SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2138-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KHAWAR SALEEM,

Defendant-Appellant.

Submitted April 26, 2023 – Decided May 19, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 18-12-1343.

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

LaChia L. Bradshaw, Burlington County Prosecutor, attorney for respondent (Nicole Handy, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Khawar Saleem appeals from a March 17, 2022 judgment of conviction following a bench trial. The trial judge found defendant guilty of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (count three). However, the judge found defendant not guilty of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7) (count one), and second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (count two). We affirm.

We recite the facts from the trial testimony. On October 6, 2017, the victim, M.K.,[1] boarded a bus traveling from New York City to Wilmington, Delaware. M.K. took the first available window seat with a vacant adjacent seat. M.K. sat with the bus window to her left and the empty seat to her right.

Defendant approached M.K. and asked if the seat next to her was open and if he could sit there. M.K. agreed. She fell asleep shortly after the bus left the station.

The seats surrounding defendant and M.K. were occupied when the bus departed. During her trial testimony, M.K. admitted that the only passengers who might have been able to see her and defendant were the passengers seated across the aisle from where she sat.

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

M.K. woke up when she felt something between her legs. She testified she felt defendant place his finger in her vagina. M.K. further explained that she saw and felt defendant move his hand when she sat upright.

M.K. confronted defendant and asked what he was doing. She told defendant that he did not have permission to touch her and instructed him to leave. When M.K. spoke to defendant, he seemed panicked, apologized profusely, left his seat, and went to the bathroom. When defendant returned from the bathroom, he took a different seat, agreed to get off the bus at the next stop, and apologized again.

M.K. testified that she texted her roommate about the incident and asked for her roommate's advice. The roommate told M.K. to inform the bus driver about the incident.

Defendant provided a different version of the incident. During his testimony, defendant admitted his hand made contact with M.K.'s thigh. However, he explained that he fell asleep and his hand accidently touched M.K. Defendant testified that he got up from his seat because M.K. pushed him and asked him to move. He apologized to M.K. for what he deemed an "accident," and went to the bathroom. When defendant returned from the bathroom, he tried

to speak with M.K. again. At M.K.'s request, defendant moved to the aisle seat immediately in front of M.K.'s row.

Heeding her roommate's advice, M.K. reported the incident to the bus driver, who contacted the police. A short time later, the driver stopped the bus and a New Jersey State Trooper arrived. M.K. was already off the bus when the trooper responded.

New Jersey State Trooper Mark Kaminski, who handled the call, testified at trial. According to the trooper, M.K. appeared visibly upset. He spoke to M.K. and asked whether she could identify her assailant. M.K. reentered the bus with Kaminski and identified defendant.

Trooper Kaminski then spoke with defendant. According to Kaminski, defendant stated he fell asleep and his hand fell in M.K.'s lap. After being read his Miranda[2] rights, defendant repeated the same version of events. Trooper Kaminski then took defendant to headquarters to be interviewed, but defendant declined to speak further with the police.

Trooper Kaminski also testified that he spoke with about five or six passengers who were seated near M.K. According to Kaminski, none of the interviewed passengers saw or heard anything.

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

On cross-examination, Trooper Kaminski testified that some passengers said, "nothing happened." However, he also stated that the interviewed passengers who were not asleep "didn't see anything because they were in their laptops or they were preoccupied." The trooper's mobile video recorder (MVR) device was activated at the scene and a transcript of the recording was admitted as evidence at trial. Additionally, the trooper told the judge he wrote the names and telephone numbers of the passengers with whom he spoke on a piece of paper. However, he lost the paper after placing it in the case folder.

After hearing testimony over two non-consecutive days, the State rested and defendant moved for a judgment of acquittal under Rule 3:18-1 on counts one and three. Defendant argued there was insufficient evidence of M.K.'s helplessness for the State to prevail on those counts. The judge denied the motion.

Defendant also requested an adverse inference regarding the trooper's lost notes. The judge granted the request for an adverse inference, stating "[the court] will draw an adverse inference from the lack of the notes and the telephone numbers as it relates to [the] contact information." However, the judge also noted that the trooper's MVR "recorded most of the transaction on

the investigation" and he would "take that into consideration" as well as "draw an adverse inference from the lack of . . . the notes."

After hearing the testimony, the judge rendered an oral decision setting forth fact findings, including credibility determinations, and legal conclusions. Regarding M.K.'s credibility, the judge noted her "testimony contained a number of inconsistencies" about the specifics of the incident and the text messages with her roommate. However, the judge explained M.K.'s "recollection of the events of October 6th were admittedly after she had come out of a deep sleep," "was in a fog," and "confused about what happened." Regarding the testimony of Trooper Kaminski, the judge found "[h]e did not seem to have a good recall of the facts and his testimony was not entirely reliable."

Regarding defendant's testimony that the incident was an "accident," the judge found that testimony "could not be corroborated." The judge also noted defendant had no trouble responding to his attorney's questions on direct examination but "repeatedly indicated he did not understand questions from the [p]rosecutor." Thus, the judge questioned the "veracity of [defendant's] overall testimony." Because defendant had "an interest in the outcome" of the trial, the judge did not deem defendant's testimony "to be entirely credible."

Based on the testimony and evidence adduced at trial, the judge found that "the victim was asleep and therefore . . . physically helpless" at the time of the incident. Regarding the State's evidence in support of penetration, the judge noted it was limited to M.K.'s testimony, and her testimony was "inconsistent, contradictory, and otherwise lack[ing] corroboration." Because "the State [could] not prove beyond a reasonable doubt the issue of penetration," the judge concluded "the State ha[d] not carried its burden of establishing each and every element of counts one and two, which both require[d] the State to establish sexual penetration."

However, as to count three, aggravated criminal sexual contact, the judge noted the State only needed to "prove that [d]efendant purposefully committed an act of sexual contact." The judge explained that "[t]he State must show beyond a reasonable doubt that the touching was intentional and that it was done with the purpose of degrading, or humiliating, or sexually arousing, or gratifying the [d]efendant." The judge found the State met its burden on count three, as "[d]efendant admit[ted] that his hand was on [M.K.]'s thighs." The judge "[did] not believe [d]efendant's allegations that his hand fell into [M.K.]'s lap or that it was an accident." In light of "[d]efendant's quick apology and offer to get off the bus," the judge concluded "[d]efendant purposefully committed an act of

sexual contact with [M.K.] while she was sleeping and otherwise physically helpless."

Defendant was scheduled to appear for sentencing on February 25, 2021, but he fled the country. A year later, defendant surrendered himself. Defendant appeared for sentencing on February 28, 2022.

Prior to sentencing, defendant filed a motion for a new trial based on the inconsistencies in M.K.'s testimony. Defendant also challenged the reliability of Trooper Kaminski's testimony. The judge denied the motion.

The sentencing judge found aggravating factors three and nine, assigning them moderate weight. The judge concluded defendant presented a risk of committing another offense based on the facts of the case and defendant fled the country after the trial. The judge found these actions demonstrated defendant's "lack of respect for others, as well as his disregard for the criminal justice system." The judge also found aggravating factor nine, the need to deter defendant and others from engaging in the criminal conduct at issue. Additionally, the judge found mitigating factors seven (defendant had no prior criminal history), eight (the circumstances were unlikely to recur), and ten (defendant was likely to respond to probationary treatment), and concluded the mitigating factors slightly outweighed the aggravating factors.

The judge sentenced defendant to 270 days in the county jail with fifty-five days of jail credit. Additionally, defendant was placed on community supervision for life and subjected to the requirements of Megan's Law.

On appeal, defendant raises the following arguments:

POINT I

> DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE STATE LOST OR DESTROYED THE IDENTITY OF THE WITNESSES WHO WERE ON THE BUS AND COULD HAVE PROVIDED EXCULPATORY EVIDENCE ON DEFENDANT'S BEHALF (PLAIN ERROR).

POINT II

> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL OF THE AGGRAVATED SEXUAL CONTACT CRIME OR AT LEAST IN FAILING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE VERDICT OR FOR A NEW TRIAL.

POINT III

> DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

We review a conviction following a bench trial to determine if the verdict is supported by substantial credible evidence in the record. State v. Johnson, 42 N.J. 146, 162 (1964). We owe "'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. Locurto, 157 N.J. 463, 471 (1999) (quoting Johnson, 42 N.J. at 161).

We discern no basis for interfering with the trial judge's well-supported factual findings, legal conclusions, and disposition of the charges against defendant. The judge rendered detailed credibility determinations. Based on the trial testimony, the judge explained why he believed the victim's account of the incident and we defer to those credibility determinations. Further, the judge's factual findings are fully supported by the record.

We also reject defendant's argument that the lost notes, identifying the five or six passengers interviewed by Trooper Kaminski, deprived defendant of a fair trial. Under the discovery rules in criminal matters, the State is required to maintain an officer's written investigation notes. State v. W.B., 205 N.J. 588, 608 (2011). If the "notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge molded, after conference with counsel, to the facts of the case." Id. at 608-09.

Under Brady v. Maryland, 373 U.S. 83, 87 (1963), "suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "[T]o establish a Brady violation, the defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material." State v. Martini, 160 N.J. 248, 268-69 (1999).

Here, there was no evidence that Trooper Kaminski destroyed or the State deliberately withheld the notes to satisfy the first Brady prong. Moreover, the notes containing the passenger names and telephone numbers were not material to the outcome of the case. Trooper Kaminski testified that none of the interviewed passengers saw or heard anything related to the incident. The MVR also captured the trooper's interviews with the passengers, confirming the passengers did not see or hear anything. If the interviewed passengers were located and called to testify at trial, nothing about their statements would have benefitted defendant or altered the outcome of the case. Thus, defendant was unable to satisfy the second and third prongs under Brady.

We also reject defendant's argument that the judge's grant of an adverse inference regarding the trooper's lost notes was ineffective and failed to remedy the prejudice resulting from the loss of the information.

Here, defendant requested, and the judge granted, an adverse inference regarding the lost notes. The judge was fully capable of applying an adverse inference to the facts in this case consistent with W.B. Further, the judge agreed to consider the lost notes in his decision. The judge also heard the trooper's testimony that none of the passengers witnessed anything that occurred on the bus. Plus, the judge had the benefit of the MVR transcript, confirming the passengers did not hear or see anything. Even if, as defendant claimed, the passengers stated "nothing happened," such a statement would have not have altered the outcome of the trial because the judge rendered his decision based on defendant's admissions and the witnesses' credibility.

We also reject defendant's claim that the judge erred in denying his motions for acquittal and a new trial because there was insufficient evidence to find intent or helplessness. We disagree.

We review the denial of a motion for acquittal de novo. State v. Fuqua, 234 N.J. 583, 590 (2018). In reviewing a decision on a motion for acquittal, "[w]e must determine 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 [judge] could find guilt

beyond a reasonable doubt." State v. Dekowski, 218 N.J. 596, 608 (2014) (quoting State v. Williams, 218 N.J. 576, 594 (2014)).

"We review a motion for a new trial decision for an abuse of discretion." State v. Fortin, 464 N.J. Super. 193, 216 (App. Div. 2020). Motions for a new trial are addressed to the discretion of the trial judge and we will not reverse absent a clear abuse of that discretion. State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000).

We disagree that the judge should have granted defendant's motion for acquittal on the charge of aggravated criminal sexual contact. N.J.S.A. 2C:14-3(a) provides, "[a]n actor is guilty of aggravated criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in [N.J.S.A.] 2C:14-2(a)(2) through (7)." N.J.S.A. 2C:14-2(a)(7) requires that the victim be one whom the actor knew or should have known was "physically helpless or incapacitated." N.J.S.A. 2C:14-1(d) defines "sexual contact" as "intentional touching by the . . . actor, either directly or through clothing, of the victim's . . . intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor."

To find that defendant committed aggravated criminal sexual contact, the judge had to determine, beyond a reasonable doubt, that defendant intended to

touch M.K. while she was helpless. A sleeping person may be considered physically helpless for purposes of the criminal sexual contact statute. State v. Rush, 278 N.J. Super. 44, 47-48 (App. Div. 1994). Additionally, the judge had to find that defendant touched M.K. with the purpose of sexually gratifying or arousing himself.

Here, defendant failed to demonstrate that a reasonable factfinder could not find him guilty of aggravated criminal sexual contact. The judge concluded defendant lacked any corroborating evidence or witness testimony to support his contention that his hand accidently slipped onto M.K.'s thigh. Additionally, the judge found defendant's conduct immediately after the incident, including apologizing several times and going to the bathroom, evidenced his intent in support of the charged offense. Giving the State every favorable inference, there was ample evidence on this record supporting the judge's denial of the motion for acquittal on the aggravated criminal sexual contact charge.

For the same reasons, we also reject defendant's argument that the judge erred in denying his motion for a new trial.

We next consider and reject defendant's argument that the sentence imposed was improper and excessive. Defendant contends the judge double-counted the facts of the offense when considering the aggravating factors,

improperly weighed the aggravating factors, and failed to find mitigating factor eleven. We disagree.

"An appellate court's review of a sentencing court's imposition of sentence is guided by an abuse of discretion standard." State v. Jones, 232 N.J. 308, 318 (2018). We "must not substitute [our] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). In reviewing a sentencing decision, we will affirm unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors were not based upon competent and credible evidence in the record; and (3) "the sentence was nevertheless 'clearly unreasonable so as to shock the judicial conscience.'" State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)). The sentencing court must "state reasons for imposing [the] sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting [the] sentence." R. 3:21-4(h); State v. Case, 220 N.J. 49, 64 (2014). A sentencing court must then "balance the relevant factors, and explain how it arrive[d] at the appropriate sentence." O'Donnell, 117 N.J. at 215.

Defendant argues, and the State concedes, that the judge improperly double-counted the facts of the offense at sentencing when he found aggravating

factor three, N.J.S.A. 2C:44-1(a)(3), the risk defendant would commit another offense, based in part on "the facts of this case that [d]efendant took advantage of a sleeping victim for his purpose." See Fuentes, 217 N.J at 74-75 ("[A] sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense.")

However, the judge also found aggravating factor three because "[d]efendant fled and failed to appear for a sentencing." The judge concluded defendant's fleeing the country after the trial indicated a "lack of respect for others, as well as . . . disregard for the criminal justice system," and evidenced a "risk of re-offense" in support of his finding of aggravating factor three. Thus, we are satisfied that the judge's finding aggravating factor three was based on facts other than the elements of the offense.

Having reviewed the sentencing transcript, we discern no abuse of discretion in the judge's assessment of the aggravating and mitigating factors. Based on the evidence, the judge found aggravating factors three and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter), and mitigating factors seven, N.J.S.A. 2C:44-1(b)(7) (no criminal history), eight, N.J.S.A. 2C:44-1(b)(8) (circumstances unlikely to recur), and ten, N.J.S.A. 2C:44-1(b)(10) (respond favorably to probationary treatment). At sentencing, the judge considered "the

arguments of [c]ounsel, as well as the statements . . . provided by . . . [defendant]," including letters of support from friends and family urging leniency. The judge cited defendant's fleeing the country, the nature of the case, defendant's lack of any prior criminal history, and the likelihood that defendant would respond positively to probation. We are satisfied the sentence imposed was grounded on competent and credible evidence in the record, the judge properly weighed and applied the aggravating and mitigating factors, and the sentence does not shock the judicial conscience.

To the extent we have not addressed defendant's remaining arguments, they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.