SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3604-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.P.R.,

Defendant-Appellant.

Argued February 14, 2017 – Decided March 16, 2018

Before Judges Ostrer, Leone and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 11-02-0097.

John W. Douard, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; John W. Douard, of counsel and on the brief).

Alexis R. Agre, Assistant Prosecutor, argued the cause for respondent (Robert D. Bernardi, Burlington County Prosecutor, attorney; Alexis R. Agre, of counsel and on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Defendant M.P.R. was convicted of committing a series of sexual assaults and a kidnapping on November 21, 2014. On appeal, he argues the trial court barred relevant evidence of third-party guilt. He also challenges the jury instructions on third-party guilt, and claims his sentence is excessive. We affirm.

I.

At defendant's trial, the victim S.L. testified as follows. On August 19, 2009, S.L. went to her boyfriend B.R.'s apartment in Burlington County. She found B.R.'s brother — defendant — sleeping on the couch. B.R. was not in the apartment, as he was a landscaper working on a job in Salem County.

S.L. agreed to drive defendant to a 5:00 p.m. appointment. After the appointment, they went to a bar. While defendant was driving them back to B.R.'s apartment, a tire fell off S.L.'s van which broke down in the street. Defendant and S.L. began fighting over the breakdown. Defendant called a friend, and he and the friend drove off leaving S.L. with the broken-down van. Defendant eventually returned to the van, but S.L. had already left the van and went back to B.R.'s apartment located a few blocks away. Throughout the course of the evening, S.L. was on the phone with B.R., arguing about the van breakdown.

Defendant came back to B.R.'s apartment at approximately midnight, and began drinking vodka and rolling cigarettes. In a

call with S.L., B.R. expressed concern that S.L. was in his apartment by herself with defendant, and was suggesting how she could get to her own apartment.

S.L. last spoke with B.R. on the phone at approximately 1:45 a.m. on August 20, 2009. Defendant exited the apartment again. Defendant re-entered at approximately 2:44 a.m., said "I'm not going to see my kids for a couple of years," then punched and smashed a chair against a wall. S.L. started texting B.R. that defendant was breaking furniture.

Defendant grabbed the cell phone out of S.L.'s hand. He told her "you're getting naked," and ripped her clothes off, tearing her bra in two. Defendant pushed and hit S.L. on the buttocks to get her to climb the stairs. S.L. continually yelled at defendant to think about B.R. and what this would do to him. Defendant threatened to kill both her and B.R.

When they reached the halfway point on the stairs, defendant painfully forced her arms "up across in front of her neck with her hands by her shoulders on each side" in an effort to "use [her] own arms to choke [her]." S.L. passed out and regained consciousness at the top of the stairs. Defendant then commenced a series of sexual assaults on S.L., ranting "he was going to do things to [S.L.] that were done to him."

The first sexual assault occurred in the upstairs bathroom. Defendant forced S.L. onto her hands and knees and put his penis into her vagina. He did not ejaculate.

The second sexual assault occurred in the hallway at the top of the stairs. S.L. testified defendant "put his penis in my anus, and then — but he took it back out. And then he put his fingers in my anus, and I'm pretty sure he stuck his fingers in my vagina at that time too." Defendant once again choked S.L. with her own arms, causing her to lose consciousness. She awoke in the hallway in what she believed was urine or some kind of oil.

The third sexual assault occurred after defendant forced S.L. to take a shower with him. While in the shower, defendant forced his hand over S.L.'s mouth, and said: "I didn't hurt you . . . I didn't do anything to you." S.L. told defendant she was going to lose control of her bowels. Defendant let her out of the shower to use the toilet.[1] While S.L. was using the toilet, defendant forced his penis into S.L.'s mouth, choking her with it.

Defendant commenced the fourth and final sexual assault when he forced S.L. to go downstairs and made her perform fellatio on

[1] In S.L.'s statement to police, she said "[B.R.], I know you — [defendant], I have to do this. I have to, you know, go to the bathroom." S.L. testified that she misspoke to the officer, that she meant defendant, and that B.R. was not there.

him in the living room. S.L. did so until defendant punched her in the face, leaving her unconscious.

After the sexual assaults, when defendant was asleep, S.L. grabbed some clothing, escaped out of the front door, and took refuge with a female neighbor. The neighbor called 9-1-1. S.L. was taken to Lourdes Medical Center and was treated for her injuries.

At the hospital, biological samples were taken. The specimens tested negative for any presence of sperm or semen, but the external genital specimen tested positive for amylase, a constituent of saliva and "most every body fluid" including "urine, blood, saliva, semen, and . . . sweat." The amylase was sent to another lab and tested positive for defendant's DNA.[2]

Defendant testified to the following. He was driving S.L.'s van when the tire fell off. His friend came to pick him up, he and S.L. alternated speaking with B.R., and S.L. left the broken-down van and went back to B.R.'s apartment. Defendant arrived at the apartment at approximately 11:30 p.m., rolled and smoked some cigarettes, and went to sleep on the couch at approximately midnight. Defendant testified that he awoke in the middle of the

[2] However, the DNA expert testified there is a possibility a transfer of DNA could have occurred without there being sexual contact.

night and saw B.R. standing in the doorway of the apartment. He went back to sleep and awoke the next morning, when his then-girlfriend E.H. called and told him the accusations against him.

B.R. testified as follows. On August 19, 2009, he was working on a job in Salem County. Because the job site was so far from his home, B.R. and some of the other men on the job site rented a cabin at Parvin State Park in Salem County. B.R. was on the phone repeatedly with S.L. for much of the night, until 2:13 a.m., arguing with her about the tire falling off the van and expressing concern that she was alone with defendant in the apartment. During these conversations, he heard defendant yelling, and he could tell defendant was getting angry by the "change in his voice." As a result, B.R. told S.L. to get out of the apartment.

B.R. also testified he was sleeping on the top bunk in a cabin he was sharing with another worker. Four workers who were in the cabins testified that B.R. was there when they went to sleep between midnight and 1:00 a.m., and there when they woke up from 5:30 to 7:00 a.m. The worker in the same cabin with B.R. testified that no one left during the night, and that if B.R. had started his loud truck during the night, he would have heard it.

B.R. testified he awoke the next morning and saw several missed calls from S.L. and from unknown phone numbers. At 7:40 a.m., B.R. received another call from an unknown phone number, and

it was later discovered this number belonged to the neighbor who helped S.L. The police also called B.R. When B.R. was finally able to get in contact with S.L., he asked her if defendant was the one who sexually assaulted her, to which she responded yes.

B.R.'s male next-door neighbor also testified at trial. He testified that at approximately 2:50 a.m., he was woken up by a lot of noise coming from B.R.'s apartment. The neighbor testified he heard a woman shouting "something to the effect, [B.R.], [B.R], and then she stopped. She said stop. Give me back the phone" and "get off me."[3] He also testified he heard "some thumping down the steps" and looked out his window, at which point he saw a man resembling one of the brothers exit the apartment, go down the stairs and throw something in a landscaping trailer, and then walk back into the apartment. The neighbor told officers the brother he saw looked like B.R., but he later realized he confused the names of the brothers, and he gave a corrected statement that he saw defendant. The neighbor testified he did not see B.R.'s truck outside.

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[3] According to the neighbor's statement to police, the woman said something like "'[B.R.], [B.R.], . . . look what you've done to me. You need to think about what you done to me. Are you nuts? . . . Get off of me, get off of me, [B.R.] Give me back the phone,'" or similar versions with B.R.'s first name interspersed throughout. However, the neighbor testified that he may have missed some words, and that it was "very possible" the woman was saying "think of [B.R.]"

The jury found defendant guilty of counts one through four, second-degree sexual assault by physical force or coercion by vaginal, anal, and digital penetration, and by fellatio, N.J.S.A. 2C:14-2(c)(1); count five, first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); and count six, third-degree terroristic threats by threat to kill, N.J.S.A. 2C:12-3(b).

At sentencing, on each of counts one through four, the court imposed a consecutive term of seven years in prison. The court also sentenced defendant to a concurrent twenty-four-year-term on count five. On each of the sentences, defendant was required to serve 85% under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appeals from his December 15, 2014 amended judgment of conviction, arguing:

> I. THE JUDGE'S IMPROPER EXCLUSION OF EVIDENCE THAT [DEFENDANT]'S BROTHER [B.R.] HAD COMMITTED PRIOR ASSAULTS AGAINST HIS GIRLFRIEND [S.L.] UNDERMINED [DEFENDANT]'S THIRD-PARTY GUILT DEFENSE. MOREOVER, THE JUDGE FAILED TO PROVIDE THE JURY WITH AN ADEQUATE JURY INSTRUCTION ON THIRD-PARTY GUILT. [DEFENDANT]'S CONSTITUTIONAL RIGHTS WERE THEREBY VIOLATED.
>
> > A. The Judge's Improper Exclusion of Testimony About Evidence That [Defendant]'s brother Had Committed Prior Assaults Against [S.L.] precluded

[Defendant]'s Ability To Present A Complete Third-Party Guilt Defense.

B. The Judge Failed to Instruct the Jury Adequately On the Defense of Third-Party Guilt.

II. THE AGGREGATE SENTENCE OF TWENTY-EIGHT YEARS IN PRISON, WITH AN 85% PERIOD OF PAROLE INELIGIBILITY, IS EXCESSIVE AND UNDULY PUNITIVE, BECAUSE THE SEX-OFFENSE COUNTS SHOULD NOT HAVE BEEN IMPOSED CONSECUTIVELY TO ONE ANOTHER AND THE FINDING OF AGGRAVATING AND MITIGATING FACTORS WAS INCOHERENT.

II.

Defendant challenges the trial court's initial exclusion of alleged evidence of third-party guilt. A criminal defendant has a "right to introduce evidence of third-party guilt 'if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.'" State v. Perry, 225 N.J. 222, 238 (2016) (quoting State v. Cotto, 182 N.J. 316, 332 (2005)).

"[A] state cannot preclude a defendant from presenting evidence of third-party guilt simply because the evidence against him strongly supports a guilty verdict." State v. DeMarco, 387 N.J. Super. 506, 519 (App. Div. 2006) (citing Holmes v. South Carolina, 547 U.S. 319 (2006)). However, courts "will not upend a trial court's decision to exclude purported third-party guilt

evidence . . . [if] the evidence proffered did no more than 'prove some hostile event and [left] its connection with the case to mere conjecture.'" Perry, 225 N.J. at 242 (quoting State v. Koedatich, 112 N.J. 225, 301 (1988)).

"The decision to admit or exclude evidence of third-party guilt is 'particularly fact sensitive[.]'" Id. at 239. "For this reason, trial courts retain broad discretion to admit or preclude evidence of third-party guilt," and appellate courts "will reverse only if the defendant can establish an abuse of that discretion." Cotto, 182 N.J. at 333. We must hew to that standard of review.

At trial, defense counsel argued B.R. committed the sexual assaults against S.L. Shortly before trial, defendant moved to admit evidence that B.R. had allegedly committed domestic violence against S.L. on May 18, 2010 — approximately nine months after the sexual assaults. Defendant proffered a police report, the criminal complaint-warrant, and a voluntary statement made by S.L. Defense counsel argued he should be allowed to ask B.R. about the incident.[4] The trial court denied defendant's request because the

[4] Defendant has never contended the documents themselves were admissible. "[T]o be admissible, evidence of third-party guilt must 'satisfy the standards of the New Jersey Rules of Evidence.'" Cotto, 182 N.J. at 334 (citation omitted) (finding "the proffered evidence consisted entirely of inadmissible hearsay and could not have been presented at trial").

alleged domestic violence "occurred after the events in this case, and is otherwise not relevant to the case at bar."

The mere fact that the alleged domestic violence occurred after the charged crimes was not sufficient basis to exclude the proffered evidence. Evidence of third-party guilt can arise from events occurring months after the charged crime. See State v. Weaver, 219 N.J. 131, 157-58 (2014) (holding it was relevant to the charged June shooting that a third party used the same gun to commit a shooting in November).

The trial court gave an alternative basis for excluding the proffered evidence, namely that it was not relevant. However, we need not determine the appropriateness of the court's alternative ruling regarding all the proffered evidence, because the court subsequently admitted much of the proffered evidence.

During B.R.'s direct examination, the prosecutor asked: "Did you beat [S.L.] on August 20, 2009?" to which B.R. responded: "Not that day or any other." The trial court found "the door has been opened to ask [B.R.] about other incidents of assault between himself and [S.L.]." The court ruled defendant was "permitted to question [defendant's then-girlfriend E.H.] and [B.R.] regarding any assaultative behavior that took place between [B.R.] and [S.L.]," including "the May 18th, 2010 incident."

After the trial court's ruling, defendant thoroughly cross-examined B.R. using the proffered documents about the alleged May 18, 2010 domestic violence. Defense counsel had B.R. identify S.L.'s signature on her voluntary statement, and then had B.R. read aloud to the jury her handwritten statement that at 1:00 a.m., B.R. came home from a bar, they argued, and B.R. held her mouth, picked her up, and threw her on the ground. Defense counsel had B.R. identify and read the criminal complaint-warrant, charging that he did "commit assault by attempting to cause bodily injury to [S.L.], specifically by grabbing the victim around the mouth and throwing her to the ground and causing the victim pain in her lower back." Defense counsel had B.R. identify the police report, and showed him the attached photos of S.L. displaying her bruises.

B.R. admitted that he and S.L. had argued on May 18, 2010, that the photos showed S.L. had bruises, that he was arrested and charged with assault, and that S.L. obtained a temporary restraining order (TRO) against him. He denied having assaulted S.L., said her bruises were not from the incident, and related that subsequently he pled guilty only to a noise violation and that S.L. dismissed the TRO.

The trial court also allowed defendant to elicit other evidence of B.R.'s violence against S.L. by cross-examining

defendant's girlfriend E.H. E.H. testified that four days before the sexual assaults B.R. grabbed S.L. by the back of her shirt with such force that it ripped her bra in half and began to tear the collar of her shirt, and that he hit her. E.H. further testified S.L. told E.H. that B.R. and S.L. had other physical confrontations, and that S.L. was fearful of B.R.

During his summation, defense counsel told the jury during "I think [B.R.] is the one that assaulted [S.L.]." Defense counsel argued that after the phone calls B.R. "just had enough and he [drove home and] went to the same modus operandi he has before — he's beaten [S.L.] before." Counsel pointed to E.H.'s "testimony that prior to this incident within the week of the incident that [S.L.] and [B.R] were arguing coming back from the bar and . . . intoxicated . . . he smacks her in the face and he rips her bra." Counsel noted B.R.'s defense, but argued "[w]e know that's a lie because the records [of the May 18, 2010 assault] prove it." Counsel told the jury B.R. "has beat her up," and that S.L. was blaming defendant because "she's afraid of [B.R.], of what he did in the past."

Thus, the trial court ultimately granted defendant substantial cross-examination to support his argument on third-party guilt. Defendant was able to bring before the jury the facts of the May 18, 2010 incident by having B.R. read S.L.'s

statement to police and the resulting criminal complaint. Defendant concedes he was able to cross-examine B.R. on the subject, and also to elicit from E.H. that S.L. told her of the violent relationship she had with B.R. On appeal, defendant contends the court's initial ruling suppressed that information's context, but he does not identify any fact he should have been able to elicit.

Defendant argues he should have been allowed to cross-examine S.L. about her violent relationship with B.R., in particular about the statements she made to E.H. However, in his pretrial hearing, defense counsel mentioned wishing to cross-examine only B.R. about the May 18, 2010 assault, which defendant was ultimately able to do. Although defendant attempted to cross-examine S.L. early in the trial,[5] defendant never requested to recall S.L. to cross-examine her after the trial court ruled that B.R. had opened the door to cross-examination "regarding any assaultive behavior" by B.R. against S.L.

[5] Defense counsel asked S.L. if B.R. ever assaulted her, but did not repeat the question after an objection. The next day, defense counsel unsuccessfully argued he should be able to ask S.L. about prior assaults, saying: "if she admits it, well, then, fine. If she doesn't admit it, I have other people that can testify with regards to what she said about that."

Moreover, E.H. testified to S.L.'s statements about B.R.'s violence against her generally and shortly before the sexual assaults. Similarly, the jury heard S.L.'s own statement about the May 18, 2010 incident. Recalling S.L. carried the risk she would deny the statements the jury had already heard.[6] In any event, even if S.L. had confirmed the statements, that would not have added much to the evidence already elicited.

Defendant argues he was harmed by the trial court's initial ruling barring cross-examination, despite the court's subsequent ruling permitting it. He contends cognitive science suggests jurors make up their minds early in the trial. However, the trial court instructed the jurors before opening statements: "You are not to form or express an opinion on this case, but are to keep an open mind until you have heard all the testimony, have heard the summations, have had the benefit of my instructions as to the applicable law, and have been instructed to begin your deliberations." Defendant's contention is consistent with the precept that "[t]here can be no assumption that the jury did not faithfully follow the [trial court's] admonition." State v. Nelson, 173 N.J. 417, 447 (2002) (quoting State v. Manley, 54 N.J. 259, 271 (1969)). "One of the foundations of our jury system is

[6] Defense counsel argued in closing that S.L. could not admit to police or her friends that her own boyfriend beat her up.

that the jury is presumed to follow the trial court's instructions." State v. Burns, 192 N.J. 312, 335 (2007).

Defendant cites State v. Cope, 224 N.J. 530 (2016), but there the trial judge totally barred testimony from "[a] person who confesses to the crime of which the defendant is accused[.]" Id. at 555. By contrast, defendant offered only propensity evidence. See State v. Harris, 156 N.J. 122, 178 (1998) (finding evidence that a third party was "violence-prone" has "little probative value"). Moreover, he does not claim on appeal that any fact was excluded by the trial court's rulings.

Moreover, defendant's third-party guilt theory was strained. As the trial court noted in denying defendant's motion for a new trial, "[t]he jury [simply] did not believe defendant's theory that [B.R.] in the dead of night drove from his worksite . . . 40 minutes away, beat and raped his girlfriend and then drove back to the work site undetected by anyone." The court added that "[t]he jury did not believe defendant's version" that he "slept through this brutal attack . . . so loud that the neighbor was awakened by the noise." Given the strength of the State's evidence, which included defendant's DNA on S.L.'s genitalia, we cannot say the court's rulings were "clearly capable of producing an unjust result." R. 2:10-2.

III.

At the charge conference, defendant asked the trial court to include in the final jury charge an instruction on third party guilt. The court gave defendant's instruction, with the following {additions} and deletions:

> The defense has introduced evidence that: [B.R.] had assaulted [S.L.] before and after the date of August 20, 2009, specifically by striking her and/or tearing or ripping off a piece of her clothing on one date and {also} on May 18,[7] 2010, by holding her mouth and/or face, picking her up and throwing her on the ground causing her to land on her lower back and buttocks area causing pain and bruising, as well as dragging her through the house causing injury to her knees. The evidence has been offered because Defendant [M.P.R.] asserts in reason, that it tends,[8] alone, or with other evidence submitted in this case, to negate Defendant [M.P.R.]'s guilt of the charges against him. You should consider this evidence, along with all the other evidence in the case, in determining whether or not the State has proven beyond a reasonable doubt that defendant is the person who committed the offense of Sexual Assault, Kidnapping, Terroristic Threats, or the lesser included offense of criminal restraint, criminal sexual contact, or false imprisonment.

Defendant argues the trial court erred by leaving out his suggested factual rendition of the alleged May 18, 2010 assault. However, "[n]o party is entitled to have the jury charged in his

[7] Transcribed as "19th."

[8] Transcribed as "has certain reason that attends."

or her own words; all that is necessary is that the charge as a whole be accurate." State v. Jordan, 147 N.J. 409, 422 (1997). "It is the sole duty of the court to deliver 'accurate instructions on the law as it pertains to the facts and issues' of the case at hand." State v. Baum, 224 N.J. 147, 167 (2016). Here, defendant got "an adequate instruction of the law." State v. Pleasant, 313 N.J. Super. 325, 333 (App. Div. 1998), aff'd o.b., 158 N.J. 149 (1999). Indeed, the court's statement of the law, was in the language defendant requested.

Moreover, "[t]rial courts have broad discretion when commenting on the evidence during jury instruction." State v. Brims, 168 N.J. 297, 307 (2001). Generally, "summarizing the strengths and weaknesses of the evidence is more appropriately left for counsel." State v. Robinson, 165 N.J. 32, 45 (2000); see State v. Swint, 328 N.J. Super. 236, 259-60 (App. Div. 2000). Of course, "there are situations in which [courts] do require that jury instructions be 'molded' or 'tailored' to the facts adduced at trial. That requirement has been imposed in various contexts in which the statement of relevant law, when divorced from the facts, was potentially confusing or misleading to the jury." Robinson, 165 N.J. at 42. The omission of the details of the May 18, 2010 incident did not make the court's instruction confusing or misleading.

On appeal, defendant argues for the first time the trial court should have added that the introduction of third-party guilt evidence did not shift the burden of proof to defendant. However, the court gave the statement of law in defendant's proposed charge, which did not contain the language he now seeks. "[I]f defense counsel asked for a particular charge, if the court relied on counsel's request, and if defendant has now chosen to challenge that decision on appeal," that challenge is barred by invited error. State v. Munafo, 222 N.J. 480, 487 (2015). "[A] party may not argue that the jury was instructed to apply the wrong legal standard if that party argued for the application of that standard at trial." Brett v. Great Am. Rec., 144 N.J. 479, 504 (1996); see, e.g., State v. Ramseur, 106 N.J. 123, 282 (1987).

At the very least, defendant must show plain error. Munafo, 222 N.J. at 488. He cannot make that showing. The trial court's instruction made clear the jury should consider defendant's evidence of third-party guilt "in determining whether or not the State has proven beyond a reasonable doubt that defendant is the person who committed the offense." Moreover, earlier in its charge, the court instructed the jury "[t]he State has the burden of proving the defendant guilty beyond a reasonable doubt," "that burden never shifts to the defendant," and defendant "has no obligation or duty to prove his innocence or offer any proof."

Defendant now argues the trial court in 2013 should have instructed the jury in line with a model jury charge that was not adopted until 2015. However, the 2015 model charge is indistinguishable from the trial court's instructions regarding the burden of proof. The 2015 model charge tells the jury that evidence of third-party guilt can raise "a reasonable doubt with respect to the defendant's guilt," merely reminds jury the judge "previously charged you with regard to the state's burden of proof, which never shifts to the defense," and states "[t]he defendant does not have to produce evidence." Model Jury Charge (Criminal), "Third Party Guilt" (approved Mar. 9, 2015). The trial court's charge contained all of those instructions.

Defendant cites the 2015 model charge's reminder about the previous instructions about the burden of proof. Although defendant's 2013 charge on third-party guilt did not contain such a reminder, defendant shows no reason to believe the jurors forgot that instruction which they heard a short time earlier and which they had copies of in the jury room. Courts "hold in high regard the capacity and integrity of juries," State v. Mahoney, 168 N.J. 202, 222 (2001), and "act on the belief and expectation that jurors will follow the instructions given [to] them by the court." State v. T.J.M., 220 N.J. 220, 237 (2015).

Defendant has not shown a "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Camacho, 218 N.J. 533, 554 (2014) (citations omitted).

IV.

Defendant next claims his sentence was excessive. "Appellate courts review sentencing determinations in accordance with a deferential standard. The reviewing court must not substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). We must affirm unless:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.
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> [Id. at 70 (citation omitted).]

Defendant argues the trial court improperly decided to run consecutively the seven-year sentences he received for sexually assaulting S.L. on four occasions.

"Under our sentencing scheme, there is no presumption in favor of concurrent sentences and therefore the maximum potential

sentence authorized by the jury verdict is the aggregate of sentences for multiple convictions." State v. Abdullah, 184 N.J. 497, 513-14 (2005). Moreover, "there can be no free crimes in a system for which the punishment shall fit the crime." State v. Yarbough, 100 N.J. 627, 643 (1985).

"When multiple sentences of imprisonment are imposed on a defendant for more than one offense," sentencing courts are vested with the discretion to determine whether the sentences "shall run concurrently or consecutively." N.J.S.A. 2C:44-5. "In State v. Yarbough, the Court articulated the following five factors to guide a trial court in determining whether to impose consecutive or concurrent sentences," State v. Spivey, 179 N.J. 229, 244 n.4 (2004):

> (1) whether "the crimes and their objectives were predominately independent of each other"; (2) whether they "involved separate acts of violence or threats of violence"; (3) whether they "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"; (4) whether they "involved multiple victims"; and (5) whether "the convictions for which the sentences are to be imposed are numerous."
>
> [Ibid. (quoting Yarbough, 100 N.J. at 643-44).]

Here, the trial court considered each of these factors. The court was aware there was only one victim, and acknowledged the

convictions were not numerous. The court also found the "crimes and their objectives were not predominantly independent of each other," as they were all performed "with the same objective, to place [S.L.] in fear and to keep her from leaving so defendant could assault her, embarrass and humiliate her."

However, the trial court found "that the offenses as committed involved separate acts of violence or threats of violence," which "were not done so close in time as to constitute one incident of abhorrent [sic] behavior." The court explained "[t]he victim was assaulted at different times and in different ways. In addition, the assaults occurred in different areas within the home. The assaults took place in the living room, the top of the stairs and in the bathroom." The court noted the victim "testified she was assaulted through the night. Each assault and threat was a separate indignity to the victim."

Defendant argues his four sexual assaults should be considered a single period of aberrant behavior. However, the court's findings were supported by the evidence. Moreover, we cannot say its conclusion was an abuse of discretion. In Spivey, our Supreme Court held an assault on a searching officer was not part of "a single period of aberrant behavior" with the search and seizure of a gun and drugs even though they occurred within minutes in the same apartment. 179 N.J. at 233, 244-45 (quoting Yarbough,

100 N.J. at 644). We have upheld consecutive sentences for the robbery, kidnapping, sexual assault, and murder of the same victim during a single hour, finding it was not "a short period of aberrant behavior[.]" State v. Johnson, 309 N.J. Super. 237, 271 (App. Div. 1998). Here, the four sexual assaults occurred over the course of about four hours.

Even if the four sexual assaults could be considered a single period of aberrant behavior, that would not prevent consecutive sentencing. The Yarbough factors "should be applied qualitatively, not quantitatively." State v. Carey, 168 N.J. 413, 427 (2001). The focus of the analysis is on the gravity of the offense, and "a sentencing court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences." Id. at 422, 427-28 (citing State v. Perry, 124 N.J. 128, 177 (1991) (finding consecutive sentences proper even though four of Yarbough's five factors favored concurrent sentences)). As "there should be no free crimes in a system for which the punishment shall fit the crime," and the four second-degree sexual assaults "involve[d] separate acts of violence" committed in four different ways (vaginal, anal, digital, and oral), "our judicial conscience is not the least bit shocked by the imposition of consecutive sentences" of seven years each. See Swint, 328 N.J.

Super. at 245-46, 264 (involving two violent crimes against the same victim in an hour and a half).

Defendant also challenges the trial court's findings on the aggravating and mitigating factors. The court properly found aggravating factor one, "[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). The trial court could and did "justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in [the] offense[s]," as detailed at sentencing. Fuentes, 217 N.J. at 75.

The trial court also properly found aggravating factor three, "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(3), aggravating factor six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted," N.J.S.A. 2C:44-1(a)(6), and aggravating factor nine, "[t]he need for deterring the defendant and others from violating the law." N.J.S.A. 2C:44-1(a)(9). Though these were defendant's first indictable offenses, he was court martialed and discharged for aggravated assault in 1993, and since then had twenty-five municipal court convictions, including five convictions for simple assault, as well as six

domestic violence offenses. That was ample basis for a finding of aggravating factor six even ignoring the seriousness of defendant's current offenses.

The trial court found mitigating factors six and ten, N.J.S.A. 2C:4-1(b)(6), (10), but did not err in rejecting the other proposed mitigating factors. The court properly found defendant's payment of child support did not justify mitigating factor eleven, "[t]he imprisonment of the defendant would entail excessive hardship to himself or his dependents." Given defendant's prior record and dangerousness, the court also properly rejected mitigating factors seven, eight, and nine. See N.J.S.A. 2C:44-1(b)(7), (8), (9).

Lastly, defendant argues that "if this [c]ourt agrees that the sexual assaults should be run concurrently, the sentencing judge should reconsider the 24-year sentence for kidnapping, which he ran concurrently with the sex-offense sentence" totaling twenty-eight years. We need not consider defendant's argument, as we have held the trial court properly made the sexual assault sentence consecutive. In any event, it does not appear S.L.'s "detention was merely incidental to the underlying crimes" as she made repeated attempts to escape which defendant forcibly thwarted. See State v. La France, 117 N.J. 583, 594 (1990).

Affirmed.