

**RECORD IMPOUNDED**

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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-3086-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RUSSELL M. BOUSE, JR.,

Defendant-Appellant.

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Submitted April 10, 2018 – Decided April 20, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey,  
Law Division, Gloucester County, Indictment  
No. 10-12-1057.

Hegge & Confusione, LLC, attorneys for  
appellant (Michael J. Confusione, of counsel  
and on the brief).

Charles A. Fiore, Acting Gloucester County  
Prosecutor, attorney for respondent (Margaret  
A. Cipparrone, Special Deputy Attorney  
General/Acting Senior Assistant Prosecutor,  
on the brief).

PER CURIAM

Defendant appeals his conviction of fourth-degree criminal  
sexual contact, N.J.S.A. 2C:14-3(b). We affirm.

In March 2010, R.G., the victim, was at defendant's apartment with defendant's niece and two nephews. R.G. alleges defendant inappropriately touched her when R.G. and defendant's niece were sleeping in defendant's bed.

In July 2010, a grand jury indicted defendant on second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1), and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). In March 2012, a jury found defendant guilty on both counts.

A judge granted defendant's motion for a new trial pursuant to Rule 3:20-2. Defendant waived his right to a jury trial and requested a bench trial, which occurred over several days with several testifying witnesses. In January 2017, the trial judge issued a written decision finding defendant guilty of fourth-degree criminal sexual contact, and not guilty of second-degree sexual assault. Defendant was sentenced to two years of probation, conditioned upon 180 days of imprisonment, with the imposition of Megan's Law.

On appeal, defendant argues:

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVEN BEYOND A REASONABLE DOUBT DEFENDANT'S GUILT OF THE FOURTH-DEGREE SEXUAL CONTACT CHARGE.

POINT II

THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO CHOOSE WHETHER TO TESTIFY (not raised below; plain error).

POINT III

THE TRIAL JUDGE IMPROPERLY FOISTED A BURDEN ON DEFENDANT TO PRESENT EVIDENCE IN HIS DEFENSE (plain error; not raised below).

POINT IV

DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

Defendant first argues that the record lacks sufficient credible evidence to support the judge's finding of guilt because the judge found R.G., the State's primary witness, not credible and her testimony exaggerated. Furthermore, defendant argues that the judge's determination rendered inconsistent verdicts.

Our review of a judge's verdict in a non-jury case is limited. "The standard is whether there is sufficient credible evidence in the record to support the judge's determination." State ex rel. R.V., 280 N.J. Super. 118, 121 (App. Div. 1995). We exercise a limited scope of review of a trial judge's findings of fact. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). Further, we "give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J.

224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

The judge found that R.G. lacked credibility in portions of her testimony when she explained some of the events that occurred at defendant's apartment. The judge had "issues with R.G.'s credibility," explaining

[t]here were inconsistencies and contradictions between her many statements and her present testimony. Much of this is not uncommon and thus is understandable when evaluating credibility. However, some concerned facts where there should be no inconsistencies or contradictions. R.G. stated that she was in a deep sleep during the digital penetration but later stated that she was awake. She testified repeatedly that she thought she may have been having a sex dream, but again was awakened to find his fingers in her vagina. The vigorous digital penetration lasting up to fifteen minutes was not corroborated by [the nurse's] physical examination. The fact that R.G. disclosed for the first time at trial, the second trial, that she felt the defendant's penis in the area of her vagina after he rolled her over and mounted her, is a critical fact that is too critical, if true, to have remained undisclosed for six and a half years. While many aspects of her testimony ring true, these added details appear to the trier of fact and the determiner of credibility to be embellishments [in] her story to make it more dramatic and thus more compelling.

[footnote omitted.]

Considering his issues with R.G.'s credibility and finding that the State failed to prove beyond a reasonable doubt that

defendant penetrated R.G., the judge found defendant not guilty of second-degree sexual assault. However, the judge found defendant guilty of fourth-degree sexual contact by finding R.G. credible in testifying that "[d]efendant turned her onto her stomach and felt [d]efendant's full weight on her back. [R.G.] then felt [d]efendant's penis touch her back." Although the judge noted that R.G. embellished her testimony to include for the first time that she felt defendant's penis in the area of her vagina, the judge declined to disregard all of R.G.'s testimony and concluded aspects of the testimony "reasonable."

The judge also considered other witnesses' testimonies. He found defendant's niece not credible and his two nephews marginally credible, yet noted that the nephews' testimonies contained inconsistencies with each other.

There exists sufficient credible evidence in the record to support the judge's finding that defendant is guilty of fourth-degree sexual contact. The judge properly concluded that defendant had committed an act of sexual contact with R.G., and defendant used physical force or coercion in making the contact. The judge found R.G. credible in her account of defendant being on top of her back, and feeling his penis.

Defendant's contention that the judge's ruling created inconsistent verdicts between the two counts is without merit.

The judge in his written decision parsed R.G.'s testimony in finding defendant guilty of fourth-degree sexual contact, but not guilty of second-degree sexual assault. Inconsistent verdicts are sustainable if there is sufficient evidence to support the conviction. State v. Grey, 147 N.J. 4, 10-11 (1996). Here, there exists sufficient evidence to support defendant's conviction of fourth-degree sexual contact.

Defendant next argues that his constitutional right not to testify at the re-trial was violated when his testimony from his first trial was read into evidence at the re-trial. He specifically alleges that the judge failed to review his voluntariness to testify at the first trial. Defendant did not object to the admission of this testimony, and at re-trial, his counsel agreed to the admissibility of the testimony. Accordingly, we review for plain error. R. 2:10-2.

N.J.R.E. 804(b)(1)(A), which permits the use of a defendant's prior testimony at a later proceeding, states:

Testimony given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.

Our Supreme Court explained the application of this rule in State v. Wilson, 57 N.J. 39 (1970). In Wilson, the defendant argued that the trial court erred in allowing his prior testimony to be read into evidence because it failed to establish a foundation of voluntariness. Id. at 46-47. The Court found defendant's argument meritless because he was represented by competent counsel at his first trial and his decision to testify was tactical. Id. at 47.

Defendant argues that Harrison v. United States, 392 U.S. 219 (1968), precludes the use of his testimony from the first trial in the re-trial. Defendant's reliance on Harrison is misplaced. Harrison excludes admission of a defendant's prior testimony in a re-trial when the testimony was impelled from illegal confessions introduced against him at the first trial. Id. at 223-26. Defendant has failed to allege any illegal confession or misconduct that would have violated his constitutional right to testify at the first trial and would require examination of that choice.

Defendant willingly testified at the first trial, was represented by competent counsel, and made a tactical decision to testify. Defendant chose not to testify at the re-trial, and upon the prosecutor's motion, the judge properly ruled defendant's testimony admissible pursuant to N.J.R.E. 804(b)(1)(A), a hearsay exception, because defendant's decision not to testify made him unavailable. See State v. Farquharson, 321 N.J. Super. 117, 122-

23 (App. Div. 1999). Defendant's counsel agreed without objection. We see no error in the admission of defendant's prior testimony at the re-trial.

Next, defendant argues that the judge foisted a burden upon him to produce evidence in his defense. Defendant did not raise this issue below and we review for plain error. R. 2:10-2.

The burden of proof in a criminal trial lies with the State to prove every element of the charged offense, State v. Medina, 147 N.J. 43, 60-61 (1996), and it never shifts to a defendant, State v. Loftin, 146 N.J. 295, 389 (1996). In a bench trial, judges are presumed to follow their own instructions and principles of procedure. Harris v. Rivera, 454 U.S. 339, 346-47 (1981). This includes a judge's ability to filter through inadmissible evidence and not to make adverse inferences regarding a defendant's failure to testify. Id. at 346.

Defendant contends that in the judge's written decision, he improperly foisted a burden upon defendant when he stated, "defendant claims to have called . . . individuals when he was searching for R.G., his niece and nephews. Where are the cell phone records to corroborate the mere fact of those calls?" The judge's comment concluded his review of defendant's prior testimony, and he found defendant's version of events to make "little sense." The judge specifically questioned defendant's



account of the teenagers leaving his apartment, searching for them, and making phone calls to them and their parents. The judge's comment merely provided one reason why he, as the fact-finder, did not accept defendant's version of events, and did not improperly shift the burden to defendant. In his written decision, the judge also properly explained that the burden of proof lied solely on the State. We see no error.

Lastly, defendant argues that the judge imposed an improper and excessive sentence. Defendant argues that the judge erred because there is a presumption of non-imprisonment attached to fourth-degree crimes, and the aggravating factors here did not warrant two years of probation, conditioned upon 180 days in county jail.

When reviewing a sentence, we must ensure that the trial judge followed the sentencing guidelines promulgated in the criminal code. We must (1) "require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence"; (2) "require that the fact[-]finder apply correct legal principles in exercising its discretion"; and (3) modify sentences only when the facts and law show "such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363-64 (1984). We must also ensure that the sentencing guidelines were not violated, determine that

findings on aggravating and mitigating factors were based on the evidence, and decide whether application of the guidelines makes a particular sentence clearly unreasonable. Id. at 364-65.

N.J.S.A. 2C:44-1(e) states in part:

The court shall deal with a person convicted of an offense other than a crime of the first or second degree, who has not previously been convicted of an offense, without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public under the criteria set forth in subsection [(a)] . . . .

Thus, a defendant who was convicted of a third- or fourth-degree crime, and who has not been previously convicted of another crime, is entitled to a presumption against imprisonment. However, judges are permitted to impose a term of imprisonment as a condition of probation even when the presumption against imprisonment exists. State v. Hartye, 105 N.J. 411, 419-20 (1987). The judge properly applied the sentencing guidelines and defendant's imprisonment is permissible as a condition of his probation. The judge did not impose an improper or excessive 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