SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2098-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW W. PENA,

Defendant-Appellant.

Submitted March 20, 2018 - Decided April 24, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Indictment No. 08-01-0010.

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

Fredric M. Knapp, Morris County Prosecutor, attorney for respondent (Erin Smith Wisloff, Supervising Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Andrew Pena was tried before a jury and found guilty of aggravated sexual assault, burglary, and criminal sexual contact. He appeals from the judgment of conviction entered on

December 24, 2015. For the reasons that follow, we affirm defendant's convictions but remand for resentencing.

I.

Defendant was charged with various offenses arising out of the assault of E.D., specifically first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3) (count one); second-degree burglary, N.J.S.A. 2C:18-2(b) (count two); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (count three); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (count four); and third-degree criminal restraint, N.J.S.A. 2C:13-2(b) (count five).

At defendant's first trial in 2009, a jury found him guilty of all charges. On December 14, 2009, defendant was sentenced to an aggregate prison term of twenty-seven years, nine months, with a period of parole ineligibility as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appealed, and in an unpublished opinion we reversed defendant's convictions and remanded for entry of an order dismissing count five, and for a new trial on counts one through four. State v. Pena, No. A-2335-09 (App. Div. Dec. 18, 2013) (slip op. at 39). The panel found that evidence of a prior offense involving another alleged victim was improperly admitted pursuant to N.J.R.E. 404(b). Id. at 22-26. The panel also determined that the conduct charged in count five did not fall within the concept

of involuntary servitude as proscribed by N.J.S.A. 2C:13-2(b). Id. at 36.

On March 26, 2015, the court granted defendant's motion to represent himself at his second trial, during which he was assisted by stand-by counsel. Defendant thereafter filed numerous pre-trial motions. Pertinent to this appeal, the court denied defendant's motions to dismiss the indictment and to suppress his testimony from the first trial.

Defendant's second trial spanned twelve non-consecutive days between October 19, 2015, and November 10, 2015. We recount only those facts presented at the trial that are most relevant to the issues raised by defendant on appeal.

On the evening of January 27, 2007, E.D. and her friend C.C. went to a party in Butler. After socializing for several hours, E.D., C.C., and a new acquaintance, L.D., decided to pick up food at a nearby bagel store. Because C.C. and L.D. had been drinking but E.D. had not, E.D. drove the three of them in C.C.'s car. The weather was cold and it was snowing lightly.

The women arrived at G & A Bagel around 3:15 a.m. The parking lot was full, so E.D. pulled to the entrance of an alley on the left side of the building. C.C. and L.D. went into the store to order bagels while E.D. waited in the car.

E.D. then saw a man with a broom in his hands, sweeping the snow. The man walked up to the driver's side window and told E.D. to pull forward into the alley. Believing the man worked at the store, E.D. did as he asked. In her rear view mirror she saw him motioning for her to keep going. She continued to drive forward, thinking the alley would lead her around the store, but instead it dead-ended at the back of the building. E.D. realized she would need to back up, but as she started to turn, the man came to the window and asked her to shut her headlights off so as not to disturb neighboring homes. She shut her headlights off, but left the car running.

When E.D. next saw the man he was walking toward the car from behind the building. His pants were down, "his private part was out," and "he had a disgusting like grin on his face." As he approached the driver's side door, E.D. panicked and tried to start the car but was unable to because it was in drive. Because she was not familiar with the controls in C.C.'s car, the man was able to open the door before E.D. could lock it.

The man shoved his whole body inside the car, wrapped his hand around E.D.'s hair, and forced her to touch his penis, while at the same time taking the keys out of the ignition and tossing them to the ground. During the struggle, he also managed to grab her cell phone and throw it over the car. The man then dragged

E.D. out of the car onto the pavement, pulled down her pants, and jammed his fingers inside of her.

At that point C.C. and L.D. came out of the store and called E.D.'s name. The man paused long enough for E.D. to break free and run toward her friends. He then ran away around the back of the building.

E.D. went inside the bagel shop and asked the clerk to call 9-1-1. The police arrived, and E.D. was taken to the hospital by ambulance.

Barbara Ackerson, a registered nurse with forensic sexual assault certification, examined E.D. in the emergency room. She described E.D. as upset, crying, and afraid, but cooperative. Ackerson observed multiple scrapes on E.D.'s buttocks and back, abrasions on her knees and hands, and a bruise on her buttocks. She also found dried secretions on the left side of E.D.'s face and on her buttocks. A genital exam revealed a great deal of redness, and a tiny nick and spot of dried blood on the cervix. Ackerson reported her diagnosis that E.D. had been raped.

Ackerson collected specimens, placing them in sample containers to be sent for analysis. She also put E.D.'s clothing in a paper bag. She noted E.D.'s underpants had been ripped, with one side "hanging by a single string."

E.D. was discharged from the hospital a few hours later and proceeded to the Butler police station. There, she described her assailant as having tan skin, brown eyes, and a very big smile with large teeth. She stated the man had a twelve-inch penis that she could not wrap her hand around.

C.C. and L.D. also went to the police station the next day. C.C. did not get a good look at the man and could not describe his appearance. L.D., on the other hand, got a brief glimpse of him and told officers that he was not Caucasian and not black, but had "darker skin" and could have been Cuban or Filipino. She said that when she was looking for E.D. in the parking lot, she noticed a silver truck parked in the back of the right side of the building. After the incident, three men gave her a partial license plate number for the truck, which they saw fleeing the scene. That license plate number was SKJ-54_.[1]

Officers from the Butler Police Department and the Morris County Sheriff's Office processed the scene at G & A Bagel. The dusting of snow that covered the ground near the driver's side door of the car E.D. was driving was disturbed, and the pavement underneath the door was bare. Shoe impressions, which had a distinctive triangular boot-lug pattern, were visible in the snow

[1] The men did not get the last digit of the license plate.

behind the trunk of the car. Impressions with a similar triangular boot-lug pattern could be seen going back and forth behind the building, and near a dumpster in the right-side parking lot. Tire tracks were also visible near the dumpster, next to the shoe impressions.

The officers further observed what appeared to be fingerprints on the driver's side window. Corporal Brian Ahern lifted latent fingerprints from the window, which were then compared against a database that contained fingerprints from a variety of sources. Based on information gleaned from that database, officers obtained a known inked impression belonging to defendant for comparison purposes.

Sergeant Kelly Zienowicz examined the latent prints and the inked impressions, and concluded three of the four latent prints were identical to defendant's known impressions. Officers then obtained a photograph of defendant for use in a photo array.

On January 31, 2007, E.D. went to the Morris County Prosecutor's Office to view a photographic line-up. E.D. identified the photograph of defendant as the man who assaulted her. She stated it "looks just like him" and she was "110% sure" it was him. At trial, E.D. identified defendant as the man who sexually assaulted her.

A search warrant was issued for defendant's residence and a pair of brown Nike boots were seized. Ahern compared photographs of the boot prints that had been preserved in the snow with the pattern found on defendant's boots. He concluded the pattern on the boots was identical to the pattern of the boot prints found near the dumpster. The prints found near the car's trunk were less distinct, however, and Ahern could only determine they were similar in size, shape and design to the pattern on the boots.

Ahern also examined a silver 2004 Dodge Ram 1500 pickup truck, New Jersey license plate number SXJ-52J, which was registered to defendant. He compared the tread pattern on the truck's tires with the tire tracks found near the dumpster. He determined the tread patterns were similar in shape, size, and design, but because the tires were in very good condition with few distinctive marks, he could not conclude the patterns were identical.

Defendant presented several witnesses, including Chief Ciro Chimento, dispatcher Joyce Opperlee, and Detective Colleen Pascal of the Butler Police Department, and K.C., the manager of G & A Bagel. For their part, these witnesses were only marginally connected with the investigation, had limited knowledge of the incident, or offered testimony directly contrary to defendant's interests.

Defendant did not testify or offer any explanation as to how his fingerprints and boot prints were found at the scene. The theory of his defense was that the State failed to conduct DNA tests on important pieces of evidence, such as the cell phone and the broom, and failed to preserve video footage from surveillance cameras at the store. To rebut the description E.D. gave to police, defendant introduced in evidence photographs of his penis. The attorney who represented defendant at his first trial testified as to the authenticity of the photographs, but stated he had no opinion as to whether they depicted defendant in a fully erect state.

The jury found defendant guilty of the remaining four counts of the indictment. On December 18, 2015, defendant was sentenced to a twenty-year prison term on count one, with an eighty-five percent parole disqualifier pursuant to NERA; eight years on count two, also with a NERA parole disqualifier, consecutive to count one; and sixteen months on count four, consecutive to count one. Count three was merged with count one. Appropriate fines and penalties were also imposed.

Defendant appeals and raises the following arguments:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO PRECLUDE THE STATE FROM INTRODUCING BEFORE THE JURY AT THE SECOND TRIAL BELOW,

DEFENDANT'S TRIAL TESTIMONY FROM THE FIRST TRIAL.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

POINT III

THE TRIAL COURT ERRED IN PERMITTING LAY OPINION TESTIMONY ABOUT TIRE TREAD IMPRESSION[S].

POINT IV

THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL.

POINT VI

DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

We address each of these arguments in turn.

II.

We turn first to defendant's argument that the court erred by denying his motion to suppress his testimony from the first trial. He contends he "chose to testify before the jury in the first trial, in part to explain the details of the prior lewdness charge that the prosecution had placed before the jury," and that our reversal of his first conviction demonstrates that his decision

to testify was not voluntary. He asks that we extend the ruling in Harrison v. United States, 392 U.S. 219 (1968), which barred the use of prior testimony upon retrial where that testimony was induced by a constitutional violation, to situations where a defendant testifies in order to refute evidence that was improperly admitted.

The State responds that defendant cannot show prejudice because none of his prior testimony was introduced at the second trial. While the prospect of being impeached by his prior testimony had the potential to affect his decision whether to testify at the second trial, the State points out that defendant repeatedly stated the reason he decided not to testify was that he was unable to locate some of his witnesses. Finally, the State argues that a review of the transcript from the first trial makes clear that defendant did not testify to explain his prior lewdness charge.

At pre-trial hearings on the motion, defendant asserted he had undergone surgery for injuries he suffered while at the correctional facility and was taking a lot of medication at the time of the first trial. He later clarified that when he testified at the first trial he was under the influence of morphine and Percocet. The court reserved on the motion in order to view the

video of defendant's first-trial testimony and allow defendant time to obtain and produce his medical records.

In the court's written statement of reasons for denying defendant's motion, it relied on State v. Wilson, 57 N.J. 39, 47 (1970), for the proposition that a defendant's testimony at a prior trial can be introduced at a subsequent trial if the testimony was given voluntarily and the defendant was not deprived of the constitutional right against self-incrimination. The court explained that its review of the transcript and audiotape of defendant's testimony at his first trial did not reveal any significant evidence of impairment or lack of capacity. It also noted defendant failed to produce any medical records to support his claim.

Initially, we note that defendant's entire argument before the trial court rested on his claim that his decision to testify at the first trial was not voluntary because he was under the influence of Percocet and morphine. Consequently, because defendant did not contend he was coerced to testify by the improper admission of the State's other-crime evidence, we decline to address this argument for the first time on appeal. "We generally 'decline to consider questions or issues not properly raised to the trial court . . . unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great

public interest.'" State v. Marroccelli, 448 N.J. Super. 349, 373 (App. Div. 2017) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)).

In any event, defendant's argument lacks merit. Defendant's repeated assertions that his decision not to testify at the second trial hinged on the availability of witnesses he could not locate clearly belie his present claim that such decision was grounded on the court's denial of his motion to suppress his first-trial testimony.

Moreover, contrary to defendant's argument, Harrison does not compel a different result. There, the United States Supreme Court held that the retrial court erred by admitting the defendant's first-trial testimony, which he had offered to rebut confessions that were later held to be illegally obtained. Harrison, 392 U.S. at 220. In so doing, the Court made clear that it was not questioning "the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." Id. at 222. It explained:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

[Ibid. (emphasis added).]

The Court held that when a defendant testifies in response to evidence that was obtained in violation of constitutional rights, however, that testimony is inadmissible in a subsequent proceeding as "the fruit of the poisonous tree." Ibid. Thus, where such constitutional violations are involved, the government bears the burden of demonstrating that the defendant's testimony "was obtained 'by means sufficiently distinguishable' from the underlying illegality 'to be purged of the primary taint.'" Id. at 226 (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

Here, defendant's first conviction was reversed not because of a constitutional violation but because the admission of evidence concerning his prior offense violated N.J.R.E. 404(b). Pena, slip op. at 22-25. Violation of a rule of evidence, however, does not necessarily rise to the level of a constitutional violation. See State v. Bunyan, 154 N.J. 261, 266 (1998) (observing that "rules of evidence may not conform with constitutional requirements"); State v. Ingenito, 87 N.J. 204, 225 (1981) (J. Schreiber, concurring) (cautioning against confusing rules of evidence and constitutional right to trial by jury); State v. Terry, 430 N.J. Super. 587, 605 (App. Div. 2013) (discussing statutory authority for rules of evidence and fact that drafters of New Jersey

Constitution deleted references to rules of evidence), aff'd, 218 N.J. 224 (2014).

In any event, the circumstances of defendant's first-trial testimony are quite different from those of the defendant in Harrison. There, the defendant testified only after the illegally-obtained confessions were introduced. Harrison, 392 U.S. at 220. Here, defendant testified before evidence of his prior lewdness conviction was presented. Pena, slip op. at 13-18. His direct testimony was confined to addressing why his fingerprints and boot prints were found at the scene, he made no mention of the prior offense. The first mention of his having exposed himself to a young woman in a CVS parking lot occurred during his cross-examination. It was only after defendant's testimony concluded that the prosecution presented rebuttal testimony from the victim of that crime. Id. at 16-17. Thus, defendant was not coerced to testify by the State's impermissible evidence. Rather, it was defendant's testimony that offered the opportunity for that evidence to be proffered. Thus, even were we to consider broadening the holding in Harrison to encompass situations where the rules of evidence are violated, there is nothing in the record to suggest that the error here induced defendant to testify. See generally State v. Bontempo, 170 N.J. Super. 220, 246-47 (App.

Div. 1979) (discussing factors influencing a defendant's decision to testify).

Finally, even if the court erred in denying defendant's motion to suppress his testimony from the first trial, that error was clearly harmless. None of defendant's prior testimony was admitted at trial. His decision not to testify was based on his dissatisfaction at being unable to locate all of his witnesses, not on the prospect of being impeached by his prior testimony.

III.

Next, defendant argues that the court erred by denying his motion to dismiss the indictment. He contends the prosecutor failed to present the following exculpatory material to the grand jury: 1) an eyewitness told authorities that the assailant was a black male; 2) an eyewitness identified the fleeing vehicle as a Ford F-150, license place SKJ54; and 3) defendant's boot prints were not found near the victim's vehicle.

Defendant raised these arguments at the motion hearing. He also claimed the indictment should be dismissed because the assistant prosecutor who presented the case to the grand jury was his lover, and that the charges against him were manufactured by the offices of the prosecutor and public defender. The court rejected these arguments and ruled the indictment was valid.

In its written statement of reasons, the court found there was no credible evidence that defendant knew the assistant prosecutor prior to his arrest, and defendant's allegation of a romantic relationship with her "is a sordid, deluded, bare assertion that lacks all credibility." The court rejected defendant's argument that the prosecution failed to submit exculpatory evidence to the grand jury, explaining:

> Defendant alleges that the [p]rosecution failed to submit clearly exculpatory evidence to the grand jury that an eye witness told authorities that a black male had committed the crime. While the [p]rosecution was aware of the evidence, the evidence . . . was not clearly exculpatory. The evidence was not clearly exculpatory because the eye witness report does not meet the test put forth by the New Jersey Supreme Court in [State v. Hogan, 144 N.J. 216 (1996)] because taken in light of all the other evidence supporting [d]efendant's indictment, the eyewitness report, if introduced would most likely not sway an individual to decide that the State had not met their burden of proof in securing an indictment. While the description may be inconsistent with other evidence, in light of other identifying information linking [d]efendant to the crime, the description would not have induced a juror to conclude that a prima facie case had not been established.

A decision to dismiss an indictment is left to the sound discretion of the trial judge and will be reversed only for an abuse of discretion. State v. Warmbrun, 277 N.J. Super. 51, 59 (App. Div. 1994). An indictment should be dismissed "only on the

'clearest and plainest ground' . . . when it is manifestly deficient or palpably defective." Hogan, 144 N.J. at 228-29 (1996) (internal citations omitted).

"[O]nly in the exceptional case will a prosecutor's failure to present exculpatory evidence to a grand jury constitute grounds for challenging an indictment." Id. at 239. "[A]n indictment should not be dismissed unless the prosecutor's error was clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." State v. Hogan, 336 N.J. Super. 319, 344 (App. Div. 2001). The role of a grand jury is "not to weigh evidence presented by each party, but rather to investigate potential defendants and decide whether a criminal proceeding should be commenced." Hogan, 144 N.J. at 235. "Credibility determinations and resolution of factual disputes are reserved almost exclusively for the petit jury." Ibid.

The State, however, "may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a 'half-truth.'" Id. at 236. The prosecutor's limited duty to present exculpatory evidence is "triggered only in the rare case in which the prosecutor is informed of evidence that both directly negates the guilt of the accused and is clearly exculpatory." Id. at 237.

Applying these principles, we conclude the judge did not abuse his discretion in denying defendant's motion to dismiss the indictment. It is clear from the record that the evidence defendant cites is not clearly exculpatory, and that the prosecutor did not withhold clearly exculpatory evidence from the grand jury. The court's decision denying defendant's motion rationally explained the facts and properly applied the analysis established by Hogan.

Furthermore, even assuming some error occurred at the indictment stage, as a matter of law, such error is "harmless given the subsequent conviction of defendant by the petit jury." Warmbrun, 277 N.J. Super. at 60; see also United States v. Mechanik, 475 U.S. 66, 70 (1986) (holding that "supervening jury verdict made reversal of the conviction and dismissal of the indictment inappropriate[,]" despite error during grand jury proceedings); State v. Cook, 330 N.J. Super. 395, 411 (App. Div. 2000) (holding that finding of guilty beyond reasonable doubt by petit jury renders harmless any failure by prosecutor to present allegedly exculpatory evidence to grand jury).

IV.

Defendant argues that the court erred by allowing Corporal Ahern to testify about the tire tread impressions found at the crime scene. He contends Ahern was not qualified as an expert,

yet offered an opinion as to whether the impressions found in the snow matched known impressions from defendant's truck. He further maintains this was not proper lay opinion testimony because it invaded the province of the jury. Finally, he asserts the court should have instructed the jury on the limits of Ahern's expert testimony. We find these arguments unpersuasive.

When the prosecutor first proposed to question Ahern about the tire tracks, defendant objected on the basis that Ahern was not an expert. The court ruled that Ahern would be allowed to testify as a lay witness under N.J.R.E. 701 because his testimony was rationally based on his perceptions from the investigation and would assist the jury in determining a fact in issue. The court reasoned that tire tread identification is no different from shoe print identification, which the Supreme Court found to be a proper subject of lay testimony in State v. Johnson, 120 N.J. 263, 293-95 (1990).

The court did, however, caution the prosecutor that the jury must not be lead to believe Ahern was providing expert testimony. Also, prior to Ahern's testimony, the court instructed the jury:

> I'm going to allow this witness to testify with regard to both the boot print comparison as well as the tire track comparison. But bear in mind, he is not an expert in that area. There are particular rules of evidence where individuals are specifically qualified as an expert, but Rule

> 701 allows opinion testimony of lay witnesses in certain circumstances. If a witness is not testifying as an expert, and this witness is not in those two areas, the witness'[s] testimony in the form of opinions or inferences may be admitted if it is rationally based on the perception of the witness, and will assist in understanding the witness' testimony or in determining the fact in issue.

We begin by noting that "'[a] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Nantambu, 221 N.J. 390, 402 (2015) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). We only reverse those that "undermine confidence in the validity of the conviction or misapply the law." State v. Weaver, 219 N.J. 131, 149 (2014); State v. J.A.C., 210 N.J. 281, 295 (2012). Simply stated, we do "not substitute [our] own judgment for that of the trial court, unless 'the trial court's ruling is so wide of the mark that a manifest denial of justice resulted.'" J.A.C., 210 N.J. at 295 (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

Here, Ahern did not need to be an expert in order to testify about the comparison between the tire treads on defendant's truck and the tire tracks found at the crime scene. See State v. Harvey, 121 N.J. 407, 427 (1999) ("Comparison between a shoe print and the shoe alleged to have made that print does not require expert testimony."). Ahern's testimony plainly satisfied the

requirements of N.J.R.E. 701 in that his opinion was rationally based on his first-hand perceptions and was helpful to the jury in determining a fact at issue. Like lay testimony about shoe prints that has been found to be admissible, his comparison of the tire prints was well within a layman's ability to observe. For those reasons, the court did not abuse its discretion in allowing Ahern to testify about the tire treads.

Finally, because Ahern did not testify as an expert witness, the court did not err by failing to give the jury an expert-witness instruction.

V.

Defendant next contends the court erred by barring him from cross-examining E.D. about whether she was at the bagel store to buy drugs or was in possession of heroin at the time of the assault. He claims he had the right to probe whether E.D.'s trial testimony was influenced by her desire to curry favor with the police or prosecution. This argument does not warrant extensive discussion.

"Both the federal and New Jersey constitutions guarantee criminal defendants the right 'to be confronted with the witnesses against them.'" State v. Budis, 125 N.J. 519, 530 (1991) (quoting U.S. Const. amend VI; N.J. Const. art. I, ¶ 10). The right of confrontation affords defendants the opportunity to cross-examine

the state's witnesses, and protects against improper restrictions on questions that may be asked during such cross-examination. Id. at 530-31. Nevertheless, "[s]tates may exclude evidence helpful to the defense if exclusion serves the interests of fairness and reliability." Id. at 531-32. "Thus, a defendant's constitutional right to confrontation does not guarantee unlimited cross-examination of a witness." State v. Harvey, 151 N.J. 117, 188 (1997).

"[T]rial courts 'retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Budis, 125 N.J. at 532 (alteration omitted)(citation omitted). "[A] cross-examiner does not have a license to roam at will under the guise of impeaching credibility." State v. Engel, 249 N.J. Super. 336, 375 (App. Div. 1991).

> For example, the cross-examiner may not ask a potentially inflammatory question without a good faith basis to support the question. The question must be based upon facts in evidence or based upon a proffer by the cross-examiner indicating his ability to prove the facts contained in the question. The reason for this rule is that the question of the cross-examiner is not evidence and yet suggests the existence of evidence tending to show bias which is not properly before the jury.

> [State v. Spencer, 319 N.J. Super. 284, 305 (App. Div. 1999) (citation omitted).]

"The scope of cross-examination . . . rests within the sound discretion of the trial court." Harvey, 151 N.J. at 188; see also N.J.R.E. 611(a)(3) and (b) (allowing court to exercise reasonable control over cross-examination to protect witnesses from harassment or undue embarrassment). We will not interfere with the trial court's control of cross-examination unless clear error and prejudice are shown. State v. Gaikwad, 349 N.J. Super. 62, 86 (App. Div. 2002).

Here, there was no evidence that E.D. went to the bagel store to buy drugs. The question posed to E.D. was inflammatory, harassing, and irrelevant. It suggested to the jury that E.D. was a drug user or perhaps even a drug dealer. Defendant had no good faith basis in the record to make such a suggestion. Indeed, the court had warned defendant before trial began that he could not raise unfounded allegations against the victim. Defendant's right to confront E.D. did not give him "a license to roam at will under the guise of impeaching credibility." Engel, 249 N.J. Super. at 375. Accordingly, the court did not abuse its discretion by limiting defendant's cross-examination and instructing the jury to disregard the question.

VI.

Defendant additionally argues the court erred by denying his motion for a mistrial, which he predicated on his inability to locate some of his proposed witnesses. He contends the court should have at least granted him an adjournment to allow more time to locate these witnesses.

In denying defendant's motion for a mistrial, the court found that the witnesses who could not be located were "of exceedingly limited utility" to defendant's case. It observed that the fact that defendant subpoenaed "anybody whose name was mentioned anywhere in any report" did not make them critical witnesses. The court ultimately concluded that the inability of the defense to locate witnesses did not provide a legal basis for a mistrial.

"The decision to grant or deny a mistrial is entrusted to the sound discretion of the trial court, which should grant a mistrial only to prevent an obvious failure of justice." Harvey, 151 N.J. at 205 (citation omitted). "An appellate court should defer to the decision of the trial court . . . . Thus, an appellate court will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice. Ibid. (citations omitted).

"The Federal and State Constitutions 'guarantee criminal defendants a meaningful opportunity to present a complete

defense.'" State v. Smith, 224 N.J. 36, 48 (2016) (citations omitted); see U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. To that end, a defendant has the right to have compulsory process for obtaining witnesses in his favor. Smith, 224 N.J. at 48. "Indeed, the right of an accused to present witnesses in his own defense 'is a fundamental element of due process of law.'" State v. Garcia, 195 N.J. 192, 202 (2008) (quoting Taylor v. Illinois, 484 U.S. 400, 409 (1988)). "Criminal defendants possess not only the right to call witnesses, but also 'the right to the government's assistance in compelling the attendance of favorable witnesses at trial.'" Ibid. (quoting Taylor, 484 U.S. at 408). "[W]here the circumstances entitle a defendant to the issuance of process requiring the attendance of an absent witness the defendant should be allowed a reasonable time for making process effectual; otherwise his constitutional right would be of little value to him." State v. Smith, 66 N.J. Super. 465, 468 (App. Div. 1961).

The constitutional right to compulsory service is not absolute, however, and may be limited by other legitimate interests, including the efficient administration of justice. Smith, 224 N.J. at 48; Garcia, 195 N.J. at 202-03. "Certainly, a defendant does not have a right to call a witness who will offer irrelevant testimony." Garcia, 195 N.J. at 203.

Having reviewed the record, we conclude defendant's argument on this point fails in several respects. First, some of the witnesses defendant identifies as "missing" did in fact testify at trial.[2] Second, many witnesses subpoenaed by defendant appeared in court or testified, but had no relevant information to offer.[3] Third, the court adjourned the matter more than once to give defendant an opportunity to locate witnesses.

Moreover, the prosecutor and stand-by counsel went to great lengths to find the witnesses that defendant claimed were

---

[2] K.P., owner of G & A Bagel, testified. Contrary to defendant's assertion that K.P. would testify "that Mr. Thomas was in fact a black male employee," K.P. stated she did not remember Thomas and did not have any black employees. Other "missing" witnesses who testified were Colleen Pascal, the lead investigator for the Butler Police Department; Cristina Somolinos, a forensic scientist with the New Jersey State Police Laboratory; and Allison Lane, a scientist from the State Police Laboratory.

[3] Ciro Chimento, the Butler Police Chief, testified he never responded to the scene, never collected evidence, and had extremely limited involvement in the investigation. K.C., manager of the bagel store, had no direct knowledge of the incident. Anthony Peter Lotz, a corrections officer, could not authenticate the photographs of defendant's penis. Sean Talt, a detective with the Vernon Township Police Department, testified he went to defendant's residence on February 1, 2007, and sat in his car at the foot of the driveway to make sure no one left the premises while a search warrant was being obtained. Lisa Reed, a private investigator employed by defense counsel at the first trial, testified she interviewed store employees but she did not remember what they said. The tow truck driver who towed the car E.D. was driving from the bagel store to the police garage was called to court, but stand-by counsel spoke to him in the hallway and convinced defendant he had no relevant information to offer.

"critical" to his case. The prosecutor assisted in getting all active, named law enforcement officers to court. The public defender's office assigned an investigator to attempt to locate and subpoena several witnesses. It is clear that defendant's problem in locating witnesses was not lack of time; it was that some of the witnesses died, relocated, or actively avoided service. Additional time would not have changed that situation.

Further, many, if not most, of the unavailable witnesses would have offered testimony that was either irrelevant or cumulative. For these reasons, the court did not abuse its discretion in concluding defendant's inability to locate the missing witnesses did not warrant a mistrial.

VII.

Finally, we address defendant's sentencing arguments. Specifically, defendant contends the trial court erred in: (1) failing to merge his convictions for criminal sexual contact and burglary with his conviction for aggravated sexual assault; (2) imposing consecutive sentences; (3) finding that aggravating factors one and two applied; and (4) imposing a greater sentence than was imposed following his first trial.

Our analysis of these arguments is framed by well-settled principles. Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We will not ordinarily

disturb a sentence that is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16, 220 (1989). In sentencing, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, 117 N.J. at 215. We are "bound to affirm a sentence, even if [we] would have arrived at a different result, as long as the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that [were] supported by competent credible evidence in the record." Ibid.

(i) Merger

In imposing sentence, the court merged count three, second-degree sexual assault, into count one, first-degree aggravated sexual assault, but did not merge the second-degree burglary or the fourth-degree criminal sexual contact counts. Defendant contends the court's failure to do so was error because the crimes are based on the same evidence and arise from the same criminal transaction.

"Merger stems from the well-settled principle that 'an accused [who] has committed only one offense . . . cannot be punished as if for two.'" State v. Cole, 120 N.J. 321, 326 (1990) (quoting State v. Miller, 108 N.J. 112, 116 (1987) (alteration in original)). Merger of convictions ensures that a defendant will avoid "double punishment for a single wrongdoing." State v. Diaz, 144 N.J. 628, 637 (1996).

New Jersey courts eschew "technisms and inflexibility" when resolving merger issues. Cole, 120 N.J. at 326. Rather, merger analysis focuses on the elements of the crime and the Legislature's intent in creating them, and the facts of each case. Id. at 327. The specific elements of the offenses must be considered in light of N.J.S.A. 2C:1-8.[4] Cole, 120 N.J. at 327-28. Thus, courts consider

> the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

[4] N.J.S.A. 2C:1-8(a) prohibits prosecution for multiple offenses, and N.J.S.A. 2C:1-8(d) defines an offense as included when "[i]it is established by proof of the same or less than all the facts required to establish the commission of the offense charged," or "[i]t 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."

[State v. Davis, 68 N.J. 69, 81 (1975).]

Here, the court did not abuse its discretion by failing to merge counts two and four with count one. It is well established that a conviction for burglary, which is complete upon entering, typically should not merge with a conviction for a separate offense the actor intended to commit when entering. State v. Pyron, 202 N.J. Super. 502, 504-05 (App. Div. 1985); see also State v. Vassalluzzo, 113 N.J. Super. 140, 141-42 (App. Div. 1971) (conviction for breaking and entering with intent to rob did not merge with conviction for robbery). In State v. Adams, 227 N.J. Super. 51, 66-67 (App. Div. 1988), we held:

> Burglary is a statutory element of attempted aggravated sexual assault. However, to strictly construe it as a lesser included offense or as merely an element of attempted aggravated sexual assault would not only be contrary to the intent of the Legislature, but would allow a free crime in this case, and potentially other cases.
>
> . . . .
>
> The harm from the attempted aggravated sexual assault is of a different nature from that involved in the burglary. It is one of the most vicious insults that can be made against a person, with devastating physical and emotional effects. The fact that it is committed during the course of one of the crimes enumerated in N.J.S.A. 2C:14-2a(3) only enhances the potential risk of harm to the victim.

The circumstances in the present case are nearly identical to Adams. Even though burglary is a statutory element of aggravated sexual assault, the two counts should not be merged. The crimes are of entirely different natures and represent distinct harms to the victim.

Likewise, fourth-degree criminal sexual contact should not merge with aggravated sexual assault. An actor is guilty of fourth-degree criminal sexual contact if he commits an act of sexual contact with the victim through use of physical force or coercion, but the victim does not sustain severe personal injury. N.J.S.A. 2C:14-2(c)(1); N.J.S.A. 2C:14-3(b). The act giving rise to the criminal sexual contact charge here was defendant's forcing E.D. to touch his penis while inside the car, and occurred prior to the aggravated sexual assault. Under the factors set forth in Davis, 68 N.J. at 81, the time and place of the two violations differed; proof of digital penetration, which was necessary to support a conviction of aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3), was not necessary to prove criminal sexual contact; and the violations had significantly different consequences for the victim. As the court reasoned in Adams, defendant should not be allowed the free crime of criminal sexual contact simply because his attack escalated to aggravated sexual assault.

(ii) Consecutive Sentences

In imposing consecutive sentences, the court recognized State v. Yarbough, 100 N.J. 627 (1985), as controlling precedent. The judge stated: "I do think that consecutive sentences are warranted in this case against Mr. Pena. As said earlier, the statutes in this case protect different interests of the victim. And in this case Mr. Pena inflicted separate harms, threatened different acts, and committed different acts of violence against the victim."

The court reasoned that there were two victims of the burglary: the owner of the vehicle who had not given defendant permission to enter it, and E.D. who was attacked after defendant forced his way into the car. Further, criminal sexual contact, arising from defendant's forcing E.D. to touch his penis, was distinct from aggravated sexual assault, which involved digital penetration.

In Yarbough, 100 N.J. at 643-44, our Supreme Court adopted the following "criteria as general sentencing guidelines for concurrent or consecutive-sentencing decisions (including any parole ineligibility feature)":

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors;
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense . . . .[5]
>
> [(footnote omitted).]

The Yarbough factors essentially focus upon "the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and

[5] A sixth guideline was later superseded by statute. State v. Carey, 168 N.J. 413, 423 n.1 (2001).

whether they involve numerous or separate victims." Carey, 168 N.J. at 423 (quoting State v. Baylass, 114 N.J. 169, 180 (1989)). They should be applied qualitatively, not quantitatively. Id. at 427. A court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences. Id. at 427-28; see also State v. Swint, 328 N.J. Super. 236, 264 (App. Div. 2000) (even when "offenses [are] connected by a 'unity of specific purpose,'" "somewhat interdependent of one another," and "committed within a short period of time," concurrent sentences need not be imposed) (citation omitted).

Concurrent or consecutive sentences are at the discretion of the sentencing judge. See Carey, 168 N.J. at 422 (citing N.J.S.A. 2C:44-5(a)). "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011).

Applying the Yarbough factors here, the crimes and their objectives were not predominantly independent of one another. Defendant's forcing E.D. to touch his penis, dragging her out of the car, and digitally penetrating her were all part of his overall objective. The crimes were committed in close proximity to one another, and with the exception of the burglary, there was only one victim. Nonetheless, as the trial court recognized, the three

crimes represented distinct acts of violence. Although these crimes could be viewed as part of a continuous episode of aberrant conduct, there is no question they represented separate violations of the victim. Defendant's entering the vehicle and pulling E.D. out of it, was different from his forcing her to touch his penis, which in turn was distinct from his inserting his fingers into her vagina. Accordingly, we discern no abuse of discretion in the court's imposition of consecutive sentences consistent with the Yarbough guidelines.

(iii) Aggravating Factors

At sentencing, the court found aggravating factors one, the nature and circumstances of the offense (N.J.S.A. 2C:44-1(a)(1)); two, the gravity of harm to the victim (N.J.S.A. 2C:44-1(a)(2)); three, the risk defendant will commit another offense (N.J.S.A. 2C:44-1(a)(3)); six, the extent of defendant's prior criminal record, (N.J.S.A. 2C:44-1(a)(6)); and nine, the need for deterrence (N.J.S.A. 2C:44-1(a)(9)). The court found no mitigating factors, and concluded the aggravating factors substantially and significantly outweighed the non-existing mitigating factors.[6]

[6] Defendant does not dispute the absence of mitigating factors.

Aggravating factor one requires consideration of "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]" N.J.S.A. 2C:44-1(a)(1). When assessing whether this factor applies, "the sentencing court reviews the severity of the defendant's crime, 'the single most important factor in the sentencing process,' assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." State v. Lawless, 214 N.J. 594, 609 (2013) (quoting State v. Hodge, 95 N.J. 369, 378-79 (1984)). The court may also "consider 'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" State v. Fuentes, 217 N.J. 57, 75 (2014) (quoting State v. Henry, 418 N.J. Super. 481, 493 (Mercer Cty. Ct. 2010)). In determining whether a defendant's conduct was "'especially heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Id. at 74-75; see also Yarbough, 100 N.J. at 645.

Here, the court noted that defendant laid in wait for a victim, and then lured E.D. to a secluded part of the building in order to isolate her from anyone who could help her. Thus, it concluded this was an intentional and calculated crime. However,

while the court's observations are true, they fail to establish that defendant's attack on E.D. was extraordinarily brutal or cruel aside from the obvious harm intrinsic in an aggravated sexual assault.

Defendant also challenges the court's finding that aggravating factor two applied. N.J.S.A. 2C:44-1(a)(2) takes into account "[t]he gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance . . . ." "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." Lawless, 214 N.J. at 611 (emphasis added).

In finding that grave harm was inflicted on the victim, the court observed that E.D. had been re-victimized by defendant during trial and at sentencing, where defendant disparaged and debased her in front of members of the public and the press. The court characterized defendant's misogynistic attacks on E.D. as "beyond all of the bounds of human decency" and as constituting continuing harms to E.D.'s mental and emotional health that would take a long time to heal.

The record supports these observations. However, we interpret aggravating factor two as focusing on the victim's vulnerability and the harm visited on the victim at the time of the offense, rather than on a defendant's conduct at an ensuing trial, where a court is empowered to take appropriate steps to control the proceedings. Since we conclude the court erred in finding aggravating factors one and two, we remand for reconsideration of defendant's sentence in the absence of those aggravating factors.

(iv) More Severe Sentence on Retrial

At his first trial, defendant was sentenced to an aggregate prison term of twenty-seven years and nine months. Pena, slip op. at 2. After his second trial, defendant was sentenced to twenty-nine years and four months, an increase of one year, seven months.

Relying on State v. Pindale, 279 N.J. Super. 123 (App. Div. 1995), defendant argues this increased sentence "violates the rule that a defendant should not be punished for exercising his appellate rights."

At the conclusion of the sentencing hearing, the prosecutor and stand-by counsel pointed out that the court was imposing a greater sentence than that imposed after the first trial. The court responded that defendant's actions at trial warranted the

increase. In the judgment of conviction entered on December 24, 2015, the court wrote:

> In imposing this sentence, the [c]ourt was mindful of the fact that this sentence is more severe than the sentence previously imposed upon defendant. The Court has reviewed . . . Pindale . . . and imposes this more severe sentence based on [d]efendant's conduct that occurred subsequent to the first trial. In particular, . . . [d]efendant has made repeated baseless and sordid allegations against an Assistant Prosecutor who was part of the trial team that initially prosecuted [d]efendant. These allegations were raised pre-trial and addressed by the [c]ourt, but then repeated by [d]efendant during trial and sentencing.
>
> More disturbingly, [d]efendant also verbally attacked the victim of the sexual assault during trial, by accusing her, without any reasonable basis, of purchasing heroin at the time of the assault. This offensive and demeaning allegation was repeated multiple times during the sentencing, thereby re-victimizing the victim.
>
> Further, [d]efendant verbally attacked the [c]ourt's staff during the sentencing, accusing the Court Clerk of official misconduct by purposely selecting alternate jurors that appeared to [d]efendant to be sympathetic to . . . [d]efendant's case. Once again, [d]efendant has launched a vicious, baseless and unwarranted attack on a female. There was absolutely no basis for any of . . . [d]efendant's verbal assault[s] on these three individuals.
>
> These noxious attacks have shed new light upon . . . [d]efendant's conduct, and mental and moral propensities, and disclosed a depraved, cavalier and misogynistic attitude

> toward the victim and others. For these reasons, as well as others more fully developed on the record, the [c]ourt has imposed this more severe sentence upon . . . [d]efendant. It bears further noting, that despite approximately seven years incarcerated for this offense, [d]efendant has not accepted any responsibility for his actions, or displayed any remorse for his crimes. Rather, he has continued to lash out at the victim, accuses others of crimes and concoct[s] baseless stories and allegations to avoid accepting responsibility for his crimes.

In Pindale, 279 N.J. Super. at 129-30, we addressed the "presumption of vindictiveness" that attaches to an increased sentence imposed on retrial following a successful appeal. We vacated the sentence at issue because the trial judge failed to state specific reasons justifying the increase. Id. at 128. In so doing, we quoted the holding in North Carolina v. Pearce, 395 U.S. 711, 723-25 (1969)

> that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Williams v. New York, 337 U.S. 241, 245 (1949). Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of

a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more consonant with the principle, fully approved in [Williams], that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." Id. at 247.

To say that there exists no absolute bar to the imposition of a more severe sentence upon retrial is not, however, to end the inquiry. There remains for consideration the impact of the Due Process Clause of the Fourteenth Amendment.

. . . .

Due process of law, . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

. . . .

In order to assure the absence of such motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional

> legitimacy of the increased sentence may be fully reviewed on appeal."
>
> [Pindale, 279 N.J. Super. at 129-30 (alteration in original) (emphasis added).]

Here, there is no indication that defendant's success in his first appeal played any role in the court's imposition of a more severe sentence. Rather, the court made clear it was defendant's conduct at the second trial that warranted the increase. It cited defendant's actions at trial during the oral pronouncement of sentence, and identified the specific conduct at issue in the judgment of conviction.

The court thus satisfied Pindale, which requires that the information constituting the basis for the increased sentence come to the judge's attention from "'evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.'" Pindale, 279 N.J. Super. at 129 (quoting Pearce, 395 U.S. at 723). The conduct at issue was adduced at the second trial and, in any event, would certainly qualify as an "other source" of information. It was therefore properly considered by the court.

Nonetheless, defendant's increased sentence was grounded, at least in part, on the court's application of aggravating factors one and two, which we have determined to be erroneous. Accordingly, as noted, we are constrained to vacate the increased

sentence and remand for resentencing absent consideration of aggravating factors one and two.

We affirm defendant's convictions, vacate the sentence imposed, and remand for resentencing. We do not retain jurisdiction.