586, 594 (App. Div. 1988), a case involving the sexual assault of a woman who had voluntarily accepted a ride from the defendant. Although finding the State did not prove kidnapping in that case as the victim was neither "confined" nor "removed," we soundly rejected the notion that the victim of a second-degree sexual assault "suffered neither physical nor emotional injury, and was thus released unharmed, N.J.S.A. 2C:13-1c(1)." Id. at 594 n.4.

Following our opinion in Sherman, the model charge for first-degree kidnapping was amended to provide that the State must prove the defendant "knowingly harmed" or "knowingly did not release" the victim in a safe place prior to his apprehension and that "[t]he 'harm' component can include physical, emotional, or psychological harm." See Model Jury Charge (Criminal), "Kidnapping – Permanent Deprivation of Custody" (March 5, 2007). In accordance with the model charge, the trial court instructed the jury as follows:

> If you find that the State has proven to you beyond a reasonable doubt that the defendant committed the crime of kidnapping, you must go on to determine whether the State has also proven beyond a reasonable doubt that the defendant knowingly harmed

> [Y.S.], or knowingly did not release her in a safe place prior to apprehension.
>
> The harm component can include physical, emotional, or psychological harm. In this case, the State alleges that defendant bound, gagged, smothered, held a gun to [Y.S.'s] head, and attempted to sexually assault her. In the course of doing so[,] defendant caused cuts to her mouth, wrist, and bruises to her elbow. The State alleges that [Y.S.] was traumatized as a result of these crimes.
>
> On the other hand, defendant contends that he did not knowingly cause harm to [Y.S.], and that she was released in a safe place, a residential street, in daylight.

Several months after the trial, the model charge for first-degree kidnapping was again revised with regard to what the State must prove when alleging non-physical harm as follows:

> If the State is contending that the victim suffered emotional or psychological harm, it must prove that the victim suffered emotional or psychological harm beyond that inherent in a kidnapping. That is, it must prove that the victim suffered substantial or enduring emotional or psychological harm.
>
> [Model Jury Charge (Criminal), "Kidnapping" (revised Oct. 6, 2014).]

Defendant, however, did not request a modification of the charge as it related to the victim's psychological injuries. He maintained he was entitled to a charge instructing the jury that "minimal or insubstantial injuries are insufficient to establish physical harm" and that "[t]he harm component must be

distinguished from the type of harm inherent in every kidnapping."

No New Jersey case of which we are aware has ever suggested that there is a difference between the physical harm sufficient to satisfy the released unharmed provision of the statute and "the type of harm inherent in every kidnapping."[2] Moreover,

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[2] The Supreme Court has previously rejected reliance on the comments of the Criminal Law Revision Commission on which defendant relies, proposing "to maximize the kidnapper's incentive to return the victim alive, by making first degree penalties apply only when the victim is not 'released alive in a safe place.'" State v. Masino, 94 N.J. 436, 446 (1983).

> Any argument that our legislature intended to soften its treatment of kidnappers is foreclosed by reference to an early draft of 2C:13-1, subsequently rejected, that discussed a downgrading provision: "We propose to maximize the kidnapper's incentive to return the victim alive by making first degree penalties apply only when the victim is not 'released alive in a safe place' . . . . Certainly those formulations which authorize extreme penalties unless the victim is 'liberated unharmed' are unsatisfactory . . . ." [Final Report of the New Jersey Criminal Law Revision Commission, vol. II: Commentary (1971) at 187] (emphasis added). As it turned out, of course, the legislature did ultimately authorize first degree sentences of 15 to 30 years unless the victim was released unharmed. N.J.S.A. 2C:13-1(c).
>
> [Ibid.]

The Sherman court likewise rejected any argument that by employing the word "unharmed" the Legislature intended it "to

while we accept that "[i]t may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which [the Legislature] had in mind," Robinson v. United States, 324 U.S. 282, 285, 65 S. Ct. 666, 668, 89 L. Ed. 944, 946-47 (1945), the harm inflicted on Y.S., whom the court aptly described as having been "bound, gagged, blindfolded, suffocated, smothered, [and] kicked" to the ground in the course of an attempted aggravated criminal sexual contact and attempted aggravated sexual assault, resulting in "cuts on her mouth and wrist, scratches on her hand, [and] bruises to her elbow and back," plainly was not of that trifling character. See Tronchin, supra, 223 N.J. Super. at 594 n.4.

Likewise, we do not fault the trial judge for not modifying the charge regarding emotional harm sua sponte in anticipation of the revision adopted several months after the trial. That revision, although apparently based on Sherman, was not made for ten years following our opinion in that case. More important, the error, if there was one, was undoubtedly harmless as there was ample evidence on this record to permit the jury to find

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mean only that the victim suffered no bodily injury or no serious bodily injury." 367 N.J. Super. at 343-44; see also State v. Sewell, 127 N.J. 133, 135-36 (1992) (including in "bodily injury" as defined in N.J.S.A. 2C:11-1, a sore leg, back, hip, and chest with no bruising, and briefly elevated blood pressure induced by collision with a fleeing thief).

beyond a reasonable doubt that defendant knowingly inflicted physical harm on Y.S. in the course of the kidnapping.

Defendant's argument with regard to alleged jury misconduct warrants no discussion here. R. 2:11-3(e)(1)(E). The comments by a single juror speculating on whether defendant was represented by private counsel or the public defender were promptly and appropriately addressed by the trial judge. The judge questioned each juror individually as to whether the juror recalled a conversation about "appointed attorneys versus private attorneys" and instructed all who heard such comments that the comments must play no role in their deliberations. The jurors advised the judge they could follow her direction.

Judge Pincus proceeded in this matter exactly as the Supreme Court directed in State v. R.D., 169 N.J. 551, 557-61 (2001). Her conclusion that the remarks were no more than "a passing comment" having no effect on the jury's deliberations is supported by the record and thus entitled to our deference. Id. at 559. Defendant's contention that the remarks entitled him to a mistrial are without merit.

We also reject defendant's argument that the trial judge double counted in applying aggravating factor two, resulting in a manifestly excessive twenty-five-year NERA term on the kidnapping count. N.J.S.A. 2C:13-1c(1) provides the sentencing

court discretion to sentence a defendant to between fifteen and thirty years for first-degree kidnapping. State v. Megargel, 143 N.J. 484, 505 (1996). Although acknowledging that "factors one and two are not easily found," Judge Pincus concluded that "this is the case for which they are appropriate."

Specifically, the judge reasoned that factor one applied because the kidnapping

> was committed in an especially heinous, cruel or depraved manner, in that Defendant did not only abduct the victim at gunpoint and take her to a deserted basement apartment where he threatened to kill her, but he did much more than that . . . .
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> He told her that her cousin was the mastermind and there was a man directing what he was doing in the other room. And that that man wanted him to do sexual things to Y.S. He tied her hands behind her back, blindfolded her, gagged her, put a bag over her head choking and smothering her to stop her from screaming. He attempted to sexually assault her and continued to tell her that other men were involved and wanted to touch her.
>
> All of these circumstances increased her terror and went well beyond what was necessary to accomplish the kidnapping.

As to factor two, the judge explained that:

> Factor two has to do with the gravity and seriousness of the harm inflicted on the victim. And in this case the defendant terrorized the victim from the moment that he grabbed her off the street at gunpoint, brought her to an isolated basement

> apartment at gunpoint. Blindfold, gagging, tying her hands, smothering her.
>
> She described the harm that was inflicted on her [in her victim impact statement]. And here it is appropriate to talk about the emotional harm. And in this case in particular, any person would be unbelievably frightened by all of these circumstances, and especially that part of the crime that had to do with attempting to sexually assault her by cutting her clothes, taking her clothes off, hearing him unzip his pants, put on a condom, all of that.
>
> But to this victim in particular, the harm was much more because she is an observant Muslim. And certainly described during the trial and today that it would not be acceptable for her to have a sexual relationship with anyone before marriage. And even though she was the victim here[,] the family is still looking at her as if in some way she's at fault. She's not permitted to talk about it, she can't talk to her family. She has to cry in privacy.
>
> And this obviously had such a significant impact on her that aside from the normal emotional trauma that would accompany any victim of an attempted aggravated sexual assault, along with the kidnapping and all of the other frightening circumstances, she has additional emotional harm through which she suffers and continues to suffer.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). Although it is axiomatic "that facts that established elements of a crime for which a defendant is being sentenced should not be considered as

aggravating circumstances in determining that sentence," State v. Kromphold, 162 N.J. 345, 353 (2000), "a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense," State v. Fuentes, 217 N.J. 57, 75 (2014). Judge Pincus did so here in meticulously describing the circumstances that increased the victim's terror "and went well beyond what was necessary to accomplish the kidnapping."

Although, as the judge acknowledged, finding factors one and two are far from usual, we have held that application of both factors is not per se unreasonable. See State v. Soto, 340 N.J. Super. 47, 71-72 (App. Div.) (finding no abuse of discretion in the trial court's application of aggravating factors one and two in sentencing the defendant for a brutal murder), certif. denied, 170 N.J. 209 (2001), overruled in part on other grounds, Dalziel, supra, 182 N.J. at 504. It is well settled that where the harm to the victim far exceeds the minimum necessary to prove an element of the offense, the court may treat the additional harm as an aggravating factor. State v. Mara, 253 N.J. Super. 204, 214 (App. Div. 1992).

Application of aggravating factor two "compels 'a pragmatic assessment of the totality of harm inflicted by the offender on the victim.'" State v. Anthony, 443 N.J. Super. 553, 575-76

(App. Div. 2016) (quoting State v. Lawless, 214 N.J. 594, 610 (2013)). "'It focuses on the setting of the offense itself with particular attention to any factors that rendered the victim vulnerable or incapable of resistance at the time of the crime.'" Id. at 576 (quoting Lawless, supra, 214 N.J. at 611). Here, Judge Pincus found the victim's Muslim faith, which she made known to defendant, increased the trauma she suffered, far exceeding that minimally necessary to elevate the crime to first-degree kidnapping, making this kidnapping more heinous than typical. That finding is well supported by the record.

Because we are satisfied that Judge Pincus's careful findings and balancing of the aggravating and non-existing mitigating factors are supported by adequate evidence in the record, and the sentence is neither inconsistent with sentencing provisions of the Code of Criminal Justice nor shocking to the judicial conscience, we affirm it in its entirety. See Fuentes, supra, 217 N.J. at 70; State v. Bieniek, 200 N.J. 601, 608 (2010); State v. Cassady, 198 N.J. 165, 180-81 (2009).

Defendant's remaining arguments, to the extent we have not addressed them, lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.