

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2533-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERTO GONZALEZ,

Defendant-Appellant.

Submitted April 24, 2018 – Decided May 15, 2018

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No.
15-05-1000.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen W. Kirsch, Assistant
Deputy Public Defender, of counsel and on the
brief).

Gurbir S. Grewal, Attorney General, attorney
for respondent (Sarah Lichter, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Roberto Gonzalez of third-degree
aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a). He was

sentenced to three years in prison, Megan's Law registration, and parole supervision for life. He also was ordered to pay mandatory penalties and assessments, including a \$750 sex crime victim treatment fund (SCVTF) penalty. Defendant appeals his conviction and the imposition of the SCVTF penalty. We affirm the conviction, but remand for the limited purpose of reassessing the SCVTF penalty.

I.

We summarize the facts based on the evidence presented at trial. The State presented testimony from the victim's court-appointed guardian, two employees of the assisted living facility where the contact occurred, and a detective who investigated the incident. Defendant elected not to testify and called no witnesses.

Defendant and the victim were both residents of an assisted living facility.¹ The victim suffered from dementia, schizophrenia, and delusions. In 2007, she was deemed legally incapacitated and a guardian was appointed to oversee her affairs.

On March 10, 2015, a physical therapist at the assisted living facility observed defendant "flipping" or "bouncing" the victim's left breast several times. The therapist testified that while

¹ To protect the victim's privacy interests, we will not refer to her by name.

defendant was doing that, the victim just "sat there and did nothing."

The physical therapist immediately alerted a certified nursing aid as to what he had observed. The nursing aid recognized defendant and he saw defendant near the victim and then saw defendant quickly move his hands away from the vicinity of the victim's breast. Defendant then walked out of the room.

The police were notified and an investigating detective spoke with the victim. The victim, however, could not provide any meaningful information and what she told the detective illustrated that she was suffering from delusions.

Before closing arguments, the trial court held a charge conference and discussed the proposed jury instructions. The court informed counsel that it would charge the jury on aggravated criminal sexual contact by using the Model Jury Charge. Defense counsel did not object to the proposed charge. Counsel and the court then discussed certain lesser included offenses and agreed to charge the jury on the lesser included offense of fourth-degree criminal sexual contact.

As previously noted, the jury found defendant guilty of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a). Defendant was sentenced to three years in state prison, Megan's Law registration, and parole supervision for life. The court also

imposed the statutorily mandated SCVTF penalty, but did not hold an ability-to-pay hearing or give a statement of reasons for imposing the maximum \$750 SCVTF penalty.

II.

On appeal, defendant makes two arguments, contending that (1) the jury instructions were confusing concerning one of the elements of aggravated criminal sexual contact, and (2) the court erred in imposing the maximum SCVTF penalty without giving a statement of reasons or conducting an ability-to-pay hearing. Specifically, defendant articulates his two arguments as follows:

POINT I – IMPROPER AND CONFUSING INSTRUCTIONS ON AN ELEMENT OF THE CRIME REQUIRE REVERSAL OF DEFENDANT'S CONVICTION BECAUSE THERE IS NO WAY OF KNOWING THAT ALL JURORS PROPERLY DELIBERATED ON THE CORRECT ELEMENTS.

POINT II – A REMAND IS REQUIRED FOR A STATEMENT OF REASONS REGARDING ONE OF THE IMPOSED PENALTIES.

We find no merit in defendant's arguments concerning the jury instructions and, therefore, we affirm his conviction. We are constrained, however, to vacate the SCVTF penalty and remand the matter so the trial court can hold an ability-to-pay hearing and give a statement of reasons for the amount of the SCVTF penalty imposed.

A. The Jury Instructions

A jury must be properly instructed to ensure that a defendant receives a fair trial. State v. McKinney, 223 N.J. 475, 495 (2015) (citing State v. Afanador, 151 N.J. 41, 54 (1997)). Accordingly, a trial judge must deliver "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury must find." Ibid. (quoting State v. Green, 68 N.J. 281, 287-88 (1981)).

