SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3174-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRUCE D. STERLING, a/k/a
DARNELL STERLING,

Defendant-Appellant.

Submitted December 20, 2017 – Decided April 24, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 05-10-1410.

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

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Bruce D. Sterling was convicted of the following counts of Middlesex County Indictment No. 05-10-

1410: second-degree burglary, N.J.S.A. 2C:18-2 (count eight); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (count nine); second-degree sexual assault, N.J.S.A. 2C:14-2(c) (count ten); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count eleven); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count twelve); and third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (count thirteen).

On March 7, 2016, defendant was sentenced on the second-degree burglary to ten years imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, twenty years on the first-degree aggravated sexual assault subject to NERA, and seven years on the second-degree sexual assault, also subject to NERA. The possession of a weapon for unlawful purpose conviction was merged with the second-degree burglary and first-degree aggravated assault. The terroristic threats offense was merged with the first-degree aggravated sexual assault and second-degree sexual assault.

The sentences on these counts were to be served concurrently with each other, but consecutively to three prior sentences defendant was serving on severed counts of the indictment tried earlier, which charged him with similar offenses. Thus, defendant's overall sentences on the indictment came to an

aggregate seventy-year prison term subject to NERA. Defendant appeals and we affirm.

The convictions now appealed resulted from the retrial after remand ordered by the Supreme Court because of severance issues. See State v. Sterling, 215 N.J. 65, 107-08 (2013).

We glean the following from the trial record. The victim, K.G., was twenty-five years old when the assault occurred on June 9, 2003. While asleep in her New Brunswick apartment, she awakened to the sound of someone entering her bedroom, and saw the silhouette of a man in her room. He was about six feet tall, husky, and held a knife in his hand. K.G. began to plead for the man to leave.

Over the course of the approximately ten-minute encounter, the assailant threatened to slit K.G.'s throat and stabbed the knife into the mattress near her head. He slapped her forcefully across the cheek, pressed the knife to her cheek, and threatened to cut her if she did not "shut up." K.G. noticed the man was wearing latex gloves. He removed her pants, cut her panties with the knife, kissed her on the mouth, and fondled her body. He used a condom when forcing intercourse upon her. K.G. continued to beg him to stop, and the assailant responded by saying that he knew she had always wanted to be "with a black man," and that he had been watching her for some time. She noticed that he was wearing

a light colored sweatshirt and that his pants were loose-fitting and dark. When the man was finished, he backed out of K.G.'s bedroom, threatened her again, and told her to be still or that he would hurt her. K.G. heard the sound of a screen door closing in the kitchen, but did not hear the sound of a car. Within a minute or two, she called 911.

When asked at trial, the victim stated that the most memorable aspect of the encounter was the sound of defendant's voice. She found it "really weird" that he was articulate and soft-spoken while "saying all of these horrible threatening things."

The police found a knife in the yard, which the victim identified as having been taken from the kitchen. Her sister was in a hospital residency program, and the latex gloves worn by the assailant reminded her of the type worn by hospital staff, not the type that would be worn for household chores.

When the police arrived at K.G.'s apartment after the assault, they were unable to locate any suspects or witnesses, but found a lawn chair outside a wide-open kitchen window. K.G. was taken to the hospital and examined by a sexual assault nurse. Her clothes were taken from her, including her pajama pants.

Some two years later in June 2005, K.G. viewed a line-up. Six individuals were asked to make statements similar to the threats made during the attack. K.G. identified defendant's voice,

and wrote on the form "[n]umber one, similar build, voice, but not definite."

K.G. testified that when she went home after the line-up, she was certain that she had identified the correct man, although her concern about identifying an innocent person kept her from making a more definitive statement. She did not contact the authorities to advise that she was 100% certain defendant was the assailant.

K.G. said that it was difficult to explain, but she was "very familiar with his -- how his voice sounded." She also remembered that the second time defendant was asked to speak during the line-up, he attempted to "disguise his voice."

A trace evidence scientist with the New Jersey State Police Office of Forensic Sciences discovered a body hair on K.G.'s pajamas. Although the hair did not contain follicular material or an actively growing root, and therefore could not be examined employing nuclear DNA testing, it could be tested for mitochondrial DNA. It was sent to Mitotyping Technologies, where it was compared with a buccal swab from defendant and determined to contain the same mitochondrial DNA sequence. This meant that defendant could not be excluded as the source of the hair.

The State presented Terry Melton, the founder and CEO of Mitotyping Technologies, as an expert in genetic mitochondrial DNA analysis and interpretation. She explained that mitochondrial DNA

sequencing only eliminates persons from a group who could have produced the test sample. That finding becomes more significant when it is determined how common or rare that type of mitochondrial DNA is in the general population.

Melton searched the relevant DNA database a second time before the retrial. She determined that no more than .03% or 3 in 10,000 Americans would have this type of mitochondrial DNA.

The State also called defendant's former supervisor at the Robert Wood Johnson University Hospital, where he had been employed during the date of the incident as a nurse's aide or clinical care technician. In order to perform his duties, defendant was required at times to wear latex gloves. They were kept in a supply room.

The hospital is located approximately a half-mile from K.G.'s apartment; on the night of the rape, defendant punched in to the night shift. The supervisor testified that employees were entitled to two breaks, one thirty minutes long and the other fifteen minutes, which could be combined. Employees were allowed to leave the premises during breaks, and were not then required to punch in and out if they left.

Investigator Paul Miller of the Middlesex County Prosecutor's Office also testified that the distance between the hospital and K.G.'s apartment was about half a mile. It took him approximately four minutes to drive the distance, and less than ten and a half

minutes to walk the same route. When arrested on May 27, 2005, defendant reported to Miller that he was five feet eleven inches tall and weighed 220 pounds.

At the close of the State's proofs, defendant made a motion for acquittal pursuant to Rule 3:18 and State v. Reyes, 50 N.J. 454 (1967). The court denied the motion in an oral opinion, giving the State the benefit of all favorable testimony. The judge reviewed the victim's statements and identification of defendant as well as the testimony regarding mitochondrial DNA. He also noted that defendant was within easy walking distance from the victim's home while working, and that during his breaks, no one would know his whereabouts. As a result, he found that a reasonable jury could convict.

Defendant called Captain J.T. Miller[1] of the New Brunswick Police Department as his witness. Within two weeks of the incident, as part of the ongoing investigation, a buccal swab submitted for DNA testing was taken from a person suspected of committing burglaries in New Brunswick by gaining entry through a window. Miller stated that although he sent the sample on for testing, he knew nothing about the results.

[1] The officer's full name was not in the record.

At the sentence hearing, the judge noted that in her letter to the court regarding defendant's sentence, the victim described defendant as "a woman's worst nightmare." He entered her home in the middle of the night when she was vulnerable, asleep in her bed, and degraded her in the most intimate of ways. The court found aggravating factor number three, N.J.S.A. 2C:44-1(a)(3), aggravating factor number six, N.J.S.A. 2C:44-1(a)(6), and aggravating factor number nine, N.J.S.A. 2C:44-1(a)(9). This was defendant's eighth Superior Court conviction, and his criminal record dated back to 1989. His convictions included drug distribution, N.J.S.A. 2C:35-5A(1), third-degree aggravated assault with serious bodily injury, N.J.S.A. 2C:12-1B(1), two disorderly persons offenses, and a petty disorderly persons offense. Two separate women had obtained temporary restraining orders against him, which were ultimately dismissed.

The judge found that aggravating factor number three, the risk of reoffense, was established by defendant's criminal history as well as the other convictions for the rapes of other women, included in the other counts of the indictment. Defendant's substantial criminal history established the evidence necessary for a finding of aggravating factor six. Additionally, the need to deter defendant and others from committing crimes of this nature was significant.

The judge imposed this sentence consecutive to defendant's fifty-year aggregate prior sentence on the other counts of the indictment because, under Yarbough,[2] he considered the matters to warrant consecutive sentences to avoid giving defendant the benefit of free crimes. The other counts of the indictment on which defendant had previously been convicted involved the rapes of three other women on separate dates. He included in his analysis rape's "unspeakable invasion of a woman's right to privacy" and refused to "diminish and denigrate the harm that this defendant has caused, a harm that will continue to live in those victim[s'] minds for the rest of their lives. . . . [t]he jail sentence should be commensurate with the harm that he has imposed upon them."

Now on appeal, defendant raises the following points for consideration:

> POINT I — THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF ALL CHARGES AT THE END OF THE STATE'S CASE-IN-CHIEF.
>
> POINT II — THE COURT'S SENTENCE OF THE MAXIMUM TWENTY YEARS IN PRISON WAS EXCESSIVE.

[2] State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014 (1986).

I.

We review Rule 3:18 motions for judgments of acquittal made at the close of the State's case employing a de novo standard of review. State v. Williams, 218 N.J. 576, 593-94 (2014) (citing State v. Bunch, 180 N.J. 534, 548-49 (2004)). We decide whether, "based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." Id. at 594 (citation omitted).

K.G. testified unequivocally that she believed defendant was the person who sexually assaulted her based on the sound of his voice and his general appearance. The mitochondrial DNA statistical evidence described by the State's expert supports the identification. Defendant was employed minutes away from the victim's home and could easily have left his workplace that night, unnoticed, committed the crime, and returned to the hospital. He wore latex gloves, commonplace in a medical setting.

When deciding a motion of acquittal, "[n]o distinction is made between direct and circumstantial evidence." State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011) (citations omitted). A reasonable inference can be drawn when "it is more probable than not that the inference is true." State v. Kitral, 145 N.J. 112, 131 (1996) (citation omitted).

The victim's testimony identifying defendant's voice was direct evidence testimony identifying defendant as the perpetrator. That she heard him attempt to alter his voice during the line-up, the only man who did so, is circumstantial evidence of guilt. Although the mitochondrial DNA evidence could only be said to not exclude defendant, the statistical probabilities were that no more than .03% or 3 in 10,000 North Americans would have this type of genetic marker. His employment nearby, the fact he could leave work undetected and return undetected, as well as his ready access to latex gloves is additional circumstantial evidence of guilt.

As the jury instruction states, circumstantial evidence can be more certain, satisfying, and persuasive than direct. Model Jury Charge (Criminal), "Circumstantial Evidence" (rev. Jan. 11, 1993). The evidence in this case was limited, but proof beyond a reasonable doubt. It exceeded the requisite level of proof that would withstand a Rule 3:18-1 motion for acquittal.

II.

Defendant claims the trial judge also erred in imposing an excessive sentence. He contends the maximum term for the first-degree offense was unnecessary in light of the imprisonment imposed on him for the other aggravated sexual assaults charged in the indictment. He bases his contention both on the fact that he was

serving a fifty-year term of imprisonment when sentenced on these crimes, and his assertion that the court merely stated in a conclusory fashion, without explanation, that the aggravating factors preponderated over non-existent mitigating factors.

We review sentences deferentially. State v. Lawless, 214 N.J. 594, 606 (2013). We ask only if legislative guidelines have been followed, if competent credible evidence supports each finding of fact upon which the sentence was based, and whether application of the facts to the law is such a clear error of judgment as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 364-65 (1984). Aggravating and mitigating factors must be fully supported by the evidence. State v. Blackmon, 202 N.J. 283, 297 (2010). Appellate review of the length of a sentence is limited. State v. Miller, 205 N.J. 109, 127 (2011).

Clearly, the record amply supported aggravating factors three and six. Defendant's multiple convictions, including convictions for similar offenses against two other women, mean he is at great risk to reoffend. See N.J.S.A. 2C:44-1(a)(3). The extent of his criminal history at age forty-four, after multiple terms of incarceration, also supports factor six.

The judge also focused on the emotional harm done to K.G., and took that trauma into account when finding that aggravating factor nine should be given substantial weight in the sentencing

calculus. Given that the aggravating factors preponderated and there were no mitigating factors, it was entirely proper for the judge to sentence defendant to the highest permissible number within the offense range. The sentence does not shock our judicial conscience. Roth, 95 N.J. at 364.

Affirmed.