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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-2995-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK TILSON,

Defendant-Appellant.

Argued telephonically April 9, 2018 –
Decided April 23, 2018

Before Judges Nugent, Currier, and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Municipal Appeal
No. 5070.

John Vincent Saykanic argued the cause for
appellant.

Mark A. Festa, Assistant Prosecutor, argued
the cause for respondent (Camelia M. Valdes,
Passaic County Prosecutor, attorney; Tom
Dominic Osadnik, Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant, Mark Tilson, appeals his conviction of disorderly
persons simple assault and his sentence of one year probation and

a suspended sixty-day jail term. On appeal, defendant seeks a reversal of his conviction and dismissal of the assault charge; or, alternatively, a remand to the Law Division for a new de novo trial. He contends his conviction should be reversed and the charge dismissed because he was denied a speedy trial; and, when he was finally brought to trial, the State did not prove him guilty beyond a reasonable doubt. He also contends the municipal court judge improperly permitted the victim to prosecute the complaint and then question him about prior bad acts. Alternatively, defendant argues the case should be remanded to the Law Division because the court did not view a video during the trial de novo. We reject his arguments and affirm his conviction and sentence.

In June 2012, police charged defendant on a complaint-summons with disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1), for allegedly punching the victim in the face. Nearly a year later, in May 2013, defendant filed a cross-complaint against the victim, alleging simple assault, N.J.S.A. 2C:12-1(a)(1), and harassment, N.J.S.A. 2C:33-4(a). The charges in the complaint and cross-complaint were tried in Paterson Municipal Court on September 24, 2013. The victim, who had no attorney, prosecuted the complaint against defendant and defended herself against the charges in the cross-complaint. An attorney represented defendant

and acted as private prosecutor on defendant's cross-complaint against the victim.

The municipal court judge found the victim not guilty. The judge found defendant guilty and imposed a probationary sentence and a suspended jail term. Defendant appealed to the Law Division, which found him guilty and imposed the same sentence the municipal court judge had imposed. This appeal followed.

Defendant, the victim, and one other witness testified at the municipal court trial. According to their testimony, the incident giving rise to the complaint and cross-complaints unfolded during a June afternoon in Passaic Community College's lunchroom, where defendant was using the Wi-Fi system with his computer. He was sitting at a table near a lunchroom wall. The victim and her mother were sitting at the table across from defendant.

According to defendant, the victim and her mother were speaking loudly, so he asked them to be quiet. The victim stood up and said something rude to defendant, to which he responded. A verbal altercation ensued. Defendant testified the victim then spit on him twice. Worried about germs and diseases that might transfer to him from her saliva, and acting to defend himself, defendant punched the victim in the face. After he punched her, she spit on him a third time and picked up a chair and threatened

him. He picked up another chair. They both put their chairs down without striking one another.

Defendant played a video purporting to depict the incident. He stopped and started it, narrating as he played it, and then he played it from beginning to end for the court.

The victim's attempts to cross-examine defendant were feeble. The judge explained to her several times that cross-examination was confined to asking questions, not testifying or making comments on defendant's testimony. The victim asked a number of questions to which defendant's attorney objected. The judge sustained a majority of these objections. Defendant did not answer other questions. Some of the questions implied defendant had either been convicted of other charges or had other charges pending.

The victim testified and told a different story. She had gone to the college, accompanied by her mother, to request a transcript from a recent course she had taken. She had seen defendant at the college on previous occasions when he had been escorted out for downloading videos.

As the victim and her mother sat at a table next to defendant and conversed in normal tones, defendant told them to shut up. The victim replied, "excuse me you don't say that to us like that because [we] are not talking in a loud voice." He responded by calling her mother a nasty name in Spanish. She said "listen if

you continue this I'm going to go to the guard right now in the corner and tell him to get [you] out of here because [you were] yelling." She got up to get the guard, and defendant punched her, causing her lip to bleed. She had to go to the hospital. A guard came to the tables, and defendant lifted a chair to attack the victim, but the guard took it from him.

The victim denied ever approaching or spitting on defendant. She also denied the video played by defendant depicted what he said it depicted. According to the victim, the video was of poor quality, did not show much of anything, and did not show her spitting on defendant.

The victim called a security guard as a witness at the municipal court trial. The guard arrived after the altercation had occurred and saw the victim bleeding from the mouth. He testified he made the video defendant had played for the court. He acknowledged the cafeteria was open to the public but also explained defendant had been escorted off the premises "every once in a while for . . . being rude."

The municipal court judge found defendant "not . . . entirely credible," and found the victim "to be the more credible witness." The judge disbelieved defendant's testimony and found the video did not support it. The judge noted the video did not show the

victim confront defendant. The judge also found it difficult to believe the victim spit on defendant from where she was standing.

The judge found defendant guilty of simple assault and found the victim not guilty. The judge sentenced defendant to a one-year probationary term during which he was to complete a program of anger management counseling. The judge also sentenced defendant to sixty days in county jail, which she suspended provided he completed probation. Lastly, the judge imposed fines, penalties, and assessments.

Defendant appealed to the Law Division. During the trial de novo, the court stated it would "not consider any of [the improper] questions and answers that . . . appear in the [municipal court] transcript." The court found defendant guilty. The court noted defendant had admitted punching the victim in the face and also noted "a person may not use more force than that which he reasonably believes is necessary to repel the attack." The court found the victim's testimony credible because "[h]er version of the incident [was] logical and believable." In contrast, the court found defendant's testimony inconsistent and also found defendant had no legitimate reason "[t]o punch a woman much smaller" than him. The court also found defendant punched the victim as a result of a verbal altercation. The court imposed the same sentence the municipal court judge had imposed.

On appeal, defendant makes the following arguments:

POINT I

THE DELAY OF MORE THAN FIFTEEN MONTHS IN THE PROSECUTION OF DEFENDANT TILSON'S SIMPLE ASSAULT TRIAL DEPRIVED DEFENDANT OF HIS FEDERAL AND STATE SPEEDY TRIAL RIGHTS.

POINT II

DEFENDANT TILSON WAS DEPRIVED OF HIS CONSTITUTIONAL AND STATE RIGHT TO A FAIR TRIAL DUE TO THE IMPROPER ADMISSION OF PRIOR "BAD ACT" TESTIMONY AND INFERENCES; THE MUNICIPAL COURT JUDGE IMPROPERLY PERMITTED THE CROSS-COMPLAINANT TO QUESTION TILSON ABOUT: 1) WHETHER HE HAD EVER BEEN ACCUSED OF ASSAULT; 2) WHETHER HE HAD EVER BEEN IN JAIL; 3) WHETHER HE HAD A DISORDERLY PERSONS CONVICTION (TO ADVERSELY AFFECT HIS CREDIBILITY); 4) WHETHER HE HAD ANY CASES PENDING IN PATERSON MUNICIPAL COURT WHICH HAD NOT BEEN RESOLVED; 5) WHETHER HE HAD BEEN ESCORTED OUT OF THE COLLEGE PREVIOUSLY; AND 6) ADMITTED TESTIMONY FROM A SECURITY OFFICER THAT TILSON "GETS ESCORTED OUT EVERY ONCE IN A WHILE FOR . . . BEING RUDE"; THE LAW DIVISION ERRED IN NOT REVERSING THE CONVICTION BASED UPON THESE IMPROPRIETIES.

POINT III

THE COURT BELOW ERRED IN FINDING THE DEFENDANT GUILTY DE NOVO OF ASSAULT AS THE STATE FAILED TO PROVE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

POINT IV

THE CONVICTION OF TILSON IS VOID AB INITIO BECAUSE THE REQUIREMENTS OF STATE v. STORM, 141 N.J. 245 (1995) WERE NOT MET.

POINT V

THE CONVICTION MUST BE REVERSED OR, AT THE VERY LEAST, THE MATTER REMANDED TO THE LAW DIVISION, AS THE LAW DIVISION JUDGE DID NOT VIEW THE VIDEO OF THE INCIDENT.