Where counsel does not object to the jury charge, we apply a plain error standard of review. State v. Young, 448 N.J. Super. 206, 224 (App. Div. 2017). Under that standard, defendant must demonstrate "a legal impropriety in the charge prejudicially affecting [his] substantive rights . . . and that . . . the error possessed a clear capacity to bring about an unjust result." Ibid. (quoting State v. Nero, 195 N.J. 397, 407 (2008)).

A person "is guilty of aggravated criminal sexual contact if he [or she] commits an act of sexual contact with the victim under any of the circumstances set forth in [N.J.S.A.] 2C:14-2(a)(2) through (7)." N.J.S.A. 2C:14-3(a). The subsection relevant here is subsection (7), which requires the State to prove that defendant knew or should have known that the victim was physically helpless or incapacitated, or intellectually or mentally incapacitated or had a mental disease or defect which prevented the victim from

understanding the nature of the conduct and that the victim was incapable of providing consent. N.J.S.A. 2C:14-2(a)(7).

Consequently, to sustain a conviction of aggravated criminal sexual contact, the State must prove three elements beyond a reasonable doubt: (1) that defendant purposely committed an act of sexual contact with the victim; (2) at the time of the contact, the victim was physically helpless, mentally incapacitated, or had a mental disease or defect which rendered him or her temporarily or permanently incapable of understanding the nature of his or her conduct, including, but not limited to, being incapable of providing consent; and (3) that defendant knew or should have known that the victim was physically helpless, or mentally incapacitated. See Model Jury Charges (Criminal), "Aggravated Criminal Sexual Contact – Victim Helpless, Mentally Incapacitated, Incapable [or] Incapacitated" (2012).

The first and third elements focus on defendant's mental state; that is, the jury must determine whether defendant purposely committed an act of sexual contact and whether defendant knew or should have known that the victim was physically helpless, or mentally incapacitated. See State v. Olivio, 123 N.J. 550, 568-70 (1991). The second element focuses on the victim's mental state; that is, the jury must evaluate the victim's ability to understand the nature of his or her own conduct, including his or

her capacity to both understand and consent to sexual acts. Olivio, 123 N.J. at 565-67; see also State v. Cuni, 159 N.J. 584, 595-96 (1999) (analyzing the proofs required to sustain a conviction for aggravated sexual assault when a victim is deemed mentally incapacitated).

In this case, the trial court listed the elements of aggravated criminal sexual contact using the Model Jury Charge and explained that the State was required to prove each element of the offense beyond a reasonable doubt. In doing so, the court referred to the victim's capacity to understand "the nature of his conduct." Although the correct reference should have been to "her conduct," a comprehensive reading of the instructions demonstrates that the jury charge was not "clearly capable of producing an unjust result." R. 2:10-2. Read in its entirety, the jury charge clearly instructed the jury as to the required elements of aggravated criminal sexual contact. Specifically, the trial court properly instructed the jury on each element. Although the instructions used the phrase "his conduct," that error was harmless because the court correctly defined the elements of the charge. Moreover, the evidence at trial made it clear that the defendant was male and the victim female.

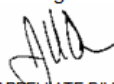
B. The SCVTF Penalty

N.J.S.A. 2C:14-10(a)(3) provides that "a person convicted of a sex offense, as defined in . . . [N.J.S.A. 2C:7-2], shall be assessed a penalty for each such offense not to exceed \$750, when the conviction is a crime of the third degree" Our Supreme Court has explained that although the SCVTF penalty is mandatory, the sentencing court must consider (1) the nature of the offense, (2) defendant's ability to pay the SCVTF penalty, and (3) provide a statement of reasons to support the amount of any SCVTF penalty imposed. State v. Bolvito, 217 N.J. 221, 223-24 (2014).

Here, the sentencing court did not consider defendant's ability to pay, nor did it provide a statement of reasons in support of its decision to impose the maximum \$750 SCVTF penalty for a third-degree sex offense. Accordingly, we are constrained to vacate the SCVTF penalty imposed and remand for the limited purpose of reassessing the amount of that penalty. On remand, the court should consider the nature of the offense, defendant's ability to pay, and provide a statement of reasons to support the amount of the SCVTF penalty imposed.

The conviction is affirmed. The matter is remanded for the court to reconsider the SCVTF penalty. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION