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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-3872-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ADOLPHUS FOSTER,

Defendant-Appellant.

Submitted May 16, 2017 – Decided August 16, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 14-05-0530.

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

Sean F. Dalton, Gloucester County Prosecutor,
attorney for respondent (Vanessa Craveiro,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant was convicted in a bench trial of third-degree aggravated assault and sentenced to a discretionary extended term as a persistent offender. He presents the following arguments for our consideration in his appeal:

POINT I

THE COURT BELOW ERRED IN DENYING FOSTER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE THIRD-DEGREE AGGRAVATED ASSAULT CHARGE AS THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT [E.L.] SUFFERED FROM A SIGNIFICANT BODILY INJURY.

POINT II

THE TRIAL COURT FAILED TO CONSIDER THE LESSER-INCLUDED OFFENSE OF SIMPLE ASSAULT. (Not raised below)

POINT III

FOSTER'S SENTENCE IS MANIFESTLY EXCESSIVE AND MUST BE REDUCED.

We are not persuaded by any of these arguments and affirm defendant's conviction and sentence.

I.

The evidence presented at trial can be summarized as follows:

The victim, E.L.,¹ and defendant were married in 2000 and divorced within two years. They resumed seeing each other in

¹ We used initials to protect the privacy of the victim.

September 2012. The event that gave rise to the charge here occurred on September 21, 2013.

E.L. described the events of that evening as follows. She and defendant visited his sister that evening. She became uncomfortable when an argument with his sister was "getting a little heated." She told everyone she was leaving in five minutes and would be sitting in the car. Defendant, who had been drinking, came out to the car and said, "You're not f'ing leaving. Don't you leave." She replied, "I am leaving," and left for home alone.

When she was at home, in bed, "there was . . . a strong knocking on the back door." She went to unlock and open the door. She said, "I didn't even have a chance to fully open the door all the way when [defendant] busted through and immediately began beating me in my face." Defendant punched her "immediately" in her left eye, "multiple times" that she "couldn't even count," and punched her "up around [her] head as well." She "dropped down, . . . screaming, crying," trying to fight back and then got up and "was able to just barely get out the back door." Defendant "came immediately behind [her], grabbed [her] by the back of [her] hair and pulled [her] down on the ground, and physically drug [sic] [her] from" the back porch inside the house. Defendant then shut the door and "beat [her] some more," "punching [her] all over, specifically in [her] head and [her] face." Then, defendant

dragged her into the bedroom, got on top of her on the bed and put "both of his hands around [her] throat using force to stop [her] from breathing," strangling her.

During the assault, which lasted for approximately one hour, defendant told her "he was going to kill [her]." The assault finally ended after defendant's sister, daughter and daughter's boyfriend came into the house, screaming at him to stop. After the assault, her "head became numb," she "couldn't focus, . . . couldn't think." Her ears were ringing and her eye was bleeding.

E.L. also stated defendant prevented her from leaving the house. She asked his daughter to call 911 and go. Defendant took E.L.'s cell phone and the keys to her car and left. E.L. used another set of keys to drive and met up with defendant's daughter and her boyfriend down the street. The police arrived there as well. She then went to the police department, where the officers took photographs of her injuries.

Two days later, E.L. sought medical attention at Underwood Memorial Hospital, where she had a CT scan. She could not see out of her left eye, which had "pretty much swollen shut" and "oozing." She also had cuts on the outside of her eye. She was out of work for two weeks. When her vision returned after three days, she "had a blurry vision in it." She was instructed by a plastic surgeon that she should not blow her nose "for at least a month

because her sinus cavity was broke[n] and the air was going into [her] eye." She testified she had permanent nerve damage and that her face was numb "straight down the center of [her] nose to [her] upper lip, all the way across and up to the bottom of [her] eye."

Ross Titton, M.D., a board certified radiologist, reviewed E.L.'s CT scan. He testified that he observed subcutaneous emphysema in the left preseptal and periorbital region. He explained this usually means there has been blunt trauma of some sort and that the most common cause is a fracture. Dr. Titton observed two definite fractures and a third "very likely" fracture. The first was in the medial wall of the left orbit of the eye; the second was a fracture of the floor of the orbit. The third "probable" fracture was "along the lateral wall of the left maxillary sinus." Dr. Titton also testified he could "tell with a very high degree of certainty" that the facial fractures occurred within the last few days before the CT scan.

Defendant's account differed from E.L.'s. He testified E.L. was drunk on the night of the incident. When he went to E.L.'s house that evening, he did not know where his key was. He banged on the door and then kicked it; the door flew open and hit E.L. He said E.L. came at him and they got into a fight because "she was pissed because I accidentally hit her with the door." He stated the argument was verbal until E.L. jumped on him. Defendant

stated he then "grabbed her, pushed her" and "pushed her over the dog kennel by accident." E.L. continued to come at him and he "smacked her, whatever, pushed her away just to get her away from [him]." He said the incident lasted between five and seven minutes.

II.

In Point I, defendant argues the trial judge erred in denying his motion for a judgment of acquittal because, he contends, the State failed to establish that the victim's injuries rose to the level of significant bodily injury. We disagree.

We review the trial court's denial of the motion for judgment of acquittal de novo, State v. Dekowski, 218 N.J. 596, 608 (2014), and conduct an independent assessment of the evidence, applying the same standard as the trial court, see State v. Williams, 218 N.J. 576, 593-94 (2014). A motion for judgment of acquittal is governed by Rule 3:18-1, which states in pertinent part:

At the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction.

The well-established standard applicable to deciding such a motion was set forth in State v. Reyes, 50 N.J. 454, 458-59 (1967):

[T]he broad test for determination of such an application is whether the evidence at that point is sufficient to warrant a conviction of the charge involved. R.R. 3:7-6. More specifically, the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

Defendant was convicted of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7), which requires proof of the following elements beyond a reasonable doubt:

1. That the defendant caused significant bodily injury to another; and
2. That the defendant acted purposely or knowingly or acted recklessly under circumstances manifesting extreme indifference to the value of human life.

[Model Jury Charge (Criminal), "Aggravated Assault – Significant Bodily Injury" (2012).]

Defendant contends the evidence was insufficient to prove that E.L. suffered a significant bodily injury. The Model Jury Charge provides the following instruction to define "significant bodily injury":

Significant bodily injury means bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses. As you know, the five senses are sight, hearing, taste, touch and smell.

[Ibid.]

E.L. testified that she could not see out of her left eye for three days. Applying the Reyes standard, there was plainly sufficient evidence to support a finding that she suffered a temporary loss of one of the five senses, allowing a factfinder to find defendant guilty on this charge.

III.

Defendant next alleges the trial judge committed plain error in failing to consider the lesser included offense of simple assault. This argument lacks sufficient merit to warrant discussion, see R. 2:11-3(e)(2), beyond the following limited comments.

N.J.S.A. 2C:1-8(d) states an offense is a lesser-included offense when:

- (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (2) It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or
- (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

In State v. Cagno, 211 N.J. 488 (2012), cert. denied, 568 U.S. 1104, 133 S. Ct. 877, 184 L. Ed. 2d 687 (2013), the Supreme Court described the two-part test applicable under this statute:

For a trial court to charge a jury on an unindicted offense, the court must conclude not only that the offense is included in the charged offense but also that the evidence at trial presents a rational basis for the jury to acquit the defendant of the greater offense and convict him or her of the lesser.

[Id. at 521 (quoting State v. Brent, 137 N.J. 107, 123 (1994)).]

Because the evidence here did not provide a rational basis for the court to acquit defendant of the third-degree offense and convict on simple assault, this argument lacks merit.

IV.

Finally, defendant argues the trial court erred in imposing an excessive sentence, "[g]iven the unexceptional nature of the offense." After determining defendant qualified for a persistent offender extended term, see N.J.S.A. 2C:44-3(a), the trial court found aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6) and (9), and no mitigating factors. The court sentenced defendant to eight years with a four-year period of parole ineligibility.

We review sentencing determinations in accordance with a deferential standard. State v. O'Donnell, 117 N.J. 210, 215 (1989).

The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Defendant does not challenge the trial court's findings regarding aggravating and mitigating factors but argues the aggravating factors found and the court's rationale do not justify the sentence imposed. He concedes his record qualifies him for the imposition of a discretionary extended term but contends the extended term was not properly imposed because the judge engaged in improper double-counting. He argues further that the court "appeared to be under the misbelief that it was required to sentence [defendant] within the second-degree range because it found that the discretionary-extended term was applicable." Our review of the record does not corroborate defendant's characterization of the trial court's reasoning. We find no basis for disturbing the sentence that was imposed.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION