RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2340-22

IN THE MATTER OF
REGISTRANT E.S., JR.

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Submitted May 1, 2024 – Decided December 31, 2024

Before Judges Vernoia and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, ML-22-04-0104.

Jennifer N. Sellitti, Public Defender, attorney for appellant E.S. Jr. (Michael Denny, Assistant Deputy Public Defender, of counsel and on the brief).

Grace C. MacAuley, Camden County Prosecutor, attorney for respondent State of New Jersey (Matthew T. Spence, Assistant Prosecutor, of counsel and on the letter brief).

The opinion of the court was delivered by

WALCOTT-HENDERSON, J.S.C. (temporarily assigned).

Registrant E.S.[1] appeals from an order entered on March 2, 2023 classifying him as a Tier II-Moderate Risk offender pursuant to Megan's Law, N.J.S.A. 2C:7-1 to -23, and requiring internet notification. E.S. challenges his classification as a Tier II offender, arguing the court erred in considering the Registrant Risk Assessment Scale (RRAS) factors and that he should be classified as a Tier I-Low Risk offender. The order was stayed pending appeal. Perceiving no abuse of discretion by the court, we affirm.

I.

The facts here are undisputed. K.L., a seven-year-old minor, and his mother had been staying with E.S. for a week in July 2017 when K.L.'s mother contacted police to report that she saw E.S. coming out of K.L.'s room buttoning his shirt.

On July 12, 2017, an officer interviewed K.L., who revealed several instances where E.S. had asked K.L. to touch his exposed penis. K.L. told police that on another occasion while K.L. and E.S. were wrestling, E.S. bit K.L.'s ear

[1] We use initials because records relating to child victims of sexual assault or abuse are excluded from public access under Rule 1:38-3(c)(9), and records related to proceedings and hearings required under the Supreme Court's decision in Doe v. Poritz, 142 N.J. 1, 39 (1995), are excluded from public access under Rule 1:38-3(c)(11).

and placed his hand into K.L.'s pants and squeezed K.L.'s penis over K.L's underwear. K.L. reported that the last time E.S. showed him his penis was in the closet of his bedroom and that E.S. forced K.L. to touch it. The officer also included in his report that K.L. had said that E.S. had masturbated in front of him and had showed him inappropriate movies.

While police were at E.S.'s house, B.A., another minor — a fourteen-year-old male — approached the officers. B.A. lived in the same apartment complex as E.S. and also reported that E.S. had approached him one time and asked if they could masturbate together. B.A. also told police that he was near E.S.'s car at the time and E.S. told him that he had a dream in which they mutually masturbated each other.

Police then sought and executed a communications data warrant for E.S.'s electronic devices, including two computers recovered from his residence. The search of E.S.'s Apple computer yielded images depicting children in various stages of undress, including images of a young boy and young girl showering together, seven images of an adolescent girl in a diaper, three images of naked children with a naked woman, and four images of a preteen female attempting to keep her shirt on while someone else was pulling it off. There were also two additional images of the same preteen posing next to E.S. The search of the

second computer, a Lenovo laptop, revealed images of children, including two images of an adolescent female exposing her back and buttocks on a bed, two images of an adolescent female in a bathtub exposing her breasts, three images of a naked adolescent female with makeup and jewelry on, one image of an adolescent vagina, one image of an adolescent female wearing lingerie, and four images of a naked adolescent female on a tub.

In April 2018, a Camden County Grand Jury returned indictment No. 1513-06-18, charging defendant with: two counts of second-degree sexual assault by committing an act of sexual contact against K.L., N.J.S.A. 2C:14-2(b); second-degree endangering the welfare of a child by engaging in sexual conduct against K.L., N.J.S.A. 2C:24-4(a)(1); third-degree endangering the welfare of a child by engaging in sexual conduct against B.A., N.J.S.A. 2C:24-4(a)(1); and two counts of third-degree possession of child pornography, N.J.S.A. 2C:24-4(b)(5)(b).

On September 28, 2018, E.S. pleaded guilty to two counts of endangering the welfare of a child under the indictment. He had no prior criminal history and no history of substance abuse. The court sentenced E.S. to a five-year term of incarceration, parole supervision for life, N.J.S.A. 2C:43-6.4, and registration

under Megan's Law. He was released from South Woods State Prison on November 4, 2020.

Thereafter, the State provided notice to E.S. of his proposed RRAS score of fifty points, placing him in Tier II-Moderate Risk, meaning he could be included on the sex offender internet registry and that notice of his status must be provided to his local police station, and various schools, daycares, and community organizations near his home. Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws (rev. Feb. 2007) (hereinafter Guidelines), at 18-19.

"The Supreme Court has held that the registration and community notification components of Megan's Law are constitutional and enforceable." In re Registrant J.G., 463 N.J. Super. 263, 274 (2020) (citing Doe, 142 N.J. at 28). The Court has upheld the use of the RRAS in classifying registrants, and has repeatedly ruled the results of the RRAS are entitled to deference, In re Registrant C.A., 146 N.J. 71, 108-09 (1996); J.G. 463 N.J. Super. at 274 (citing In re Regisrant G.B., 147 N.J. 62, 81-83 (1996); In re N.B., 222 N.J. 87, 95 n.3 (2015)). The RRAS was "designed to provide prosecutors with an objective standard on which to base the community notification decision mandated by

[Megan's Law] and to assure that the notification law is applied in a uniform manner throughout the State." C.A., 146 N.J. at 100-01. The RRAS "is used to assess whether a registrant's risk of reoffending is low, moderate or high." In re A.D., 441 N.J. Super. 403, 407 (App. Div. 2015).

Tier designations reflect a registrant's risk of re-offense, as determined by a judge evaluating various information. In re Registrant A.A., 461 N.J. Super. 385, 402 (App. Div. 2019). The RRAS contains four categories: seriousness of offense, offense history, characteristics of offender, and community support. Within each of those categories are thirteen risk assessment criteria, which include "the statutory factors as well as other factors deemed relevant to re-offense." The validity of the Guidelines, which contain the RRAS, has been upheld by our Supreme Court. C.A., 146 N.J. at 110; see also In re T.T., 188 N.J. 321, 328 (2006); In re J.M., 167 N.J. 490, 491 (2001); G.B., 147 N.J. at 69; J.G., 463 N.J. Super. at 274.

E.S. opposed the Tier II classification and a Megan's Law initial tier hearing was held on March 2, 2023. At the hearing, E.S. argued a lower tier is warranted because he did not use force against K.L. when he asked the child to touch his penis, and at least some of the images found on his computers were of his step-grandchildren and were not pornographic. During the hearing, after the

court read aloud a May 30, 2018 police report detailing each allegedly pornographic photo extracted from E.S.'s two computers, E.S. requested an adjournment to further review the photographs the State argued were pornographic. He asserted the photographs showed his step-grandchildren and were not pornographic and the court should not rely on the police report detailing the photographs.

The court denied E.S.'s request for an adjournment, stating "you were on notice that the State was making this argument. You submitted something to the [c]ourt this week. Why didn't you make that request of the State before you came into court?" Further, the court referenced specific photographs described in the police report, including the image of an "adolescent female in lingerie" and noted that the extracted images, as described in the report, are undoubtedly child pornography. Lastly, E.S. argued K.L.'s statements to police were false and inaccurate because they conflicted with other statements K.L had made to K.L.'s mother.

The court rejected E.S.'s claims he was entitled to a lower RRAS score and tier based on his challenges to factors one — the degree of force — and four — victim selection. Addressing factor one — the degree of force — the court discussed whether E.S. used force against K.L., and concluded the K.L. had.

The court was satisfied K.L. had reported that E.S. "made [him] put it there," referring to K.L. touching E.S.'s penis. The court further found "moderate risk of force," stating "that there can be a finding clearly and convincingly that there was some type of coercion, but no physical harm involved. So[,] I do find that there was a moderate risk of force." The court also found persuasive K.L.'s statement to police that E.S. had told him to keep "it a secret and not to tell anybody" supported the scoring of moderate risk, finding E.S.'s actions as described by K.L. established E.S. had used a degree of force and there was moderate risk of reoccurrence.

Addressing factor four — the victim-selection factor — E.S argued he should be scored as a moderate risk, not high risk as proposed by the State, because some of the "alleged victims of child pornography" were his step-grandchildren, which, as family members, should be scored as low risk. He also averred one close-up photograph may not have been of a child. E.S. did not argue that he is related to K.L. as a basis for lowering his score under the victim-selection factor. He argued that because B.A. was an acquaintance, a neighbor, the victim-selection factor should have been scored as moderate risk, not high

risk.[2] The court was not persuaded by E.S.'s arguments and determined he scored as a high risk under factor four – victim selection.

The court then found that the State's proposed score of fifty should be reduced to forty-seven based on a stipulation with E.S. regarding the "employment and education stability" factor under the community support category. That factor based on the sex offender's continuing education and length of employment.[3]

On the same day, the court issued an oral opinion and written order designating E.S. as a Tier II-Moderate Risk based on a final score of forty-seven

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[2] Under the victim-selection factor, the Guideline's supply examples of the types of offender-victim relationships that qualify for low, moderate, or high-risk scores. Guidelines at 5. The Guideline's example for moderate risk is that of an acquaintance, which is defined as implying

> a degree of social/business interaction beyond that of a single contact and includes an offender who sexually abuses a neighbor's child, a child for whom he or she is babysitting, or a child for whom he or she is coach or teacher; offender performs coercive sexual acts with date ("date rape").
>
> [Ibid.]

[3] Other than this stipulation, the parties do not address the "employment and education stability" factor.

and in accordance with the RRAS. The court also ordered that E.S. shall be included on the sex offender internet registry.

E.S. moved for a stay of internet publication pending an appeal. The court granted the stay in the same order.

On appeal, E.S. raises the following arguments:

> POINT I
>
> THE HEARING COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT SUFFICIENT FORCE HAD BEEN USED IN THE OFFENSE TO JUSTIFY A MODERATE RISK SCORE ON RRAS FACTOR ONE.
>
> POINT II
>
> THE HEARING COURT'S REFUSAL TO GRANT [E.S.'S] REQUEST FOR A SHORT ADJUORNMENT [SIC] TO VIEW A HANDFUL OF IMAGES WAS AN ABUSE OF DISCRETION.
>
> POINT III
>
> [E.S.] WAS DENIED HIS RIGHT TO ALLOCUTION DURING THE TIERING PROCESS.

II.

We begin our consideration by summarizing the relevant provisions of Megan's Law and the tier classification process. Depending on the type and time of an offense, Megan's Law requires certain sex offenders to register with local

law enforcement agencies and notify the community. T.T., 188 N.J. at 327 (citing N.J.S.A. 2C:7-2). Because registration and community notification under Megan's Law can have a significant impact upon a registrant's personal liberties, the trial court must balance the registrant's right to privacy against the community's interest in safety and notification. G.B., 147 N.J. at 74. In applying this balancing test, the RRAS is a reliable tool "to fulfill the State's burden of presenting a prima facie case." Id. at 81-82.

The RRAS is an instrument used to determine whether a sex offender's risk of re-offense is low (Tier I), moderate (Tier II), or high (Tier III). State v. C.W., 449 N.J. Super. 231, 260 (App. Div. 2017) (citing In re V.L., 441 N.J. Super. 425, 429 (App. Div. 2015)). In assigning a tier rating to a registered sex offender, the court considers thirteen factors across four categories: (a) seriousness of the offense; (b) the offender's history; (c) community support available; and (d) the characteristics of the offender. Ibid. (citing V.L., 441 N.J. Super. at 429).

"Seriousness of offense" includes three factors that are numbered as follows: (1) degree of force; (2) degree of contact; and (3) age of victim. C.A., 146 N.J. at 103. "Offender's history" includes five factors numbered as follows: (4) victim selection; (5) number of offenses/victims; (6) duration of offensive

behavior; (7) length of time since last offense; and (8) any history of anti-social acts. Ibid.

"Support available" and "characteristics of offender" are considered "dynamic categories, because they are evidenced by current conditions." Ibid. "Characteristics of offender" includes the following two numbered factors: (9) response to treatment and (10) substance abuse. Id. at 103-04. "Support available" includes three factors numbered as follows: (11) therapeutic support, (12) residential support; and (13) employment/educational stability. Id. at 104.

Each factor is assigned a risk level of low, moderate, or high, and points are assigned based on the risk level. Zero points are assigned for a low-risk level, one point is assigned for a moderate-risk level, and three points are assigned for a high-risk level. The points assigned "all levels within a category" are totaled and those totals are then "weighted based on the particular category." Ibid. A registrant who receives a total factor score below thirty-seven is considered Tier I and a low risk for re-offense. Id. at 83. A registrant who receives a total factor score of more than thirty-seven, but less than seventy-four, is deemed Tier II and a moderate risk for re-offense. Ibid. Finally, a registrant who receives a total factor score of seventy-four or higher is considered Tier III and a high risk for re-offense. Ibid.

N.J.S.A. 2C:7-8(c)(1) provides that when risk of re-offense is low, "law enforcement agencies likely to encounter the [registrant]" must be notified of registrant's tier designation, name, and address. Guidelines at 22-24. When risk of re-offense is moderate, "organizations in the community including schools, religious and youth organizations" must also be notified in addition to the notice to law enforcement agencies. N.J.S.A. 2C:7-8(c)(2). When risk of re-offense is high, public notice "designed to reach members of the public likely to encounter the [registrant]" is required, in addition to the notification to law enforcement agencies and community organizations. N.J.S.A. 2C:7-8(c)(3). Further, the court may order the information of Tier II offenders to be listed on a public internet registry. Guidelines at 23. All Tier III offenders are listed on the internet registry. Ibid. State police are required to maintain the internet registry, which includes personal information about a registrant, including his or her address. Id. at 47.

This court "review[s] a trial court's conclusions regarding a Megan's Law registrant's tier designation and scope of community notification for an abuse of discretion." In re Registrant B.B., 472 N.J. Super. 612, 619 (App. Div. 2022). "[A]n abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an

impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "A trial court's interpretation of the law and the . . . consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In addressing a registrant's classification, a judge is free to consider reliable evidence beyond the RRAS score, even if such evidence would not be admissible under our Rules of Evidence, because the "hearing process . . . is not governed by the [R]ules of [E]vidence." C.A., 146 N.J. at 83; see also In re J.W., 410 N.J. Super. 125, 130 (App. Div. 2009).

As to the RRAS "seriousness of offense" category, which includes an assessment of use of force, E.S. maintains that when the "court found that" K.L.'s statement E.S. had "made" K.L. touch his penis established E.S. had used force, it did not consider the "credibility" of then seven-year-old K.L. and the ambiguity of the word "made" in his statement to the police. He maintains the court therefore erred by finding the "degree of force" factor was properly scored as a moderate risk.

E.S. also maintains that the State improperly calculated the "offense history" score category because the two scores of high risk in the "victim

selection" and "number of victims" factors reflect his possession of child pornography, and he asserts he should have had an opportunity for those factors to be rescored. He argues that although he had been indicted for two counts of third-degree possession of child pornography, N.J.S.A. 2C:24-4(b)(5)(b), he only pleaded to the two counts of endangering the welfare of a child, and the court erred by allowing the State to consider the possession of child pornography in the tiering without giving him or counsel an opportunity to dispute the scores.

E.S. further maintains he was denied an opportunity to address the court during the hearing, arguing that his right to allocution was violated. He argues he could have "potentially clarified what was shown [in the child pornography] if given an opportunity." He also argues that the court erred by denying his adjournment request, made during the tier hearing, for the purpose of reviewing the photographs, "so that [counsel] could make a more nuanced argument about what they contained."

The State asserts that E.S.'s conduct merits a moderate risk score under factor one — degree of force, in the seriousness of offense category — of the RRAS, the court did not abuse its discretion by refusing to grant an adjournment, and E.S. was not denied his right to allocution.

In a tier classification proceeding, the State bears the burden of proving by clear and convincing evidence that the proposed tier classification and scope of community notification for a particular registrant are warranted. See, e.g., In re Registrant M.F., 169 N.J. 45, 54 (2001); C.W., 449 N.J. Super. at 260; In re Registrant R.F., 317 N.J. Super. 379, 383-84 (App. Div. 1998).

We are not persuaded by E.S.'s argument the court erred in its determination that E.S. had used force in the offense against K.L. The Guidelines provide:

> Degree of force is related to the seriousness of the potential harm to the community if re[-]offense occurs.
>
> Low risk example: intra- or extra-familial child sexual abuse in which the offender obtains or attempts to obtain sexual gratification through use of candy, pets or other nonviolent methods; offender exposes self to child; offender fondles adult victim without use of force.
>
> Moderate risk example: offender threatens physical harm or offender applies physical force that coerces but does no physical harm, for example, by holding the victim down; the offender uses verbal coercion against a child victim, for example, by telling a child victim that he will get "in trouble" or "won't be loved" if he tells anyone of the abuse.
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> [Guidelines at 5. (emphasis added).]

The court reviewed K.L.'s statements that E.S. "made" him touch E.S.'s penis, and that "[E.S.] told me to keep it a secret and not to tell anybody." The court next reviewed the Guideline's standard for moderate risk of degree of force and found by clear and convincing evidence that there was "some type of coercion, but no physical harm involved."

The court stated that "even considering every fact that [E.S.] raised to the court. . . . The court finds force" because K.L. reported to the officer "[E.S.] made me put it there." We agree with the court that E.S. satisfies the Guidelines for moderate risk, which includes an offender who "threatens physical harm or offender applies physical force that coerces but does no physical harm, for example, by holding the victim down; the offender uses verbal coercion against a child victim, for example, by telling a child victim that he will get "in trouble" or "won't be loved" if he tells anyone of the abuse." Here, K.L. reported to police that E.S. had forced him to touch E.S.'s exposed penis on more than one occasion; the last instance occurred while E.S. was in the closet of K.L.'s room and E.S. had also told him to keep it a secret. While the court focused on K.L.'s statement, "he made me put it there and then I took it back quickly," there are other instances where K.L. stated that E.S. forced him to touch his exposed penis and where E.S. placed his hands on K.L.'s penis. Based on this record, we are

convinced that E.S. used physical force to compel K.L. to touch him and combined with E.S.'s statement to K.L. that he should not tell anyone, E.S.'s conduct constitutes a sufficient basis to support a finding of moderate risk under the Guidelines.

In State in Interest of M.T.S., we held that "physical force" had been established by the sexual penetration of the victim without her consent involving no more force than necessary to accomplish that result. M.T.S., 129 N.J. at 425. Here, K.L. at age seven could not give his consent to the behavior he accused E.S. of engaging in – taking K.L.'s hand and placing it on E.S.'s penis. Ibid. Moreover, K.L. at age seven and residing in E.S.'s home would be particularly susceptible to the commands of an adult. Additionally, physical force was used as E.S. took K.L.'s hand and placed it on E.S.'s penis, as documented in the police report relied on by the court, M.T.S., 129 N.J. at 425, and K.L. reported he had been "made" by K.L. to engage in such acts.

We further reject E.S.'s argument that K.L.'s use of the word "made" in K.L.'s statement to police that E.S. "made me put it there and then I took it back quickly," is ambiguous as he provides no legal support for this wholly self-serving contention. Rather, given its ordinary meaning, and in this context, "made" implies that E.S. forced or coerced K.L. into touching him. Thus, the

court correctly ruled that E.S.'s conduct equated to a moderate risk score on the degree of force factor of the RRAS. Ibid.

We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of the judge. Id. at 450. We are persuaded that the record provides reasonable support for the court's conclusion. Ibid. In a tier hearing, all reliable information that is "supported by documentation deemed reliable including, e.g. admissions by the Registrant, police reports and psychiatric reports" may be considered. J.W., 410 N.J. Super. at 130-31 (quoting C.A., 285 NJ. Super. at 347-48) (emphasis added)). The court, therefore, properly considered the police records of K.L.'s statements under the clear and convincing evidentiary standard. C.A., 146 N.J. at 83. The clear and convincing standard "should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 170 (2006) (citing In re Purrazzella, 134 N.J. 228, 240 (1993)). Thus, the court correctly ruled that E.S.'s conduct equated to a moderate risk score on the degree-of-force factor of the RRAS. Ibid.

Further, because the court based its opinion on competent evidence and made its findings based on the record, the court did not abuse its discretion.

R.Y., 242 N.J. at 65. It had more than sufficient information based on the record to support its findings and conclusion under the clear and convincing standard. C.W., 449 N.J. Super. at 260. Nor did the court abuse its discretion in denying E.S.'s counsel's motion for an adjournment to view the pornographic photographs. B.B., 472 N.J. Super. at 619. The written descriptions of the images provided to counsel and the court represented the content with sufficient detail. Moreover, the request for adjournment should have been made before the start of the trial, but it was not made until after the court had issued its decision on the matter.

Lastly, E.S. argues for the first time on appeal that he was denied his right to allocute without asserting that this argument is jurisdictional or concerns a matter of great public interest. See State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (explaining a reviewing court generally declines to consider arguments that were not "properly presented to the trial court" and that do not "go to the jurisdiction of the trial court or concern matters of great public interest"). Here, E.S. did not ask to address the court directly but allowed his counsel to present argument on his behalf.

E.S. had already been sentenced in the underlying criminal matter and had been incarcerated in accordance with his prior sentence. Moreover, he relies

solely on Rule 3:21-4(b), which provides that the "[sentencing] court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment." Rule 3:21-4(b) provides a right to allocute at sentencing, and the court here did not sentence E.S. A Megan's Law initial tier hearing is for the remedial purpose of assessing his risk of re-offense and to take appropriate notification measures to protect E.S.'s community, In re Registrant M.L., 479 N.J. Super. 433, 442 (App. Div. 2024) and is not the same as a sentencing hearing. In re C.J., 474 N.J. Super 97, 118-19 (App. Div. 2022) (stating "the criminal sentencing process, however, serves a different purpose than a Megan's Law tier designation"); see also E.B. v. Verniero, 119 F.3d 1077, 1111 (3d Cir. 1997) ("A Megan's Law hearing . . . is a civil proceeding that stands apart from the criminal proceeding in which one is convicted and sentenced.").

We further reject E.S.'s argument because he did not ask to address the court at the tier hearing and his counsel did not call him to testify in opposition to the State's tier classification. In re Registrant R.S., 258 N.J. 58, 78 n.7 (2024) ("[A] Megan's Law registrant . . . who aptly challenges the State's proofs is entitled to present evidence . . . ."). Instead, E.S.'s counsel made clear to the

court that E.S. believed he should not be scored in the manner urged by the State due to the fact that he was related to some of the children depicted in the pornographic photographs.

Applying these standards, we are satisfied the court thoroughly reviewed the evidence and legal arguments in finding the State established, by clear and convincing evidence, E.S.'s RRAS score of forty-seven points thereby designating E.S. a Tier II offender and imposing the attendant notification requirements. Reviewing the record as a whole, we discern no abuse of discretion in the court's tier designation and notification requirements.

Affirmed.