SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0103-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JERMAINE R. RAMIREZ,
a/k/a JERMAINE RAMIREZ,
JEMMAINE RAMIREZ, and
JERNMAINE RAMIREZ,

Defendant-Appellant.

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Submitted December 7, 2022 – Decided August 28, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 18-09-0581.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Jennifer E. Kmieciak, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Following a jury trial, defendant was convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, and burglary. He was sentenced to an aggregate term of eighteen years' imprisonment, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, a special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4, and restrictions under Megan's Law, N.J.S.A. 2C:7-1 to -23. Additionally, he was ordered to pay various monetary fines and penalties, including a Sex Crime Victim Treatment Fund penalty (SCVTF), N.J.S.A. 2C:14-10(a). The convictions stemmed from a vile attack on a sixty-seven-year-old woman during a 4:00 a.m. burglary of her Rahway home. During the intrusion, the victim was sexually assaulted by an unknown assailant. DNA evidence subsequently tied defendant to the crimes.

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> DEFENDANT WAS DENIED HIS RIGHT TO A FAIR JURY TRIAL DUE TO THE TRIAL JUDGE'S EXCESSIVE AND PREJUDICIAL INTERVENTION, NECESSITATING REVERSAL. U.S. CONST., AMENDS. VI, XIV; N.J. CONST. . . ., ART. 1, [¶] 9. (NOT RAISED BELOW).

POINT II

THE SENTENCING JUDGE ERRED IN THE FINDING OF TWO AGGRAVATING FACTORS AND THE FAILURE TO FIND A MITIGATING FACTOR.

A. Aggravating [F]actors [One] [A]nd [Two] [S]hould [N]ot [H]ave [B]een [F]ound.

B. The [J]udge [F]ailed [T]o [C]onsider [T]he "Under [Twenty-six]" [F]actor.

C. The SCVTF [P]enalty [W]as [E]xcessive [A]nd [S]hould [B]e [R]educed.

We have considered the arguments in light of the record and applicable legal principles. Based on our review, we affirm the convictions and sentence.

I.

We glean these facts from the eleven-day trial conducted on diverse dates in October 2019, during which the State produced nine witnesses, including the victim, the responding officers, and experts in the fields of fingerprint analysis, forensic sexual assault examinations, and DNA profiling.

Around midnight on June 29, 2018, sixty-seven-year-old K.C.[1] fell asleep on her first-floor dining room couch. K.C. lived alone in a one-family Rahway

[1] We use initials to protect the victim's identity pursuant to Rule 1:38-3(c)(12).

home. K.C. testified that when she awoke, an unknown intruder was "standing over [her]," and she began "screaming." The intruder "grabbed each of [her] arms," and "kept saying, ['W]hat's your problem? What's your problem? Chill.[']" The intruder then asked K.C., "[A]re you here alone?" K.C. "pointed upstairs," hoping "he wouldn't kill [her] or . . . hurt [her]" if he thought someone else was upstairs. However, the intruder was not dissuaded.

All of a sudden, K.C. "was laying on the floor" with the intruder "on top of [her]." Believing "he[was] going to kill [her]," K.C. pleaded with the intruder to stop. Ignoring her pleas, the intruder "grabbed the crotch of [K.C.'s] underpants," "pulled them to the side," and began "rubbing his penis . . . against [her]." K.C. recounted that the intruder was unable to achieve an erection and began "sucking on [her] breasts," and "rubbing them" with "[h]is hands." K.C. begged the intruder to "stop" and told him that he was "hurt[ing]" her, but he responded by telling K.C. to "just chill" and "relax."

K.C. testified that eventually, the intruder became erect and forcibly penetrated her vagina with his penis. He did not wear a condom and "ejaculated inside [her]." When he "pulled his penis out," "some semen ended up on . . . [her] legs." After the intruder was finished, he told her numerous times not to call or tell anyone and then fled "through the back door" of K.C.'s home.

After the intruder left, K.C. called the police. K.C.'s 9-1-1 call was received by dispatch at around 4:56 a.m. and was played for the jury at trial. K.C. described the intruder to police dispatch as a "tall . . . male" wearing a "[b]lue hooded sweatshirt" and "smell[ing] of liquor." Police responded to K.C.'s residence in "less than two minutes" because officers were "right around the corner" looking for a suspect who had broken into Manish Karna's nearby residence.

Shortly after 3:00 a.m., Karna had awakened to the "sound" of a door "being locked" in his home and observed a "shadowy figure," estimated at between 5'10" and 6'2" tall, near "the entrance" of his bedroom. After the figure disappeared, Karna noticed an open window screen in the adjoining living room and called the police at 4:33 a.m. to report a suspected break-in. Responding officers detected a "muddy" "boot print at the base of the window" and "recovered fingerprint evidence" from the Karna residence. An expert in fingerprint and palm print analysis subsequently determined that "the latent print" recovered from the Karna residence was a match to the "known impression" collected from defendant.

When police officers arrived at K.C.'s residence, which was estimated to be "[l]ess than a minute walk" from the Karna residence, they searched her home

and photographed the crime scene. Emergency medical technicians transported K.C. to the Rahway Hospital, where she was examined by Linda MacDermant, a sexual assault nurse examiner (SANE).

At trial, MacDermant was qualified as an expert in forensic sexual assault examinations and testified that she observed and photographed "suction injur[ies] on [K.C.'s] breasts," abrasions on K.C.'s vulva, bruising on K.C.'s right upper arm, and broken fingernails on K.C.'s left hand. MacDermant swabbed various areas of K.C.'s body, including K.C's breasts and both her internal and external genital areas. The swabs were sent to the forensic laboratory at the Union County Prosecutor's Office (UCPO) for analysis.

Monica Ghannam, a forensic scientist in the UCPO's Forensic Laboratory, was qualified as an expert in the field of forensic DNA extraction, analysis, and comparison. Ghannam testified that after receiving the samples collected from K.C., she performed several "serology and DNA profiling" tests. Ghannam testified that preliminary tests of the vaginal swabs were presumptively positive for both semen and blood. She then examined a sample under a microscope and "counted [fifteen]" sperm cells.

Ghannam performed a "differential extraction," which is a technique "use[d] . . . to separate the DNA of the sperm from the DNA from all the other

cells that may be present, such as epithelial cells." After separating "the epithelial cell fraction and the sperm fraction," Ghannam was able to generate "DNA profiles . . . from both . . . fractions."

For the sperm sample, Ghannam concluded that "there was a mixture of DNA . . . from a minimum of two individuals," and that K.C. could not be excluded as one of those individuals. Ghannam was able to generate the DNA profile of the other individual by "put[ting] [K.C.'s] reference profile" and "the DNA profile from the sperm fraction" into a program called STRmix. After generating a DNA profile for the unknown source, Ghannam "placed it into a database for searching." On July 2, 2018, a "database match" was returned linking the unknown DNA profile to the DNA profile of defendant.

Once law enforcement was notified of the match, defendant was arrested the following day, July 3, 2018. That same day, a photographic identification procedure was conducted with K.C. The photo array presented to K.C. contained defendant's photograph. The parties stipulated at trial that K.C. was unable to identify defendant as the intruder.

On July 5, 2018, defendant provided a buccal swab as "a reference sample" for comparison. Ghannam testified that after "conduct[ing] a DNA analysis on . . . th[e] buccal swab[]" and comparing the results to the DNA

profile generated from the vaginal swabs, "it [was] approximately 11.5 quadrillion times more likely . . . the DNA [was] a mixture of [K.C.] and [defendant] than a mixture of [K.C.] and an unknown individual." As a result, Ghannam opined that defendant was "the source of the sperm DNA" collected from the vaginal swab.

Ghannam also performed DNA testing on the dried saliva samples taken from K.C.'s breasts. Ghannam testified that as to the left breast sample, it was "approximately 368 trillion times more likely . . . the DNA [was] a mixture of [K.C.] and [defendant] than a mixture of [K.C.] and an unknown individual." As to the right breast sample, Ghannam testified that it was "approximately 11.5 trillion times more likely . . . the DNA [was] a mixture of [K.C.] and [defendant] than a mixture of [K.C.] and an unknown individual." Based on the analysis, Ghannam opined that defendant was the source of the saliva on K.C.'s breasts.

On September 28, 2018, defendant was charged in a five-count Union County indictment with: first-degree aggravated sexual assault of K.C. during the commission of a burglary, contrary to N.J.S.A. 2C:14-2(a)(3) (count one); second-degree sexual assault of K.C. by using physical force, contrary to N.J.S.A. 2C:14-2(c)(1) (count two); third-degree aggravated criminal sexual contact upon K.C. during the commission of a burglary, contrary to

N.J.S.A. 2C:14-3(a) (count three); second-degree burglary of K.C.'s residence, contrary to N.J.S.A. 2C:18-2(a)(1) (count four); and third-degree burglary of Karna's residence, contrary to N.J.S.A. 2C:18-2(a)(1) (count five).

On October 25, 2019, at the close of the State's case, the trial judge partially granted defendant's application for dismissal of count five, see R. 3:18-1, and amended the charge to criminal trespass, a lesser included offense of burglary. See N.J.S.A. 2C:18-3. On October 31, 2019, the jury found defendant guilty of counts one, two, three, and four. The jury acquitted defendant of count five, as amended. On March 6, 2020, the judge sentenced defendant, which sentence was memorialized in a March 13, 2020, judgment of conviction. This appeal followed.

II.

In Point I, defendant argues he was deprived of a fair trial because the judge was "blatantly biased" and "engaged in an impermissible amount of prejudicial intervention" during the trial.

"In our judicial system, the trial court controls the flow of proceedings in the courtroom." State v. Jones, 232 N.J. 308, 311 (2018). "[W]e apply the abuse of discretion standard when examining the trial court's exercise of that control." Ibid. "[A] functional approach to abuse of discretion examines whether there

are good reasons for an appellate court to defer to the particular decision at issue." State v. R.Y., 242 N.J. 48, 65 (2020) (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

"Trial courts can and should intervene at trial in certain circumstances." State v. Taffaro, 195 N.J. 442, 450 (2008). We have recognized that:

> The parameters of judicial intervention in the conduct of a trial are well settled. Our courts have long rejected the "arbitrary and artificial methods of the pure adversary system of litigation which regards the lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed." . . . The discretionary power of a judge to participate in the development of proof is of "high value," because a fair trial is his [or her] responsibility.
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> [State v. Medina, 349 N.J. Super. 108, 130-31 (App. Div. 2002) (citation omitted) (first quoting State v. Riley, 28 N.J. 188, 200 (1958); and then quoting State v. Guido, 40 N.J. 191, 207 (1963)).]

Indeed, N.J.R.E. 611(a) specifically authorizes trial courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." Thus, claims of prejudicial judicial intervention in trial

proceedings "must be weighed against the important interest of preserving order in the courtroom." Medina, 349 N.J. Super. at 131.

While "[t]he intervention of a trial judge is a 'desirable procedure,' . . . it must be exercised with restraint." Ibid. (quoting Village of Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132 (1958)). "There is a point at which the judge may cross that fine line that separates advocacy from impartiality." Ibid. (quoting Sreel Inv. Corp., 28 N.J. at 132). If the line is crossed, "[a] trial judge 'may so take over the entire proceedings as to create prejudicial error.'" Ibid. (quoting Davanne Realty Co. v. Brune, 67 N.J. Super. 500, 511 (App. Div. 1961)).

"In determining whether a trial judge crossed over this line, we must examine the record as a whole." State v. Ross, 229 N.J. 389, 409 (2017). "The critical concern, of course, is that a court not suggest to jurors . . . that it is taking one party's side." Taffaro, 195 N.J. at 451. "[O]fficial expressions of displeasure or disapproval may convey to the jury the belief that defense counsel was somehow acting improperly, disrespectfully, or deceptively; or worse yet, give the impression that the judge has an opinion of [the] defendant's guilt or innocence." State v. Tilghman, 385 N.J. Super. 45, 59 (App. Div.), remanded on other grounds, 188 N.J. 269 (2006).

However, "isolated instances of judicial annoyance or impatience do not warrant the drastic remedy of vitiating an otherwise valid conviction." Medina, 349 N.J. Super. at 132. Therefore, "in reviewing a claim of prejudicial intervention by a trial judge," we "must determine whether, in the aggregate, 'the actions of the trial judge deprived the defendant of a fair trial.'" Hitchman v. Nagy, 382 N.J. Super. 433, 452 (App. Div. 2006) (quoting Mercer v. Weyerhaeuser Co., 324 N.J. Super. 290, 299 (App. Div. 1999)).

Here, defendant points to various excerpts from the trial record to demonstrate that the judge "completely dominated the trial to defendant's detriment." Specifically, defendant takes issue with the following: the judge's interjections during defense counsel's voir dire of two expert witnesses' qualifications; the judge's interjections during defense counsel's cross-examination and re-cross-examination of the State's DNA expert; the judge's denial of defense counsel's requests for sidebar conferences; and the judge's adverse evidentiary rulings made both in and outside the presence of the jury, including the judge's decision to bar defense counsel from cross-examining the State's DNA expert on a remote scandal involving contaminated DNA samples in the New York City Medical Examiner's Office and four journal articles presented for the first time hours before cross-examination was to recommence.

As to the latter, defendant does not challenge the adverse evidentiary rulings on the merits, only the purported prejudicial impact on the tone and the tenor of the trial.

Based on our careful review of the record, we discern no abuse of the judge's discretionary authority or prejudicial intervention in the trial proceedings. Contrary to defendant's contentions, the judge was well within her discretion in limiting defense counsel's voir dire to questions that were relevant and appropriate to determining whether the proposed experts were qualified in their respective fields. See State v. Budis, 125 N.J. 519, 532 (1991) ("[T]rial courts 'retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986))); see also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 611 (2023) ("The scope of redirect and re-cross-examination is presumably governed by N.J.R.E. 611(a), giving the court reasonable control of the mode of interrogating witnesses." (emphasis omitted)).

We also reject defendant's claim that the judge inappropriately interrupted defense counsel's questioning of witnesses and refused sidebars. The record shows that the judge repeatedly directed defense counsel "not to argue with [her] in front of the jury," to "[s]top interrupting [her]," to "[s]top making comments" before the jury, and to "[l]et the witness finish" answering the question posed. The judge acknowledged her "exasperat[ion]" at defense counsel's refusal to heed her warnings. The judge also admitted that she had denied some of defense counsel's requests for sidebars, but pointed out that she had "denied both sides . . . sidebar[s]." Because the judge did not completely prohibit all sidebar conferences, we discern no abuse of discretion. See State v. Smith, 55 N.J. 476, 483 (1970) (explaining that the decision to hear matters at sidebar conferences "was clearly one within the trial court's discretion"); see also Priolo v. Compacker, Inc., 321 N.J. Super. 21, 29 (App. Div. 1999) ("[T]he blanket bar of side-bar conferences is not the exercise of discretion at all; it is an arbitrary rule which fails to recognize the vagaries of trial and, is, in itself, an abuse of discretion.").

When defense counsel accused the judge of "denying [his] client's right[s]," the judge responded outside the presence of the jury:

> I have asked you a number of times not to argue with me. Now, disagreeing with me, it's okay. I know you

> asked for sidebars and sometimes I say, yes, sometimes I say, no.
>
> Do not make a statement in front of this jury that I'm depriving your client of his rights. That is absolutely not the case. The record speaks for itself. Do not do that[] again, or I am going to sanction you.
>
> It is not appropriate. It is not correct. And it is not a fair statement of this very fair trial to both sides. Don't do it[] again.

A trial judge may admonish counsel for arguing with the court after ruling on an objection. State v. Knight, 63 N.J. 187, 192 (1973) (finding that the trial judge "properly, and in a civil manner, admonished counsel for arguing with the court after an objection had been overruled"); see also Tilghman, 385 N.J. Super. at 62 ("If there was a need to caution counsel against abusing courtroom protocol or rules of procedure, the admonition should . . . occur[] outside the presence of the jury."). Moreover, "[w]hen an attorney provokes a judge's rebuke by defying his [or her] authority to limit argument, [the attorney] cannot complain of the judge's appearance of hostility while trying to control the proceedings." State v. Stewart, 162 N.J. Super. 96, 103 (App. Div. 1978).

Any potential prejudice caused by the judge's interjections and comments during trial were remedied by her thorough and detailed jury instructions. During preliminary and final instructions, the judge made clear that she had no

feelings about the case and even if she did, the jury "would have to disregard them because [the jurors were] the sole judges of the facts." She warned the jury that at times she would dismiss the jury to "discuss a particular issue with the attorneys" but cautioned that "whatever the ruling may have been in any particular instance, . . . it was not an expression or opinion by [the judge] on the merits of the case" and should not be considered "as favoring one side or the other." The judge also stressed that "remarks made by [her] to counsel or by counsel to [her] . . . should not affect or play any part in [the jury's] deliberations."

"One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." State v. Vega-Larregui, 246 N.J. 94, 126 (2021) (quoting State v. Burns, 192 N.J. 312, 335 (2007)). Given the instructions, there was no real possibility that the judge's conduct was detrimental to defendant or denied him a fair trial in any way. A "reviewing court should not evaluate the trial judge's conduct from the vantage point of twenty-twenty hindsight." Medina, 349 N.J. Super. at 132. Based on our review, "[w]e have no reason to doubt the judge's good faith and impartiality," and "[w]e find no error in the manner in which the proceedings were conducted." Ibid.

III.

In Point II, defendant challenges his sentence as excessive on various grounds. We review sentences "in accordance with a deferential standard," State v. Fuentes, 217 N.J. 57, 70 (2014), and are mindful that we "should not 'substitute [our] judgment for those of our sentencing courts,'" State v. Cuff, 239 N.J. 321, 347 (2019) (quoting State v. Case, 220 N.J. 49, 65 (2014)). Thus, we will

> affirm the sentence 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."
>
> [Fuentes, 217 N.J. at 70 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Here, based on the "nature and circumstances of the offense," "the vulnerability of [the] victim," "the extent of [defendant's] prior [criminal] record," defendant's commission of crimes "while on probation," and the "absolute overwhelming need" for deterrence, the judge found aggravating factors one, two, three, six, and nine, and no mitigating factors. See N.J.S.A. 2C:44-1(a)(1), (2), (3), (6), and (9). The judge determined "the aggravating factors clearly and substantially outweigh[ed] the complete lack of

mitigating factors," and sentenced defendant to eighteen years in prison, subject to NERA, on count one, and a concurrent four-year term on count three. The judge merged counts two and four into count one. See Case, 220 N.J. at 64-65 ("'[W]hen the aggravating factors preponderate, sentences will tend toward the higher end of the range.'" (quoting State v. Natale, 184 N.J. 458, 488 (2005))).

Defendant argues the judge abused her discretion in finding aggravating factor one because "[t]his case does not rise to the level of being cruel, depraved, and heinous," and the record does not support the judge's conclusion that aggravating factor one was not negated by the "effects of alcohol or drugs." Under N.J.S.A. 2C:44-1(a)(1), the sentencing court may consider "[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner."

In applying aggravating factor one, the judge explained:

> I do find there's competent, credible evidence to support that factor. And as [the prosecutor] pointed out, . . . this victim begged . . . defendant to stop, . . . he threw her to the floor, committed various acts of sexual contact with her, biting her on the chest, . . . and to this [c]ourt, behaved in a particularly cruel manner. He also asked, ["]was there anyone home.["] [K.C.] did the smart thing, I think she lied and said somebody was upstairs. Defendant didn't believe it.

> In fact, it appears to me that there was no influence of drugs and alcohol on [defendant] at all, because he achieved his goal, he found a house he could break into, and he found a woman who he could sexually assault. Any effects of alcohol and drugs doesn't seem apparent to this [c]ourt. He ignored the pleas of the victim through the acts of sexual contact, when she begged him to stop, he ignored it. In fact, he continued to perform those acts of sexual contact in an effort to be able to perform the act of sexual penetration, which, unfortunately, he was able to do eventually.
>
> I do find it was cruel, depraved, and heinous by this defendant. This isn't double counting. The courts are warned . . . not to double count the elements, and I'm not. But it's the circumstances that make this particularly heinous, cruel, and depraved.

"[A]ggravating factor one must be premised upon factors independent of the elements of the crime and firmly grounded in the record." Fuentes, 217 N.J. at 63. The prohibition against double counting will not apply when there are "aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior." State v. Miller, 237 N.J. 15, 30 (2019) (alteration in original) (quotation marks omitted) (quoting Fuentes, 217 N.J. at 75). Such a finding must be "clearly explained so that an appellate court may be certain that the sentencing court has refrained from double-counting the elements of the offense." Fuentes, 217 N.J. at 76. The disturbing facts of this

case clearly support the judge's finding of aggravating factor one, which she meticulously explained.

Further, the judge did not abuse her discretion by finding that the effects of drugs and alcohol did not "play[] any role in [defendant's] decisions." Although K.C. testified that she could smell the strong odor of alcohol emanating from defendant's breath, we have held that "[c]rimes committed under the influence of alcohol or drugs do not detract from the seriousness of the offense." State v. Towey, 244 N.J. Super. 582, 595 (App. Div. 1990) (citing Roth, 95 N.J. at 368); see also State v. Rivera, 124 N.J. 122, 126 (1991) (noting that the criminal code "does not condone leniency" even where "the commission of the offense may be related to the offender's drug or alcohol addiction").

Defendant also argues that the judge abused her discretion because "[a] crime against a [sixty-seven]-year-old occurring at 4[:00] a.m. does not fall under aggravating factor [two]." Under N.J.S.A. 2C:44-1(a)(2), the sentencing court may consider

> [t]he gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance.

Aggravating factor two "focuses on the setting of the offense itself with particular attention to any factors that rendered the victim vulnerable or incapable of resistance at the time of the crime." State v. Lawless, 214 N.J. 594, 611 (2013).

In applying aggravating factor two, the judge reasoned:

> [Aggravating factor two] addresses the vulnerability of a victim. It often applies in child abuse cases. But the court says . . . specifically, that it's not just the age, meaning youthful age, it can be advanced age. Now, I'm not implying at all that [K.C.] is elderly. No, but she was [sixty-seven].
>
> But the statute says, "and was for any other reason substantially incapable of exercising normal physical or mental power of resist[a]nce." What made her particularly vulnerable was the fact that she was awakened at [four] o'clock in the morning. Anybody would be confused and disoriented. And that made her particularly vulnerable. Again, I find it was the intent of . . . defendant to make sure that the person he found to assault would be just that, would be asleep. Most people are asleep at 4[:00] a.m. . . . [K.C.] had every right to be asleep in her own home. But it made her very vulnerable to the acts of . . . defendant.

There is ample record support for the judge's finding, and we discern no abuse of discretion. See State v. McBride, 211 N.J. Super. 699, 704 (App. Div. 1986)

(finding aggravating factor two where amateur boxer over six-feet tall severely beat a fifty-six-year-old man).[2]

Finally, defendant argues the judge's imposition of a SCVTF penalty of $1,900 was "completely random." Defendant acknowledges the judge "attempt[ed] to follow the guideline[s] for 'ability to pay'" but maintains he "has no ability to pay [$]1,900 any more than he has the ability to pay . . . [$]2,750," which is the maximum allowable total penalty.

Under N.J.S.A. 2C:14-10(a), a person convicted of a qualifying sex offense "shall be assessed a penalty for each such offense." For a qualifying first-degree offense, the maximum SCVTF penalty is $2,000. N.J.S.A. 2C:14-10(a)(1). For a qualifying third-degree offense, the maximum SCVTF penalty is $750. N.J.S.A. 2C:14-10(a)(3). Although the SCVTF penalty is mandatory, a sentencing court has "substantial discretion with respect to the amount of the

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[2] Although defendant, who was twenty-four years old at the time of the offense, concedes he was sentenced before the New Jersey Legislature amended N.J.S.A. 2C:44-1(b) to add youth as a fourteenth mitigating factor for offenders under twenty-six years old at the time of the offense, he nevertheless argues he is entitled to consideration of mitigating factor fourteen on remand because the judge abused her discretion in applying aggravating factors one and two. Based on our decision, we need not address the argument. See State v. Lane, 251 N.J. 84, 97 (2022) (holding the Legislature intended aggravating factor fourteen to "apply . . . prospectively to defendants sentenced on or after its effective date of October 19, 2020"). In any event, the judge did, in fact, consider defendant's youth at the request of defense counsel but rejected it.

SCVTF penalty" and "may impose a [SCVTF] penalty in any amount, from a nominal amount up to the statutory maximum based on the defendant's offense." State v. Bolvito, 217 N.J. 221, 231-32 (2014). In imposing the SCVTF penalty, the trial court should consider "the nature of the offense" and "the defendant's ability to pay the amount assessed." Id. at 233-34. "[A] defendant's ability to pay should not be measured only by current circumstances, but assessed over the long term." Id. at 234. In addition, the court "should provide a statement of reasons" for the assessed penalty to "facilitate appellate review." Id. at 235.

Here, the judge provided the following statement of reasons for the SCVTF penalty:

> I have seen a number of cases that have come back to the court because the court did not consider a defendant's ability to pay, much like a court has to consider restitution and ability to pay.
>
> Now, I can ask [defendant], . . . but I don't think [defendant] is going to be able to tell me, at this stage, what he's going to make every month in [s]tate [p]rison, I'm sure it's limited. And even if we were to add up the monthly income, frankly, . . . it is not going to come close to $2,000.
>
> So what I'm going to do is . . . reduce that, not because I think it's not a valid penalty, it's mandatory, but because, frankly, . . . [the maximum is] not going to be something that could be paid by [defendant] during the time he's in State [p]rison.

> So I'm going to . . . reduce the [$]2,000 [SCVTF] penalty to $1,400 on the first[-]degree [offense] and the [$]750 penalty on the aggravated criminal sexual contact to $500, . . . which [altogether] is $1,900.

We are satisfied that the judge's statement of reasons in conjunction with her prior assessment of the nature of the offense in connection with aggravating factor one essentially comply with Bolvito's requirements.

To the extent any argument raised by defendant has not been explicitly addressed in this opinion, it is because the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.