Defendant's speedy trial argument is unsupported by a proper record. Rule 2:6-1(a)(1) requires an appellant to include in the appendix certain enumerated documents as well as "such other parts of the record . . . as are essential to the proper consideration of the issues." When considering whether a defendant has been deprived of the right to a speedy trial, courts generally consider four factors: the "length of delay, the reason for the delay, the defendant's assertion of the right and prejudice to the defendant." State v. Szima, 70 N.J. 196, 201 (1976). Here, defendant has not provided a record as to when or how many times the trial was scheduled, why it was adjourned on each occasion, or if he first raised the issue before trial.

The complaint was filed on June 7, 2012, and the municipal court trial took place on September 24, 2013. Defendant's first reference to his assertion of his right to a speedy trial occurred as the municipal court trial was ready to begin. Defense counsel informed the court defendant had asked him "to move to dismiss under the grounds of speedy trial." Counsel further informed the court, "[defendant has] indicated to me that he's requested that

the matter be tried in a speedy fashion and it had not been." Defense counsel also candidly told the court he had only been involved in the matter since June or July 2013, shortly after defendant filed the cross-complaints in May 2013. Defendant did not explain how he was prejudiced by the delay.

The oral motion defendant made as the trial de novo was about to begin was equally vague and unsupported. Defense counsel stated:

Judge, . . . at the outset of the trial and again, [defendant] had asked me to make a speedy trial motion. I did indicate that the matter was some [fifteen] months old that I was assigned . . . just a couple of months before we tried the case and that [defendant], I had indicated, had repeatedly asked that the case be tried.

In denying the motion, the court noted "[n]o reason for the delay is reflected in the record except the defendant was in court a couple of times" and further noted "defendant failed to file the cross-complaint against the complaining witness [until] May 22nd, 2013." The court determined defendant demonstrated no prejudice occasioned by the delay. In view of the scant record and defendant's belated application and skeletal argument, we cannot conclude the court's denial of defendant's oral speedy trial motion was "clearly erroneous." State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).

Equally unavailing is defendant's argument the State did not prove his guilt beyond a reasonable doubt. The argument boils down to a disagreement with the courts' credibility determinations. We generally defer "to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). And "[u]nder the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Ibid. No such error occurred here. Based on the victim's testimony, the findings of the Law Division "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). We need make no further inquiry. Ibid.

We have considered defendant's remaining arguments in light of the record and the parties' submissions and found them to lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following brief comments.

Defendant argues the municipal court judge admitted improper "bad acts" evidence. In the Law Division, however, the court stated expressly it would not consider such evidence. When a

party appeals from a de novo trial on the record, we generally "consider only the action of the Law Division and not that of the municipal court." State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001) (citing State v. Joas, 34 N.J. 179, 184 (1961)). And this was a bench trial, not a jury trial. Thus, the possible prejudicial impact of such evidence is of less concern. See In re Commitment of A.X.D., 370 N.J. Super. 198, 202-03 (App. Div. 2004).

Defendant not only failed to raise his argument concerning State v. Storm, 141 N.J. 245 (1995) – in which the Supreme Court held that "whenever an attorney for a private party applies to prosecute a complaint in the municipal court, the court should determine whether to permit the attorney to proceed," id. at 248 – at the municipal court trial, he agreed to permit his attorney to prosecute the complaints he had filed. He has cited no authority that either suggests the Storm doctrine should be extended to pro se litigants or holds that if a pro se litigant prosecutes a municipal court charge, the charge must be dismissed. In addition, defendant has demonstrated no prejudice occasioned by the victim prosecuting the complaint filed on her behalf. We discern no such prejudice, particularly in view of defendant's representation by a seasoned trial attorney.

Last, defendant claims the case should be remanded to the Law Division because the court did not consider his video. But the video had not been marked as an exhibit or admitted into evidence at the municipal court trial. Significantly, the municipal court judge made an adequate record as to its content, or more precisely, the lack of its probative value. This finding was supported by the testimony of the security guard who made the video. The security guard testified he did not arrive on the scene until after the victim had been assaulted.

For the foregoing reasons, we affirm defendant's conviction and sentence.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION