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Michael Ferguson, Benjamin Unger, Chaim Levin, Jo Bruck, Bella Levin, Plaintiffs, v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY, LAW DIVISION Docket No. L-5473-12 CIVIL ACTION **CERTIFICATION OF THOMAS S. KESSLER ATTACHING UNPUBLISHED OPINIONS**

I, Thomas S. Kessler, hereby certify as follows:

1. I am an associate at the law firm Cleary Gottlieb Steen & Hamilton LLP, co-counsel for Plaintiffs Michael Ferguson, Benjamin Unger, Chaim Levin, and Jo Bruck in this action. By order of this Court, I have been admitted *pro hac vice* as one of the counsel of record for Plaintiffs in this case. I am familiar with the facts and circumstances of this matter.

2. Attached hereto as Exhibit A is a true and accurate copy of the unpublished decision captioned *Deere & Co. v. MTD Prods., Inc.*, No. 94 CIV. 2322 (DLC), 1995 WL 81299 (S.D.N.Y. Feb. 28, 1995).

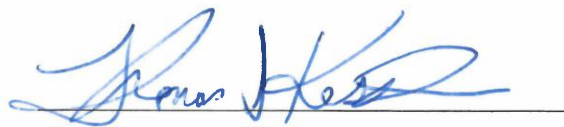
3. Attached hereto as Exhibit B is a true and accurate copy of the unpublished decision captioned *Halimi v. Pike Run Master Ass'n*, No. A-2621-13T3, 2015 WL 1980492 (N.J. Super. Ct. App. Div. May 5, 2015).

4. Attached hereto as Exhibit C is a true and accurate copy of the unpublished decision captioned *PictureWindow Software, LLC v. Greene*, No. SOM-C-12058-04, 2006 WL1381619 (N.J. Super. Ct. Ch. Div. Apr. 28, 2006).

5. Attached hereto as Exhibit D is a true and accurate copy of the unpublished decision captioned *State v. T.M.S.*, No. A-2411-11T2, 2014 WL 3928450 (N.J. Super. Ct. App. Div. Aug. 13, 2014).

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: May 24, 2019
New York, NY



Thomas S. Kessler

EXHIBIT A

1995 WL 81299
United States District Court, S.D. New York.

DEERE & COMPANY, Plaintiff,
v.
MTD PRODUCTS, INC., Defendant.

No. 94 CIV. 2322 (DLC).
|
Feb. 28, 1995.

Attorneys and Law Firms

Arthur J. Ginsberg, Richard Kurnit, David Y. Atlas, Frankfurt, Garbus, Klein & Selz, P.C., New York City, for plaintiff.

Patricia Hatry, Neal H. Klausner, Davis & Gilbert, New York City, for defendant.

OPINION AND ORDER

COTE, District Judge:

***1** On August 9, 1994, the Honorable Lawrence M. McKenna, to whom this case was previously assigned, preliminarily enjoined MTD Products, Inc. ("MTD") from using an animated or otherwise altered version of Deere & Company's ("Deere") trademark of a leaping male deer in New York State. The preliminary injunction was based on a showing of probability of success on the merits of Deere's claim under New York's anti-dilution statute, N.Y.Gen.Bus.Law § 368–d. In order to expedite a final decision on the geographic scope of a permanent injunction, the parties have stipulated to (1) dismiss all other claims in this action except for the claim for injunctive relief under the New York anti-dilution statute, and (2) rest on the record submitted to Judge McKenna.[1] Because this Court finds that MTD violated the New York anti-dilution statute, and that the geographic limitation of Judge McKenna's injunction was appropriate in this case, the preliminary injunction will now become permanent and be limited to the confines of New York State.

BACKGROUND

This case concerns a television commercial commissioned by MTD Products in order to advertise its Yard–Man lawn tractors, which compete with those of Deere.[2] The advertisement, first aired in March 1994, displays an animated version of Deere's logo, a two-dimensional leaping male deer, in order to demonstrate that the MTD tractors are of comparable quality but less expensive than those made by Deere. The animation makes the deer appear small, weak, and frightened.

On April 1, 1994, Deere brought an action against MTD for trademark infringement, 15 U.S.C. § 1125(a), unfair competition, 28 U.S.C. § 1338(b), dilution of its trademark under New York's anti-dilution statute, N.Y.Gen.Bus.Law § 368–d, and unjust enrichment. After denying Deere's application for a temporary restraining order, Judge McKenna held a three-day preliminary injunction hearing. The preliminary injunction, based solely on Deere's claim under New York's anti-dilution statute, was granted on July 28, 1994. *Deere & Co. v. MTD Products, Inc.,* 860 F.Supp. 113 (S.D.N.Y.1994). On August 9, 1994, Judge McKenna issued an Order restraining and enjoining MTD from

> broadcasting, publishing, or distributing, or causing to be broadcast, published, or distributed, *from, in, or into the State of New York* any audiovisual, video, film, or printed materials that show an altered, including animated, version of the figure of the deer shown in any of the registered versions of Plaintiff's leaping deer trademark.

(Emphasis supplied.) In Supplemental Findings of Fact, Conclusions of Law, and Order issued August 11, 1994, the Court addressed the remaining claims. The Court found that Deere had not established a likelihood of success on the merits that the Commercial was misleading or confusing, an element of trademark infringement under Section 43(a) of the Lanham Act. *Id.* at 123–24.

The Court also found that it

> ***2** need not address the other two claims contained in the Complaint, namely that Defendant violated the common law of unfair competition and unjust enrichment, since the same considerations that led the Court to limit the injunctive relief for the violation of the New York anti-dilution statute to activities originating or having an effect within the boundaries of the State of New York likewise would apply to injunctive relief granted pursuant to these two state common law claims.

Id. Thus, Judge McKenna's ruling was limited to New York's anti-dilution statute.

The preliminary injunction, as well as its geographic scope, was upheld by the Second Circuit on November 21, 1994. *Deere & Co. v. MTD Products, Inc.,* 41 F.3d 39 (2d Cir.1994). In finding liability under the New York anti-dilution statute, the Court opined that the traditional blurring or tarnishing dichotomy does not necessarily represent the full range of uses that can dilute a mark under New York law. *Id.* 44. "Poking fun" at a directly competing product also risks "diluting the selling power of the mark that is made fun of." *Id.* Moreover, the scope of protection under the statute "must take into account the degree to which the mark is altered". *Id.* at 45. Alterations of the kind made by MTD, in which the Deere logo is diminished in grace and power and made to appear fearful, crossed the line. *Id.*

Addressing Deere's objection to the geographic scope of the injunction, the Second Circuit concluded that

> the District Court did not exceed its discretion in limiting the scope of relief to New York State.... In view of the novelty of the issues raised, we cannot say that limiting interim relief to conduct in New York State was beyond the range of [the District Court's] decision-making authority ... notwithstanding the fact that district courts have in other circumstances granted nationwide injunctive relief on trademark dilution claims. *See, e.g., Stern's Miracle–Gro Products, Inc. v. Shark Products, Inc.,* 823 F.Supp. 1077, 1095–96 (S.D.N.Y.1993); *Instrumentalist Co. v. Marine Corps League,* 509 F.Supp. 323, 340 (N.D.Ill.1981), *aff'd,* 694 F.2d 145 (7th Cir.1982).

Id. at 46. The Court noted that

> a number of states do not have anti-dilution laws, and even those states with such laws or similar causes of action might not restrict commercial use of trademarks that do not confuse consumers or blur or tarnish the trademark.

Id.

By Stipulation and Order dated February 2, 1995, Deere's claims for damages and injunctive relief for trademark infringement under the Lanham Act, 15 U.S.C. § 1125(a), for unfair competition, 28 U.S.C. § 1338(b), and for unjust enrichment under New York common law, were dismissed without prejudice. The sole remaining claim in this action is Deere's claim for injunctive relief under New York's anti-dilution statute, N.Y.Gen.Bus.Law § 368–d. In submitting this claim to the Court, the parties agreed to rest on the record presented to Judge McKenna in the preliminary injunction hearing.

***3** Deere contends that Judge McKenna's preliminary injunction of August 9, 1994, as well as the Second Circuit's affirmance of the injunction, prohibits MTD from using a version of the Deere logo, *that is altered in any way,* in its advertisements.[3] Deere asks this Court to expand the geographic scope of this broadly worded injunction beyond New York to encompass all states, or at least those states which have anti-dilution statutes

comparable to New York's.[4] MTD asks this Court to maintain the geographic limitation of the preliminary injunction.

DISCUSSION

Liability under New York Anti–Dilution Statute

New York's anti-dilution statute protects against dilution of a trademark even when there is no likelihood that a consumer will be confused as to the source of goods, by providing expressly for injunctive relief in such a situation. Section 368–d provides that:

> Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

N.Y.Gen.Bus.Law § 368–d. In order to prevail on a claim under Section 368–d, Deere must prove:

> first, that its trademark either is of truly distinctive quality or has acquired secondary meaning, and, second, that there is a 'likelihood of dilution.' ... A third consideration, the predatory intent of the defendant, may not be precisely an element of the violation, but ... is of significance....

Deere, 41 F.3d at 42.

There is no dispute that Deere has established the first element of an anti-dilution claim. The Deere logo "is a distinctive trademark that is capable of dilution and has acquired the requisite secondary meaning in the marketplace." *Id.*

As for the second element of an anti-dilution claim, the MTD commercial mocks the Deere logo in a manner that runs afoul of the statute. The Second Circuit affirmed Judge McKenna's finding of the "likelihood of dilution," despite the fact that MTD's use of the Deere logo did not fit into the traditional categories of dilution (*i.e.,* "blurring" or "tarnishment").

> The commercial takes a static image of a graceful, full-size deer —symbolizing Deere's substance and strength—and portrays, in an animated version, a deer that appears smaller than a small dog and scampers away from the dog and a lawn tractor, looking over its shoulder in apparent fear. *Alterations of this sort,* accomplished for the sole purpose of promoting a competing product, *are properly found to be within New York's concept of dilution because they risk the possibility that consumers will come to attribute unfavorable characteristics to a mark and ultimately associate the mark with inferior goods and services.*

Id. at 45 (emphasis supplied).

***4** Third, although it is not necessarily an element to a claim under Section 368–d, the existence of "predatory intent" can help to identify the parodies of trademarks that are impermissibly dilutive. A humorous alteration that is designed to sell a competitor's product is sufficient to establish predatory intent for these purposes. *Id.* at 46. Again, there is no dispute that MTD's sole purpose in using the altered Deere logo was to promote its own products. Accordingly, Deere is entitled to injunctive relief pursuant to Section 368–d.

Scope of Injunctive Relief

There are two questions for the Court to answer regarding the proper scope of injunctive relief: 1) whether this Court has the power to issue a nationwide injunction based on a violation of the law of one state; and 2) if so, how broadly this Court, in the exercise of its discretion, should make the injunction.

1) Power to issue a nationwide injunction

MTD argues that the Court is without power to issue a nationwide injunction based on a violation of a single state's law. *See CIBA–GEIGY Corp. v. Bolar Pharm. Co., Inc.,* 747 F.2d 844, 854 n. 6 (3d Cir.1984) (violation of New Jersey laws against unprivileged imitation and passing off permit only an injunction within New Jersey under the full faith and credit clause), *cert. denied* 471 U.S. 1137 (1985); *Hyatt Corporation v. Hyatt Legal Services,* 610 F.Supp. 381, 383 (N.D.Ill.1985) (on remand, held that a nationwide injunction arising out of Illinois' anti-dilution statute would violate the commerce clause). The weight of authority, including most significantly the law of this Circuit, is, however, to the contrary.

The Second Circuit, in affirming the August 9 injunction in this case, observed in *dicta* that, although it was within the discretion of the district court to limit the injunction to New York, "district courts have in other circumstances granted nationwide injunctive relief on trademark dilution claims." 41 F.3d at 46. The Second Circuit has itself affirmed an injunction requiring action outside New York on the basis of New York trademark law, noting that in appropriate cases, a New York court can order action outside New York.[5] *Columbia Nastri & Carta Carbone v. Columbia Ribbon & carbon Manufacturing Co.,* 367 F.2d 308, 313 (2d Cir.1966). In *Columbia Nastri,* the Second Circuit upheld an injunction which required an Italian plaintiff, that had sought to adjudicate the ownership of Italian trademarks, to change its corporate name.

In cases where a nationwide injunction was issued based on both federal and state claims, the Second Circuit has also indicated that the state claims alone would sustain the injunction. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.,* 604 F.2d 200, 205 n. 8 (2d Cir.1979) (even if plaintiff had not prevailed on federal claims it would be entitled to relief under New York anti-dilution statute). *See also Stern's Miracle–Gro Products, Inc. v. Shark Products, Inc.,* 823 F.Supp. 1077, 1092 (S.D.N.Y.1993) (where nationwide preliminary injunction issued based on federal and state claims, plaintiff was "entitled to a preliminary injunction based upon the cause of action for dilution under Section 368–d"). *See also Eastman Kodak Co. v. D.B. Rakow,* 739 F.Supp. 116, 120 n. 3 (W.D.N.Y.1989) ("Defendant's contention that the geographic scope of this injunction [based on New York anti-dilution statute] is limited to New York state is without merit"); *Mars, Inc. v. Standard Brands, Inc.,* 386 F.Supp. 1201, 1206 (S.D.N.Y.1974) (claim that "Illinois court might not be able to grant plaintiff extraterritorial relief [under Illinois Uniform Deceptive Trade Practices Act] ... has no merit.").

2) The geographic scope of the injunction

***5** Given this Court's power to issue a nationwide injunction, the question becomes whether it is appropriate to extend the current injunction beyond the confines of New York State. Several factors play a role in this inquiry. Judicial efficiency and economy certainly favor a nationwide injunction that would allow Deere to litigate this factual issue once, rather than requiring it to resort to numerous state courts. Similarly, the nationwide recognition of the Deere trademark favors nationwide relief. Another factor on this side of the equation is MTD's derogatory use of Deere's mark in a commercial. When the anti-dilutive effect of a commercial is so apparent that it requires the creation of a new category of trademark infringement, then it can be argued that a nationwide ban on such commercials is warranted.

Interests of comity, however, strongly favor a limited injunction. Only approximately half the states have anti-dilution laws. Moreover, as the Second Circuit noted, "even those states with such laws or similar causes of action might not restrict commercial use of trademarks that do not confuse consumers or blur or tarnish the trademark." *Deere,* 41 F.3d at 46. Notably, Deere's claim would not stand in Illinois, where Deere has its principal place of business. *See AHP Subsidiary Holding Co. v. Stuart Hale Co.,* 1 F.3d 611, 619 (7th Cir.1993) (protection of the anti-dilution law is not available to competitors). Ohio, where MTD has its principal place of business, has no anti-dilution statute. The Sixth Circuit has recognized dilution under Ohio common law, in the form of either blurring or tarnishment. *Ameritech, Inc. v. American Inf. Tech.,* 811 F.2d 960, 965 (6th Cir.1987).

Each of the Ohio state court cases relied upon by the Sixth Circuit in so ruling, however, found a likelihood of consumer confusion. *See Worthington Foods, Inc. v. Kellogg Co.,* 732 F.Supp. 1417, 1457–58 n. 94 (S.D.Ohio 1990) (acknowledging Sixth Circuit's recognition of a common law dilution claim in Ohio, and observing that the cases relied upon by the Sixth Circuit in so ruling uniformly found consumer confusion). Thus, neither of the states where the parties have their principal place of business would find a violation of their anti-dilution law here.

Consideration of the differences among states' laws have regularly influenced courts to limit the scope of their injunctions. For example, in *Blue Ribbon Feed Co., Inc. v. Farmers Union Central Exchange, Inc.,* 731 F.2d 415 (7th Cir.1984), the Seventh Circuit reviewed an award of damages and injunctive relief based on Wisconsin law. Both awards were limited not only to Wisconsin's borders, but to a twenty-mile radius around plaintiff's operations in Wisconsin. In addressing the limitation to Wisconsin's borders, the Court noted that while the Seventh Circuit had “on occasion upheld injunctions which prohibited defendants from out-of-state infringement of exclusive rights acquired by plaintiffs under domestic law,” a district court may fashion more limited relief.

> ***6** In fact, *considerations of comity among the states favor limited out-of-state application of exclusive rights acquired under domestic law,* and a district court does not err when it takes a restrained approach to the extra-territorial application of such rights.

731 F.2d at 422 (emphasis supplied).

Even when a court uses one state's law as a basis for a nationwide injunction, it is routine to consider the effect on other jurisdictions. In *Carson v. Here's Johnny Portable Toilets, Inc.,* 810 F.2d 104 (6th Cir.1987), the Sixth Circuit upheld a nationwide injunction based on liability under Michigan law on rights of publicity. Noting that not all states recognize such rights, however, the court observed that the defendant could seek modification of the injunction should it become apparent that another state's laws permit the banned conduct. *Id.* at 105. *See also Columbia Nastri,* 367 F.2d at 313 (court noted that injunction against Italian corporation did not “conflict [ ] with any articulated policy of Italy”).

The interests of comity weigh particularly heavily here where neither party claims any special relationship to New York, and where, unlike the Italian corporation enjoined in *Columbia Nastri,* the restrained party —MTD—did not choose New York as the forum for this litigation. Moreover, unlike the situation in *Instrumentalist Co. v. Marine Corps League,* 509 F.Supp. 323, 340 (N.D.Ill.1981), *aff'd,* 694 F.2d 145 (7th Cir.1982), a party is not seeking the protection of its home state's anti-dilution law.

Two other factors also strongly favoring limitation are the broad wording of the injunction itself, which goes well beyond the commercial actually viewed by the district court and the Second Circuit, and the acknowledged novelty of the legal theory which was used to affirm the injunction.

Deere's citation to other cases is of no avail. Of the other cases cited by Deere where a nationwide injunction was issued, most either found a violation of *federal* law in addition to, or in place of, state law, *see, e.g., Dallas Cowboys Cheerleaders,* 604 F.2d 200 (nationwide injunction supported by federal trademark claims); *Golden Door, Inc. v. Odisho,* 437 F.Supp. 956, 968 (N.D.Cal.) (Lanham Act and California trademark infringement and anti-dilution law), *aff'd* 646 F.2d 347 (9th Cir.1980); *Triangle Publications, Inc. v. New England Newspaper Pub. Co.,* 46 F.Supp 198, 203 (D.Mass.1942) (federal copyright and Massachusetts unfair competition claims), or do not discuss the scope of the injunction at all, *see, e.g., Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc.,* 618 F.2d 950 (2d Cir.1980); *Gemveto Jewelry Co. v. Jeff Cooper, Inc.,* 694 F.Supp. 1085 (S.D.N.Y.1988), *aff'd,* 884 F.2d 1399 (Fed.Cir.1989); *Metro Kane Imports, Ltd. v. Rowoco, Inc.,* 618 F.Supp. 273 (S.D.N.Y.1985), *aff'd,* 800 F.2d 1128 (2d Cir.1986).

After weighing each of these factors, I conclude that the geographic limitation of the August 9, 1994 injunction should remain in place. In making this decision, I am most persuaded by the fact that the injunction in this case is not based on common law unfair competition claims, which are more widely shared, but on New York's anti-dilution

statute, which does not exist in at least half of the states, and which many states that *did* pass such legislation *do not* apply to competitors, and by the breadth of the injunction for which Deere seeks nationwide enforcement.

CONCLUSION

***7** The preliminary injunction issued on August 9, 1994, is hereby ordered to be enforced as a permanent injunction limited to the confines of New York State. Final judgment in this action is hereby entered.

SO ORDERED:

1 The parties have restricted themselves to briefing solely the issue of the geographic scope of the injunction. They have agreed not to attack the injunction on any other ground.

2 MTD Products in an Ohio corporation with its principal place of business in Ohio. Deere is a Delaware corporation with its principal place of business in Illinois.

3 Deere has explicitly eschewed a request that this Court consider the geographic scope of an injunction which would be limited to the specific commercial at issue before Judge McKenna.

4 Deere lists 26 states with anti-dilution statutes, 22 of which are identical or nearly identical to Section 368–d. This, however, does not mean that even those states with *identical* language have interpreted this language as New York has. Deere claims that only Illinois denies standing to a competitor, but MTD counters that only a few of the 22 states have analyzed their statutes, and of those that have, many (Illinois, Florida, Oregon, and Iowa) have denied standing to competitors. New Mexico, Texas, and Massachusetts have, according to MTD, limited anti-dilution in other ways such that Deere's case would not stand. Ohio, which has incorporated anti-dilution as part of its common law, has included consumer confusion as an element of the cause of action, which would defeat Deere's claim.

5 *See, e.g., Niagara Falls Int'l Bridge Co. v. Grand Trunk Ry.,* 241 N.Y. 85 (1925) (upholding injunction restraining commission of certain acts in a foreign country); *Dubinsky v. Blue Dale Dress Co., Inc.,* 162 Misc. 177, 292 N.Y.S. 898 (Sup.Ct.1936).

All Citations

Not Reported in F.Supp., 1995 WL 81299, 34 U.S.P.Q.2d 1706

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EXHIBIT B

2015 WL 1980492
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Laurence HALIMI, Plaintiff–Appellant,
v.
PIKE RUN MASTER ASSOCIATION, Defendant–Respondent,
and
Access Property Management, Inc. and USA Homes Realty, LLC, Defendants.

A-2621-13T3
|
Argued April 21, 2015.
|
Decided May 5, 2015.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L–900–11.

Attorneys and Law Firms

Brian M. Cige argued the cause for appellant.

Michael S. Karpoff argued the cause for respondent (Hill Wallack LLP, attorneys; Mr. Karpoff, on the brief).

Before Judges FISHER and ACCURSO.

Opinion

PER CURIAM.

***1** This appeal requires our consideration of defendant's late assertion of plaintiff's lack of standing and its impact on plaintiff's attempts to obtain enforcement of the terms of the parties' settlement agreement.

This action has its genesis in the assertion of fines imposed by defendant Pike Run Master Association against plaintiff, a unit owner, who placed a "for sale" sign on her property contrary to a condominium bylaw. Plaintiff thereafter contracted to sell her unit but closing was delayed when a lien based on the accrued fines stood in the way of her conveyance of clear title. Consequently, on June 6, 2011, plaintiff filed a complaint against Pike Run, alleging a violation of her right to display a sign on her property and seeking damages and other relief.

On September 24, 2012, the parties amicably resolved the issues raised in this suit. Pike Run agreed: to pay plaintiff a certain amount to be kept confidential; to amend its bylaws to comport with *Mazdabrook Commons Homeowners' Association v. Khan,* 210 *N.J.* 482 (2012); and to forego enforcement of its existing signage bylaw. At some point not revealed in the record on appeal, the monetary sum was paid to plaintiff. In August 2013, upon learning Pike Run had not amended its bylaws, plaintiff demanded compliance with the settlement agreement and, when compliance was not forthcoming, plaintiff moved for enforcement of the settlement agreement. The parties thereafter consented to an order, entered on August 27, 2013, which contained both Pike Run's promise to amend the signage bylaws at its November 27, 2013 meeting and the parties' agreement that plaintiff "may make an application for fees and costs pursuant to *Rule* 1:10–3 for enforcing litigant's rights." A revised order, entered on September 11, 2013, memorialized Pike Run's promises to provide plaintiff with notice of its actions in amending the bylaw and to refrain from enforcing the existing bylaw.

Pursuant to the terms of these two consent orders, plaintiff applied for counsel fees. On or about September 23, 2013, without filing or serving a notice of motion, plaintiff submitted to the trial court a certification of services rendered which failed to comply with the requirements of *Rule* 4:42–9(b) and *RPC* 1.5. When Pike Run did not respond, the judge entered an order, dated October 2, 2013, which directed Pike Run to pay plaintiff $7680.36, the entire amount plaintiff sought.

When the ordered fees were not thereafter paid, despite demands,[1] plaintiff sought enforcement by way of a motion filed on December 17, 2013. On January 21, 2014, Pike Run's new attorney cross-moved to vacate the October 2, 2013 order. These motions were heard by a different judge.[2]

1 The record on appeal includes a copy of plaintiff's counsel's email of November 13, 2013, and a copy of his December 13, 2013 letter to Pike Run's former counsel memorializing telephone discussions concerning, and seeking payment of, the fees awarded on October 2, 2013.

2 It is not clear why these cross-motions were not heard by the judge who entered the prior orders, including the order in question—the far better practice.

Pike Run's cross-motion included a certification of its former attorney, who acknowledged the orders incorporated plaintiff's right to move for counsel fees. Pike Run's former counsel, however, asserted that he "expected to receive a copy of that application [for fees]," that he did not "recollect ever seeing the certification or the cover letters directed to [him] until copies" were provided by Pike Run's new attorney, and that he "did not see the October 2, 2013[o]rder until" he received plaintiff's December 17, 2013 enforcement motion. He further claimed: "I do not believe that I ever received them previously. If they were actually received in my office in September or October, I never saw them."

***2** In seeking relief from the counsel-fee order, Pike Run not only relied on the claim that its former counsel's mistakenly failed to respond or was apparently not served or did not actually receive the fee application. Pike Run also—and for the first time in the proceedings—argued that plaintiff did not have standing to seek enforcement of the August and September 2013 orders because plaintiff was no longer an owner of property in the association.[3] In addition, Pike Run claimed there was no basis for enforcing the August and September 2013 orders because the failure to amend the bylaws was merely a product of "confusion and unclear messages," and in fact, the bylaws had been amended.[4]

3 The date upon which plaintiff transferred title to her condominium unit is not readily apparent in the record on appeal; we assume, however, that this event occurred months before the filing of the complaint in this action on June 13, 2011, since it is alleged in the complaint that the closing took place on January 31, 2011.

4 At oral argument in the trial court on January 31, 2014, Pike Run's attorney asserted that "the board adopted the amendment and ... it was forwarded to the [c]ounty [c]lerk's [o]ffice on Monday[,]" which we assume meant January 27, 2014. He also stated at that time that he had brought to court copies of the amendment for the benefit of the court and plaintiff's counsel.

The judge denied plaintiff's motion for enforcement and granted Pike Run's motion to vacate the October 2, 2013 fee order. This second judge concluded enforcement was precluded by *Haynoski v. Haynoski,* 264 *N.J.Super.* 408 (App.Div.1993), thereby rendering the fee order void, pursuant to *Rule* 4:50–1(d). The judge also stated that the August and September 2013 consent orders were void, a holding no one sought.[5] notwithstanding those comments, which were not embodied in the judge's order, the judge later recognized in his opinion that plaintiff's motion to enforce, which led to the entry of those consent orders, was a reasonable step in light of Pike Run's failure to "respond [to plaintiff's earlier inquiries] other than to say, 'We'll get back to you.' " In any event, the judge concluded that once plaintiff transferred title to her property in the association she lost standing to enforce the settlement agreement beyond the agreement's monetary aspects.[6]

5 It is not clear to us what the judge meant—in referring to the consent orders—that "[r]easonable minds can differ about whether or not ... th[ose] order[s][are] still equitable."

6 The judge also determined that plaintiff's certification of services were not in conformity with *Rule* 4:42–9(b) and *RPC* 1.5.

Plaintiff appeals the January 31, 2014 order, which vacated the October 2, 2013 order, arguing the judge erred in finding plaintiff lacked standing and in granting Pike Run relief from that order.

In considering the arguments raised in this appeal, we briefly turn to *Haynoski,* which held that *Rule* 1:10–5, which is now *Rule* 1:10–3, does not permit an award of fees when a party moves to enforce a private agreement to settle litigation. 264 *N.J.Super.* at 413–14. In *Haynoski,* the plaintiff moved in the Chancery Division for enforcement of an agreement to settle the action and for an award of counsel fees expended in those efforts. *Id.* at 410. We recognized that "the settlement was never incorporated in an order or judgment" but "was simply a contract entered into between the parties as a condition for the dismissal of pending litigation." *Id.* at 414. Consequently, we held that "[t]he *sine qua non* for an action in aid of litigant's rights, pursuant to [*Rule* 1:10–3], is an order or judgment; a predicate element missing here." *Ibid.*

This interpretation of *Rule* 1:10–3, with which we remain in accord, has only partial application here. For example,

had plaintiff moved for an award of counsel fees when originally seeking the court's aid in compelling Pike Run to comply with the settlement agreement, *Haynoski* would have required the denial of that fee request; the settlement agreement did not contain a provision authorizing such an award. But, here, Pike Run consented to the entry of an order memorializing the settlement agreement in August 2013, which provided the required platform—what Judge Keefe in *Haynoski* referred to as the *sine qua non*—for an award of fees in seeking the future enforcement of the consent order.

***3** More importantly, we consider the judge's determination that plaintiff lost standing to seek enforcement of either the settlement agreement or the later confirming orders insofar as they compelled the amending of the bylaws [7] because she had transferred her interest in the property and was no longer a member of the defendant association. Considered on a clean slate, the judge's view of standing is accurate. *See, e.g., Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n,* 383 *N.J.Super.* 22, 67 (App.Div.2006), *rev'd on other grounds,* 192 *N.J.* 344 (2007). This case is unusual, however, because of Pike Run's inexplicably late assertion of plaintiff's lack of standing.

7 No one questions plaintiff's standing to pursue the monetary remedies permitted by the settlement agreement because those rights indisputably survived her transfer of title.

Even more unusual is the fact that plaintiff transferred title to the property *before* the settlement agreement was reached; it is odd and somewhat inconsistent with what was argued in the last trial court proceeding, and with what has been argued here, that Pike Run would promise plaintiff that it would amend the bylaws when plaintiff no longer owned any property within the association. Stated another way, the record fairly suggests—or provides a reasonable inference—that Pike Run negotiated with and promised to plaintiff changes in the bylaws because it viewed her as speaking for other property owners notwithstanding she did not commence the action as a representative of others.

Pike Run then further acted in conformity with its assumption that plaintiff possessed standing because, when plaintiff later sought enforcement of the settlement agreement, Pike Run negotiated with her and consented to the incorporation of portions of the settlement agreement into a consent order. And Pike Run again kept to itself its belief that plaintiff lacked standing when consenting to another order, which was entered in September 2013.

In fact, it was not until cross-moving for relief from the October 2, 2013 counsel-fee order that Pike Run asserted —for the first time in more than thirty-two months since plaintiff transferred her property interests—that plaintiff lacked standing.

To be sure, a party's standing cannot be created by consent or a failure to object. *See N.J. Citizen Action v. Riviera Motel Corp.,* 296 *N.J.Super.* 402, 411–12 (App.Div.1997), *appeal dismissed as moot,* 152 *N.J.* 361 (1998). But standing is not a matter of jurisdiction, only justiciability, which does not preclude but only counsels against the invocation of the court's power to act; as we said in *N.J. Citizen Action,* the lack of standing is "a *judicially constructed* and *self-imposed* limitation," *id.* at 411, which ensures that "the invocation and exercise of judicial power" were appropriate in the given case, *id.* at 412. *See also Deutsche Bank Nat'l Trust Co. v. Russo,* 429 *N.J.Super.* 91, 101–02 (App.Div.2012). Because the standing requirement is not as inexorably applied as an absence of jurisdiction, we conclude that a party's lack of standing may at times be disregarded to avoid an inequitable consequence. This case presents such a unique situation.

***4** In light of the procedural history outlined above, we find it would be inequitable to allow Pike Run to play its standing trump card—founded on plaintiff's transfer of title, a fact well known to Pike Run since it occurred before suit was filed—and thereby avoid the consequences of its failure to fully abide by the settlement agreement and later court orders at such a late date. The equities further favor plaintiff's position since, by agreeing with her to amend its bylaws at a time when she was no longer a property owner, Pike Run implicitly viewed her as having the right to seek vindication not only of her rights but also the rights of other property owners. In short, even though we generally recognize that standing cannot be created by a defendant's failure to object, we find it inequitable in the particular circumstances presented here to absolve Pike Run of its dilatory compliance with the consent orders through its late assertion of plaintiff's lack of standing. *See In re Estate of Shinn,* 394 *N.J.Super.* 55, 70 (App. Div .) (applying estoppel principles when a party had previously remained silent when conscience required that

party to speak), *certif. denied,* 192 *N.J.* 595 (2007). Pike Run allowed plaintiff to expend her time and expenses and now tardily argues she lacked standing. Even though we agree plaintiff lacked standing to complain about the bylaws once she transferred her ownership interest, Pike Run's failure to speak when conscience demanded its assertion of the standing requirement now commands that Pike Run remain silent in that regard. Plaintiff is entitled to pursue her claim for fees for her efforts in seeking enforcement from the time of the August 27, 2013 order.

We, thus, reverse the January 31, 2014 order under review, and we remand for consideration of plaintiff's claim for fees incurred in seeking enforcement of the August and September 2013 consent orders. We lastly observe that the judge appears to have vacated the October 2, 2013 order on the alternative ground that the failure of Pike Run's former counsel to respond to plaintiff's fee application should not be visited on Pike Run and, also, that plaintiff's certification of services was inadequate. We find no fault in those conclusions, although the former would ordinarily require further examination after an evidentiary hearing. Those determinations, however, do not result in a bar to an award of fees; they merely suggest that plaintiff should have been given the opportunity to provide a proper certification of services, and Pike Run should have been given an opportunity to respond to that certification on its merits.[8] Pike Run, however, should not be further heard on the question of standing in that regard, but it should be permitted to further argue that the fees were unreasonable or unnecessary or incurred prior to entry of the August 27, 2013 consent order. We remand for these further proceedings.

8 Pike Run contends that plaintiff is not entitled to fees because her attorney is her husband. Although we are aware of no bar to an award of fees in such circumstances, it is for the trial court, in the proceedings to follow, to assess whether or to what extent that fact may impact on plaintiff's fee application.

Reversed and remanded. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2015 WL 1980492

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EXHIBIT C

2006 WL 1381619
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division, Somerset, Hunterdon and Warren Counties.

PICTUREWINDOW SOFTWARE, LLC, Plaintiff,
v.
Patrick GREENE, et al. Defendants.

Decided April 28, 2006.

Attorneys and Law Firms

Jarrod C. Cofrancesco (Laddey, Clark & Ryan), for Plaintiff.

Thomas P. Heeney, Jr. (Heeney & Associates, P.C.), for Defendants.

WILLIAMS, J.

Motion in Aide of Litigant's Rights

I. *Background*

***1** On February 23, 2005, this Court executed an Order settling the matter between PictureWindow Software, LLC (hereinafter "Plaintiff") and Patrick Green, et al (hereinafter "Defendants"). The Settlement Agreement provided that with the exception of 14 specific companies, the Defendants could not market, sell, or service its computer telephony programs to customers utilizing a Nortel M2250 and/or PCCIU telephone system for a period of one year. Plaintiff alleges Defendants have failed to comply with this Court's Order and brought this Motion in Aide of Litigant's Rights, pursuant to *R.* 1:10–3.

II. *Plaintiff's—Movant's—Position*

Plaintiff claims Defendants violated the terms of this Court's Settlement Agreement by specifically marketing, selling and servicing Office Suites Plus with Defendants' software program, "Contact," to operate on an M2250 console. Office Suites Plus, it advises, is not one of the entities specifically exempt from the non-compete provisions of the agreement. In addition, Defendants marketed and sold "Contact" to Office Suites Plus approximately one month after entering into the Settlement Agreement with Plaintiff. They have even sold "Contact" to three separate Office Suite Plus locations and have continued to service those locations thereafter.

Plaintiff claims the servicing aspect of Defendants' relationship with Office Suites Plus is significant because it provides clear and convincing proof that Defendants were not only aware of Office Suites Plus' use of "Contact" but aided this use by providing technical service. Also, in an e-mail to Plaintiff's investigator, Donald Schmidt, Defendant Harrington admitted that he knowingly sold "Contact" to Office Suites Plus for use on an M2250 because the non-compete provisions of the settlement agreement did not prohibit him from doing so. Moreover, since Defendants developed the "Contact" software with Office Suites Plus in mind, it is evident, Plaintiff contends, that Defendants developed the software with full knowledge that the company would be using it in violation of the Settlement Agreement. Based upon the foregoing, Plaintiff argues Defendants were aware of Office Suites Plus' use of "Contact" on an M2550 telephone system in violation of the Settlement Agreement.

Plaintiff argues it is entitled to monetary relief as a result of Defendants' breach, which was memorialized in this Court's Order dated February 23, 2005. Also, as a result of Defendants' alleged breach, Plaintiff contends it has sustained damages for the loss of business. According to Scott Beauchamp, the IT Director for Office Suites Plus, Plaintiff and Defendant are the only two "options" for Office Suites Plus' computer telephony software needs. But for Defendants' breach of the Settlement Agreement, Plaintiff would have realized the sale and servicing support for the Office Suites Plus locations. Consequently, as a direct result of Defendants' breach of the settlement, Plaintiff sustained damages for loss of business. Therefore, Plaintiff asserts it is entitled to equitable relief in this matter. *See Roselin v. Roselin,* 208 N.J.Super. 612 (App.Div.1986). Also, it is permissible to seek a continuing obligation in an enforcement proceeding. *Essex County Welfare Board v. Perkins,* 133 N.J.Super. 189 (App.Div.1975). Accordingly, Plaintiff now requests that Defendant be Ordered to reconfigure all software programs, including but not limited to " "Contact" " to make them incompatible

and/or inoperable on both M2250 and PCCIU telephone systems, when those programs are being sold to any customers not specifically exempt from the non-compete provisions of the Settlement Agreement. In addition, Plaintiff is requesting this Court extend the Settlement Agreement for a period of one year following the ruling in this Motion, as Defendants' violated the initial agreement within one month of its commencement.

***2** Lastly, Plaintiff is seeking counsel fees and argues it is entitled to them. *Jersey City REDEV v. Clean–o–Mat,* 289 N.J.Super. 381, 401 (App.Div.1996). In New Jersey, Courts have also held that the authority to grant fees under *R.* 1:10–3 applies to Settlement Agreements that have been memorized pursuant to Court Order. *Haynoski v. Haynoski,* 264 N.J.Super. 408 (App.Div.1993). Based upon the evidence that Defendants knowingly and intentionally violated the terms of the Settlement Agreement, Plaintiff contends this Court should award attorneys fees for its enforcement action.

III. *Defendants' Position*

Defendants explain that prior to the onset of litigation in this matter, Scott Beauchamp of Office Suites Plus formed a personal relationship with Alex Harrington, a named defendant, during the summer of 1999 and later a personal relationship with Patrick Greene, also a named defendant, during the spring of 2004. After Mr. Greene left Picture Window Software, LLC, Mr. Beauchamp contacted him to offer his assistance with feature development and live beta testing of their software project, "Contact". Based upon this existing relationship and involvement in the development process, Office Suites Plus has been a client of EVO Technologies from their inception. Mr. Beauchamp's knowledge of "Contact" and its capabilities was gained from the time he began assisting in its development up to the present. After the Settlement Agreement, Defendants informed Mr. Beauchamp that they could not sell any products or services related to the M2250 console or its successor.

EVO Technologies then began providing Office Suites Plus "Contact M2616 compatible reception software and services." They claim that unbeknownst to them, Mr. Beauchamp reconfigured "Contact" to make it compatible with the M2250 console. Defendants claim they were unaware of this until December 23, 2005. Office Suites Plus is located hundreds even thousands of miles away from Defendants and they had virtually no way of knowing Mr. Beauchamp had reconfigured their software. Upon learning this information, Defendants assert they demanded that Office Suites Plus cease and desist from violating the license they hold to use Defendants' software. Further, they demanded that all M2250 consoles currently connected to the "Contact" program be replaced with M3094 consoles to maintain compliance with the settlement agreement. Within days of being notified of the demand to discontinue use of the M2250 consoles in conjunction with the "Contact" program, Office Suites Plus began taking steps to comply. Due to availability issues of certain critical components and scheduling conflicts, implementation was delayed.

Defendants argue that if anyone breached the Settlement Agreement, it was Office Suites Plus, an entity not a party to the agreement, and therefore one not subject to the agreement's terms. *Attardo v. Murphy,* 2005 WL 2334360 (N.J.Super.). They assert that the reality here is that the settlement came to its natural conclusion on February 23, 2006 and that the only wrinkle in the agreement was created by the independent action of a non-party that never had any intention of doing business with the plaintiff.

***3** Defendants further contend Plaintiff is not due any counsel fees in connection with the filing of this instant Motion. Plaintiff cites *R.* 1:10–3, which permits the Court, at its discretion, to award attorneys fees along with the enforcement of an order. However, the Court never issued an order as those usually associated with said Rule. *Haynoski v. Haynoski, supra.* The present situation coincides with the situation noted by the *Haynoski* Court that "... the settlement agreement was never incorporated in an order or judgment. It was simply a contract entered into between the parties as a condition for the dismissal of pending litigation. The *sine qua non* for an action in aid of litigant's rights, pursuant to *R.* 1:10–5, is an order or judgment; a predicate element missing here." *See Id.* at 414. Therefore, Defendants argue, Plaintiff's Motion in Aide of Litigant's Rights and for Counsel Fees are baseless, as the necessary Order of the Court is lacking. Defendants contend the parties' contract came to its natural conclusion on February 23, 2006 and request this Court deny Plaintiff's Motion.

IV. *Plaintiff's Reply to Opposition*

Plaintiff argues that the defendants, along with Mr. Beauchamp, engaged in a ruse to deceive it and

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violate the terms of the settlement agreement. It claims that Mr. Beauchamp's admission that he unilaterally modified the "Contact" software to be compatible with a M2250 is nothing more than a smokescreen to protect Defendants from liability and shield Defendants' unfair and impermissible actions from exposure. It asserts that Mr. Harrington's involvement as the contact person for servicing the "Contact" program, coupled with the e-mail correspondences between Mr. Harrington and the investigator, Donald Schmidt, where Defendant claimed the settlement agreement did not apply to Office Suites Plus, illustrate the defendants' knowledge and involvement in the breach of the agreement.

Moreover, Plaintiff argues Defendants were incorrect in their interpretation of *Haynoski.* In *Haynoski,* the settlement agreement was never incorporated in an Order or Judgment. 264 N.J.Super. at 414. The Court in *Haynoski* based this reasoning on the fact that it believed the settlement agreement was simply a contract entered into between the parties as a condition for dismissing the pending litigation. *Id.* However, in the present matter, the agreement was set forth on the record and immediately thereafter memorialized and incorporated in the Court's February 23, 2005 Order. Therefore, Plaintiff contends, it was permissible for it to bring this Motion, as the proper Court Order was issued.

Plaintiff claims the evidence demonstrates the Defendants' intention to cheat the terms of the settlement agreement from the date it was executed through the use of Defendants' personal friend, Mr. Beauchamp. Thus, it argues, the Court should grant its Motion in Aide of Litigant's Rights.

V. *Discussion*

***4** An action to enforce litigant's rights is "essentially a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant. In such proceeding the judge, before ordering any sanction, must determine that defendant has the ability to comply with the order which he has violated, and incarceration may be ordered only if made contingent upon defendant's continuing failure to comply with the order." *Essex County Welfare Board v. Perkins,* 133 N.J.Super. 189, 195 (1975). Pursuant to *R:* 1:10–3, this court has discretion to make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule. This Court finds that Defendants violated the court order by selling and servicing M2250 telephony software during the one-year period. While Defendants are correct to point out that a motion brought pursuant to *R.* 1:10–3 requires that an order or judgment exist, the Court referenced the settlement agreement in its Order, stating that the terms were memorialized on the record. Moreover, the Court even explained to both parties on the record that they could seek the help of the Court in enforcing the terms of the agreement if either party were to violate said agreement. Therefore, Plaintiff was correct in bringing its Motion pursuant to that *Rule.* Furthermore, this Court will impose counsel fees in the amount of $5,260.00, as the defendants have been in willful violation of the settlement agreement virtually from its inception.

The validity of the settlement is not dependent upon whether it is memorialized in a writing. *Pascarella v. Bruck,* 190 N.J.Super. 118, 124 (App.Div.), *certif. denied,* 94 N.J. 600 (1983). The parties agreed to the essential terms of the settlement freely, with advice of counsel, and without fraud or duress. *Berg Agency v. Sleepworld–Willingboro, Inc.,* 136 N.J.Super. 369, 376 (App.Div.1975); *Bistricer v. Bistricer,* 231 N.J.Super. 143, 148 (Ch. Div.1987). After review of the record, the Court finds that both parties had agreed that Defendants would not compete with Plaintiff in the "sales, service, and marketing of the M2250 and the PCCIU systems, with the exception of 14 specific clients who they [would] be permitted to compete with PictureWindow over." Office Suites Plus was not one of the fourteen clients with whom Defendants were allowed to sell, service or market those noted software. Thus, due to the fact that Defendants were conducting business with an entity not identified in the agreement and the information referenced below, it is evident to the Court that the defendants violated the settlement agreement they held with Plaintiff.

While Defendants contend Mr. Beauchamp was responsible for reconfiguring the systems to a M2250 format, the Court points to the evidence that Mr. Harrington was the contact person for any problems with the M2250 software. Surely, even if Mr. Beauchamp did in fact reconfigure the format, Mr. Harrington had to have been notified, before receiving notification through the plaintiff, that Office Suites Plus' use of the "Contact" program was in violation of Defendants' settlement agreement. The Court does not believe that Defendants

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were completely unaware of the unauthorized use of the "Contact" system until December 2005.

***5** Furthermore, the Court finds Mr. Clay Greene's Certification worth noting, as it raises substantial doubt that Mr. Beauchamp was the only individual not in compliance with the agreement, as Defendants allege. In his Certification, he explains that a significant amount of knowledge and understanding of the system itself would be required for an individual to create an "adaptor" which could reconfigure the "Contact" program created for a Nortel M2616 desktop telephone to operate with the Nortel M2250 attendant console. Specifically, he states:

> The M2616 telephone uses an entirely different signaling protocol from the M2250 console. An application designed for the M2616 telephone would not be able to operate when connected physically to an M2250 attendant console. Mr. Beauchamp claims that he created an "adaptor" that bridges the gap. His adaptor allegedly allows a PC running Contact for the M2616 telephone to physically connect to an M2250 console and operate properly. In order for an adaptor to be created that could accomplish this, the individual creating the adaptor would need to be intimately familiar with both the M2250 and the M2616 complex signaling protocols. This adaptor (and designer) would need to know that when it receives one particular grouping of binary data bits form the M2616 version of Contact that it needs to translate that into some other equivalent grouping of binary data that makes sense to the M2250.
>
> If this adaptor was some sort of hardware device then the level of expertise needed would be even greater. In addition to knowing how to interface these two protocols the designer would need to be knowledgeable in integrated circuit component design. Typically these skills would require a degree in electrical engineering and significant hands on experience designing and building electronic circuits.

Moreover, the evidence indicates that a staff-member of Office Suites Plus confirmed that the current phone being utilized to operate the "Contact" program was a Nortel M2250 Console. If the M2250 console was being used, the "adaptor" that Mr. Beauchamp allegedly created would be useless.

Mr. Greene also provided detailed information about the services provided by Picture Window Software and EVO Technologies in his Certification which indicate Defendants had to be aware of the use of "Contact" on a M2250 console by Office Suites Plus. He explains that companies like EVO Technologies are typically involved in software installation, configuration, testing, training, cutover support, and on-going technical support. During installation, the software vendor provides the telephone programming information to the customer's PBX vendor so that they can configure any PBX specific features for the telephone model being used. During the configuration period, the software vendor works with the customer contact during this phase to determine which telephone specific features the customer is interested in. The model of the telephone must be known at this point as some features may only be supported with certain telephones. Further, the model of the telephone being used must be known in order to appropriately test the software. Then, the receptionists who will be using this software are trained, which obviously requires that the software provider know which telephone is being used. Also, during the cutover period (which refers to the first day the receptionists begin using the application), many questions arise and troubleshooting is necessary. The software provider cannot accurately trouble shoot if it doesn't know which telephone is being utilized. Lastly, in order to properly service the account (i.e., on-going support and maintenance), the provider must know which type of telephone is being used. It seems obvious to the Court that EVO Technologies would not have been able to fulfill any of those services without having any knowledge that a M2250 console was being used.

***6** Therefore, the Court finds Defendants in violation of the settlement agreement and will further impose this agreement on Defendants for an additional six months, starting May 19, 2006. Defendants are ordered to immediately configure all software sold to customers not identified as one of the 14 exceptions in the settlement agreement dated February 23, 2005, so as to make the software incompatible for use on both M2250 and PCCIU telephone systems. Moreover, the Court awards Plaintiff attorneys fees in the amount of $5,260.00 for fees accumulated with the investigation and filing of this Motion.

VI. *Decision*

Accordingly, for the reasons stated herein, Plaintiff's Motion in Aide of Litigant's Rights is hereby Granted. Plaintiff is hereby awarded $5,260.00 for fees and the Court further imposes this agreement on the parties for a six-month period, beginning May 19, 2006.

All Citations

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EXHIBIT D

2014 WL 3928450
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
T.M.S., Defendant–Appellant.

A-2411-11T2
|
Submitted April 30, 2014.
|
Decided Aug. 13, 2014.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 10–08–1409.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Robert L. Sloan, Assistant Deputy Public Defender, on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Elizabeth R. Rebein, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges SAPP–PETERSON and LIHOTZ.

Opinion

PER CURIAM.

***1** Defendant T.M.S. was charged by a Bergen County grand jury in Indictment No. 10–08–1409, with four counts of first-degree aggravated sexual assault, *N.J.S.A.* 2C:14–2(a)(1) and 2C:14–2(a)(2)(c) (counts one, two, three and five); second-degree sexual assault, *N.J.S.A.* 2C:14–2(b) (count four); third-degree aggravated criminal sexual contact, *N.J.S.A.* 2C:14–3(a) (count six); and second-degree endangering the welfare of a child, *N.J.S.A.* 2C:24–4(a) (count seven).

Following his conviction by a jury on all counts, the trial judge denied defendant's motion for a new trial and sentenced him to two consecutive eighteen-year terms of imprisonment on counts one and five, subject to the 85% parole ineligibility period of the No Early Release Act (NERA), *N.J.S.A.* 2C:43–7.2, a consecutive ten-year flat term on count seven, concurrent eighteen-year terms on counts two and three, a concurrent ten-year term on count four, and a concurrent five-year term on count six. Parole supervision for life, applicable penalties and assessments were also imposed.

On appeal, defendant challenges his conviction and sentence, arguing:

POINT I

THE ADMISSION OF TESTIMONIAL HEARSAY, INDICATING THAT AN ANONYMOUS TIP HAD IMPLICATED DEFENDANT, VIOLATED DEFENDANT'S RIGHT TO CONFRONT WITNESSES AND TO DUE PROCESS OF LAW AND A FAIR TRIAL. *U.S. CONST.* AMEND. XIV; *N.J. CONST.* (1947) ART. I, PARS 1,9,10 (NOT RAISED BELOW).

POINT II

DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.

In a pro se supplemental brief, defendant raises several arguments challenging the probable cause to support the arrest warrant, which he characterizes as follows:

POINT I.

THE PROSECUTOR COMMITTED PLAIN ERROR PURSUANT TO *RULE* 2:10–2, SPECIFICALLY, THE PROSECUTOR FAILED TO REFRAIN FROM PROSECUTING A CHARGE THAT THE PROSECUTOR CLEARLY KNEW WAS NOT SUPPORTED BY PROBABLE CAUSE. THE PROSECUTOR'S NEFARIOUS ACTS WERE IN CLEAR VIOLATION OF *RULE* 3.8(A) “SPECIAL RESPONSIBILITIES OF A PROSECUTOR” OF THE LAWYERS RULES OF PROFESSIONAL CONDUCT. THE FORBIDDEN AND MALICIOUS PROSECUTION CLEARLY VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO

EQUAL DUE PROCESS OF THE LAW. CONST. AMEND. 4TH, 5TH, 6TH AND 14TH AMENDS.

POINT II.

PROSECUTING ATTORNEY (MR. DAVID V. CALVIELLO) COMMITTED REVERSIBLE ERROR, DURING THE PROSECUTOR'S OPENING AND CLOSING ARGUMENTS (MR. CALVIELLO) ERRONEOUSLY AND REPETITIOUSLY VOUCHED FOR THE VICTIM'S CREDIBILITY ON SEVERAL DIFFERENT OCCASIONS. IN ADDITION, STATES WITNESSES (DETECTIVE MICHAEL) AND [E.W.] IMPROPERLY VOUCHED FOR THE VICTIM'S CREDIBILITY. DESPITE THE CLEAR FACT THAT TRIAL COUNSEL NEVER MADE ANY TIMELY OBJECTIONS PURSUANT TO *RULE* 1:7–2 AND THE TRIAL JUDGE NEVER GAVE ANY PROMPT CURATIVE JURY INSTRUCTIONS PURSUANT TO *RULE* 2:10–2(5)4.3. THOSE FACTS ALONE DOES [SIC] NOT RECTIFY THE BLATANT CUMULATIVE PREJUDICIAL ERRORS THAT OCCURRED DURING THE DEFENDANT'S TAINTED JURY TRIAL. THUS, THE ASSORTED PREJUDICIAL ERRORS CLEARLY DENIED THE DEFENDANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JUDGE AND JURY. *U.S.C.A.* 5TH, 6TH AND 14TH AMENDS.

***2** Following our review of the arguments advanced in light of the record and applicable law, we affirm.

I.

These facts are taken from the record of the eight-day jury trial. Defendant's wife, P.S. moved to the United States from the Caribbean island of St. Vincent in 1997. She had two children, C.H. and R.H. In 2000, P.S. met defendant. Defendant had three children, who at that time lived with their biological mothers. Defendant and P.S. married in October 2003. The following month, defendant, P.S., C.H. and R.H. moved into a two-family home in Hackensack. In 2004, defendant and P.S. had a daughter, S.S. About this time defendant's eighteen year-old daughter A.S. began residing in their home. During the summer of 2009, P.S.'s adult niece moved into the residence, as R.H. had moved out. In the fall of 2009, P.S. began working the night shift. Defendant or P.S.'s niece would care for C .H. and S.S.

In mid-April 2010, C.H. and her best friend, C.A., were texting, each complaining about life's difficulties. In an effort to emphasize the difficulties she faced, C.H. texted to C.A. “at least you don't have a rapist of a stepfather to worry about.” C.H. did not disclose any details to her friend, but told her “when it had started.”

The following day, C.H. texted another friend E.W. and revealed the abuse. E.W. was “shocked,” and told C.H. she “should tell [her] mom or tell someone about it.”

On April 17, 2010, P.S. and C.H. got into an argument, and C.H. went to her room. From her room, C.H. texted P.S., stating “I don't care if you believe me or not but [defendant] was molesting me since I was five years old. I mean since I was eight years old.” P.S. rushed to C.H.'s room, and told her she “need[ed] to tell [her] what's going on.” C.H. insisted she was not lying; “all she said was that he touched me.” C.H. did not tell P.S. where defendant touched her and shook her head when P.S. asked whether he had sexual intercourse with her. P.S. insisted they go to the police station, but C.H. resisted.

After C.H. refused to go to the police station, P.S. called defendant, but she “dropped the phone, the phone closed, he called back, [she] didn't pick up. He called [C.H.'s] phone.... She sa[id] its [defendant].” At P.S.'s direction, C.H. answered the phone, putting defendant on speaker phone. Defendant asked “what's wrong with your mom?” C.H. informed him that she told P.S. “everything.” He asked, “Why would you tell her some shit like that?”

When defendant arrived home, P.S. asked him, “what did you do to [C.H.]?” Defendant said, “I didn't do nothing to that girl and [C.H.] was standing right there and she said yes you did. You touched me. And he said I didn't do anything to you.” Defendant and P.S. spoke alone, and he insisted he did not do “anything to that girl.” During this conversation, defendant abruptly suggested the family order Chinese takeout for dinner, and they all rode together to pick up the food. After dinner, P.S. and defendant discussed whether defendant should move out and that evening defendant slept on the couch while C.H. and S.S. slept in the master bedroom with P.S.

***3** On April 20, 2010, Luke Drummond, a Division of Youth and Family Services [1] (the Division) caseworker, contacted the Juvenile Division of the Hackensack Police Department and the Bergen County Prosecutor's Office after receiving an "anonymous call" regarding "allegations of abuse going on in [C.H.'s] home." The Hackensack Police Department then contacted Edward Meneses, the resource officer assigned to Hackensack Middle School, who located C.H. and escorted her to the police station, allowing officials "to speak to her about the allegations."

1 On June 29, 2012, the Department of Children and Families was reorganized and the Division of Youth and Family Services was renamed as the Division of Child Protection and Permanency. *L.* 2012, *c.* 16, eff. June 29, 2012 (amending *N.J.S.A.* 9:3A–10b).

C.H. was interviewed separately by Detectives Michael Capone and Niles Malvasia. She described six incidents of abuse by defendant that occurred over the previous five years. C.H. also related these incidents at trial.

When C.H. was eight years old, defendant was watching C.H. and S.S. while P.S. worked. C.H. was sleeping on the living room floor when defendant entered "laid on top of [C.H.], ... pulled [her] shirt up and he started trying to pull [her] pants down[,]" and rubbed her vagina with his penis. Despite C.H.'s protest as she said "no, I don't want to do this[,]" defendant reassured her "it's okay, don't worry about it. Don't worry it won't hurt." After approximately a minute and a half, defendant "ejaculated and he just got up and went to the bathroom to clean off."

C.H. recounted two instances when defendant forced her to perform fellatio. One incident occurred in defendant's van when C.H. was ten years old. Defendant drove C.H. to the store to purchase supplies for her science project. When they returned to the van, defendant told C.H. to get in the back. Despite her protests, defendant "took [her] by [the] arm and he pulled [her] into the back seat[,]" which contained a "long couch looking seat that went all the way back if you pressed a button in the front" and the rear windows had curtains. Defendant pulled up C.H.'s shirt and removed her pants, kissed her breasts and rubbed his penis against her vagina. He then told C.H. to "suck this" and forced her to put her mouth on his penis. When he was finished he told her to rinse her mouth with Listerine, which he kept "under the cup holders." Defendant then "wiped himself off" with a paper towel, and drove home.

The second time occurred when C.H. was eleven years old. C.H. had called P.S. to pick her up from school because she was sick; defendant went to the school. As soon as C.H. and defendant arrived home she used the bathroom. When C.H. exited the bathroom, defendant "had closed the bedroom door ... and he pulled his pants down and told [her] to suck this. And said [she did not] want to, and knew he wouldn't leave until [she] did. So [she] did." After defendant ejaculated, C.H. "spit his semen out in the garbage" and rinsed her mouth out.

C.H. also recounted an instance during a trip to Newark to purchase DVDs where defendant performed oral sex on her. Additionally, when she was twelve years old, C.H. accompanied defendant to retrieve his mail from his mother's home. C.H. stated while in the backseat of defendant's van, he rubbed his penis against her vagina.

***4** C.H. told police of those times defendant unsuccessfully attempted sexual intercourse. Defendant woke C.H., who was sleeping in bed with P.S. and S.S., and "grabbed [her] by [her] arm and he pulled [her] into the living room, and laid [her] on the couch." After presumably going to retrieve a condom, defendant "tr[ied] to fully penetrate [C.H.]" However, he was "[n]ot fully ... able to get ... inside [her] vagina[.]" On another occasion, defendant attempted to perform anal sex on C.H., but "that only lasted a few seconds, because [she] said ouch or ow and then he stopped."

During their investigation, police also interviewed defendant's children A.S., B.S. and F.S., as well as C.H.'s friends, C.A. and E.W. C.H. underwent a medical evaluation for "possible sexual abuse" performed by Dr. Paulett Diah, a board certified physician in child abuse and general pediatrics. Dr. Diah interviewed C.H., who told her she "got molested by [her] step-father." C.H. informed Dr. Diah defendant engaged in digital, and vaginal penetration along with "oral vaginal contact." C.H. denied any anal contact and stated the last time defendant molested her was in March 2010.

Dr. Diah performed a physical examination, which included a pelvic and anal examination. She noted C.H. "had some marks or scars on her body" and C.H. was able to provide "innocent explanation[s]" for "most of the injuries that she had on the body ." There were "no findings ... of the anus, or of her genital or her urinary

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areas." Further, the examination revealed "[n]o acute or chronic anogenital injury." Discussing her findings, Dr. Diah stated:

> In this case to better understand the result of [C.H.'s] genitourinary examination one should consider the type of activities which she described, whether or not she was pubertal at the time of contact, whether or not there was injury and the possibility of healing said injury. In this case [C.H.] disclosed digital/vaginal penetration, attempted penile/vaginal penetration and oral/vaginal contact. Oral/vaginal contact may not result in injury so that a normal examination may be obtained. When considering vaginal penetration one should consider that [C.H.] is pubertal. At puberty, estrogen effects on the genital tissues (which includes the hymen) result in tissue that is thickened, lubricated and elastic. These characteristics reduce the likelihood of injury from penetrating trauma. A normal examination is not unusual in this setting. Superficial injury such as bruises or abrasions to the genetalia could have occurred at the time of the contact that may have now healed without residua.

Dr. Diah concluded the "normal examination ... neither confirms nor denies the possibility of sexual abuse. [C.H.'s] disclosure should not be discredited."

Defendant did not testify. He presented testimony from two of his children, his sister and a coworker. The family members related his and her observations of C.H.'s interactions with defendant over the years, noting they were close, affectionate and interacted appropriately. There was no sign of tension or discomfort. Defendant's children also discussed their relationship with defendant, who they described as a good father. All the witnesses asserted defendant had a reputation for being honest, hardworking, and providing for his family.

***5** Following his conviction of all charges, defendant moved for a new trial. His motion was denied. This appeal ensued.

II.

A.

Appealing his conviction, defendant argues he was denied a fair trial as a result of Detective Capone's statement informing the jury the Division received an anonymous tip of abuse, which "left the jury with a clear impression that defendant had been implicated in sexual abuse by someone besides the alleged victim, [C.H.]." Defendant maintains the anonymity of this third-party informant deprived him of the right to confront the anonymous caller and dispute the allegations, as expounded in *Crawford v. Washington,* 541 *U.S.* 36, 124 *S.Ct.* 1354, 158 *L. Ed.*2d 177 (2004).

The State responds Detective Capone's testimony was properly introduced to demonstrate the basis of the officer's actions, showing his decision to investigate was not arbitrary. Further, the statement was not offered for the truth of the matter asserted, but merely to support why he acted. Finally, the State notes Detective Capone never suggested the anonymous caller identified defendant as the perpetrator.

At trial this colloquy occurred:

> [THE PROSECUTOR]: Can you just summarize for us briefly ... how you got involved in this investigation.
>
> [DETECTIVE CAPONE]: The day of the incident I was assigned to work the day shift, and [the Division] ha[d] contacted our [Youth and Juvenile] Division along with the Prosecutor's Office of the allegations of a student being abused.

After explaining who called, who else was contacted, how C.H. was located and brought to the police station, and who was involved in her interview, the subject was again raised as follows:

> Q: Can you tell the [j]urors ... your understanding of how this incident was reported to law enforcement?
>
> A: It came in through an anonymous call through [the Division].
>
> Q: As of today have you been able to identify who the caller was?
>
> A: No, I haven't.

Because defendant did not raise a *Crawford* challenge at trial, our "review of an alleged error is guided by the plain error standard, that is, whether the error was "of such a nature as to have been clearly capable of producing an unjust result." *R.* 2:10–2. Defendant maintains the use of this evidence "implicates constitutional questions under the Confrontation Clause, so the appropriate plain error analysis would address whether any constitutional error was harmless beyond a reasonable doubt." *State v. Basil,* 202 *N.J.* 570, 615 n. 5 (2010) (Rabner, C.J., concurring in part and dissenting in part) (citations omitted).

The Sixth Amendment's Confrontation Clause, which applies to the states by way of the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him[.]" It bars the admission of " '[t]estimonial statements of witnesses absent from trial' except 'where the declarant is unavailable, and only where the defendant had a prior opportunity to cross-examine' " that witness. *State v. Dehart,* 430 *N.J.Super.* 108, 114 (App.Div.2013) (quoting *Crawford, supra,* 541 *U.S.* at 59, 124 *S.Ct.* at 1369, 1374, 158 *L. Ed.*2d at 197).

***6** Detective Capone's trial testimony regarding the Division referral was offered to provide context as to why he requested to interview C.H. in an investigation. Certainly, "such testimony explains his subsequent conduct and shows that the officer was not acting in an arbitrary manner." *Ibid.* (citing *State v. Bankston,* 63 *N.J.* 263, 268 (1973)).

The issue requires examination of the hearsay statement as related in the testimony. In *Bankston,* the Court explained the hearsay rule is not violated when a police officer testifies during a criminal prosecution that he took certain action based "upon information received." *Bankston, supra,* 63 *N.J.* at 268 (citation and internal quotation marks omitted). "However, when the officer becomes more specific by repeating what some other person told him concerning the crime by the accused the testimony violates the hearsay rule ... [and] the accused's Sixth Amendment right to be confronted by witnesses against him." *Id.* at 268–69 (citations omitted).

The Court clarified these concepts in *State v. Branch,* 182 *N.J.* 338 (2005). In that matter, a police officer was asked to explain why he included the defendant's photo in an array. The defendant was charged with burglary and armed robbery based on identification evidence by two witnesses. *Id.* at 346–47. At trial, "a police detective testified that he included [the] defendant's picture in a photographic array because he had developed [the] defendant as a suspect 'based on information received.' " *Id.* at 342. The Court found "[t]here was no legitimate need or reason for [the detective] to tell the jury why he placed [the] defendant's picture in the photographic array. The only relevant evidence was the identification itself." *Id.* at 348. Because the jury heard irrelevant, "gratuitous hearsay testimony[,]" which violated the defendant's right to confrontation and the rules of evidence, the Court found this plain error required reversal. *Ibid.*

> When a police officer testifies concerning an identification made by a witness, such as in this case, ... [w]hy the officer placed the defendant's photograph in the array is of no relevance to the identification process and is highly prejudicial. For that reason, we disapprove of a police officer testifying that he placed a defendant's picture in a photographic array "upon information received." Even such seemingly neutral language, by inference, has the capacity to sweep in inadmissible hearsay. It implies that the police officer has information suggestive of the defendant's guilt from some unknown source.
>
> [*Id.* at 352 (citation omitted).]

In *Dehart,* we found the Confrontation Clause was violated by admission of police testimony that related an unidentified witness's statements identifying defendant as a perpetrator of an armed robbery. *Dehart, supra,* 430 *N.J.Super.* at 110, 113. Finding the detective's testimony "clearly hearsay [,]" we examined the facts and stated:

> ***7** [The] defendant's identification, or misidentification, was the main issue at trial. The

> suspect's face was not visible on the surveillance video. While [the victim] was able to give a description of the perpetrator, there was nothing linking [the] defendant to the crime until an anonymous source told [the victim], who then told [the detective], that [the] defendant was the culprit. Permitting this double hearsay into evidence deprived [the] defendant of his right to confrontation.
>
> [*Id.* at 115.]

Guided by these principles, we cannot agree Detective Capone's statements violated defendant's rights of confrontation. Clearly, the statements were offered not for their truth, but to explain why he interviewed C.H. *See Fitzgerald v. Stanley Roberts, Inc.,* 186 *N.J.* 286, 316 (2006) (noting hearsay evidence "may be admissible if it is adduced not for its truth, but for another purpose, for example, its effect upon a listener."). Detective Capone's brief response that he received a call from a Division caseworker relating an anonymous call that abuse occurred in C.H.'s home imparted only the basis of his conduct. No testimony related the anonymous caller's out-of-court statements or implicated defendant as the alleged abuser. *Bankston, supra,* 63 *N.J.* at 272. These statements did not convey an "impression that the detective had some other knowledge implicating defendant in the crime." *Dehart, supra,* 430 *N.J.Super.* at 115 (citation omitted).

Therefore, we conclude the brief comments do not rise to the plain error found in *Branch* or *Dehart.* Rather, Detective Capone's testimony was admissible and no error is found.

B.

Defendant also challenges his sentence as excessive. Specifically, he maintains the judge erred when weighing aggravating factor two, *N.J.S.A.* 2C:44–1(a)(2), by improperly considering the harm his conduct caused his family, rather than the victim. Further, he argues the court erred in imposing consecutive sentences.

In our review we must first determine whether the correct sentencing guidelines have been followed. *State v. Roth,* 95 *N .J.* 334, 365 (1984). The fundamental purpose of the sentencing guideline is to assure the punishment fit the crime, not the criminal. *State v. Hodge,* 95 *N.J.* 369, 376 (1984). The "inexorable focus" upon the offense is required when formulating a sentence. *Roth, supra,* 95 *N.J.* at 367. We next determine whether substantial evidence exists in the record to support the findings of fact upon which the sentencing court based the application of those guidelines. *Id.* at 365–66. Finally, we determine whether, in applying those guidelines to the relevant facts, the trial court clearly erred in reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors. *Id.* at 366.

Our role is limited. *State v. Lawless,* 214 *N.J.* 594, 606 (2013). When a trial court follows the sentencing guidelines, we will not second-guess the decision, as we do " 'not sit to substitute [our] judgment for that of the trial court.' " *State v. Jabbour,* 118 *N.J.* 1, 5–6 (1990) (quoting *State v. O'Donnell,* 117 *N.J.* 210, 215 (1989)). Unless the sentencing court was "clearly mistaken," *State v. Jarbath,* 114 *N.J.* 394, 401 (1989), or a sentence otherwise "shock[s] the judicial conscience," *Roth, supra,* 95 *N.J.* at 365, an appellate court is bound to affirm. *See O'Donnell, supra,* 117 *N.J.* 215–16; *cf. State v. Dunbar,* 108 *N.J.* 80, 83 (1987) (sentence within statutory guidelines may strike reviewing court as harsh, but that is a consequence of the legislative scheme and not error by trial court). *See also State v. Cassady,* 198 *N.J.* 165, 183–84 (2009) ("[O]ur task is clear. If a sentencing court observes the procedural protections imposed as part of the sentencing process, its exercise of sentencing discretion must be sustained unless the sentence imposed 'shocks the judicial conscience.' ").

***8** Applying these standards, we identify no basis to disturb defendant's sentence. We find the trial court properly identified and balanced applicable aggravating and the lack of mitigating factors, which was supported by sufficient credible evidence in the record. *State v. Carey,* 168 *N.J.* 413, 426–27 (2001). We conclude the judge's consideration of the harm to the families affected by defendant's conduct was in addition to her consideration of "[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 ... extreme youth[.]" *N.J.S.A.* 2C:44–1(a)(2).

We reject defendant's argument that the judge erroneously expanded the application of *N.J.S.A.* 2C:44–1(a)(2) as proscribed by the Court in *Lawless. See Lawless,*

supra, 214 *N.J.* at 611 ("[T]he 'victim,' for purposes of aggravating factor two, is the individual against whom the offense is committed.") Although the trial judge began her remarks by noting defendant "destroyed two families[,]" and "destroyed the lives, ... of [his] children [,]" she solidly based her application of factor two on defendant's harm to C.H.:

> When [C.H.] testified, she specifically talked about the fact that she was in high school. So not only was she ripped from this ... extended family that she had with your other children from your previous marriage, she was also ripped from her life—you know, from her home, from her community, from her high school.
>
> [H]er high school [years] should have been wonderful. They should have been spectacular. They should have been full of happiness. They should have been about planning a prom, about graduating, making her parents proud, but that's not what [C.H.] went through. [C.H.'s] life was pure hell and you destroyed that happiness that every child should grow up with. Her memories of her childhood is of horror.
>
> And it's ironic that, in the beginning you spoke and said that you feel like you are a POW—prisoner of war, well you actually made [C.H.] a prisoner. And she used the same word in her impact statement that she felt like a prisoner in her own home, in a jail cell of sexual horrors. Something [like] she got the lifetime sentence; she's never going to get over this. She will become a stronger person because of what happened to her, but the pain will always be there.
>
> And everything that she wrote in her impact statement, and was said today, is all still true; it is a life sentence for her. And every time that she goes to have intimacy with a man, she will always, forever have to deal first with the horror of her memory, before she could even be intimate with another person.
>
> And who is to blame for that? You. Someone who she loved; there's no question, I saw her testify.....
>
> So the question is, she gets a life sentence because of what happened, so what should you get? Should you not also get a life sentence, for what you did to her? And ... the horrors that she will have to face the rest of her life. That's really what the issue is here.

***9** We find no error.

Defendant also contends consecutive sentences were unwarranted because his crime involved "a single victim in an ongoing course of conduct[.]" Defendant believes the length of his aggregate sentence was "unfair" and must be modified.

When determining whether consecutive, rather than concurrent sentences should be imposed, a sentencing court should examine whether: (1) the crimes and their objectives were predominantly independent of each other; (2) the crimes involved separate acts of violence or threats of violence; (3) the crimes 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) any of the crimes involved multiple victims; and (5) the convictions for which the sentences were imposed were numerous. *State v. Yarbough,* 100 *N.J.* 627, 644 (1985), *cert. denied,* 475 *U.S.* 1014, 106 *S.Ct.* 1193, 89 *L. Ed.*2d 308 (1986). These five factors are to be applied qualitatively, rather than quantitatively and, in determining the appropriate sentence, the court must ensure there are no free crimes. *Id.* at 639.

"There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." *N.J.S.A.* 2C:44–5(a). However, "[w]here separate crimes grow out of the same series of events or from the same factual nexus, consecutive sentences are not imposed." *State v. Lester,* 271 *N.J.Super.* 289, 293 (App.Div.1994), *certif. denied,* 142 *N.J.* 453 (1995). The imposition of "[c]onsecutive sentences [is] not an abuse of discretion when separate crimes involve separate victims, separate acts of violence, or occur at separate times." *State v. Copling,* 326 *N.J.Super.* 417, 441 (App.Div.1999) (citations omitted), *certif. denied,* 164 *N.J.* 189 (2000).

The trial judge sentenced defendant to eighteen years imprisonment, subject to NERA on counts one and five, to run consecutively. The judge noted the sexual assaults in these two counts were distinguishable warranting separate sentences because the conduct occurred prior to C.H. turning thirteen and after she had done so. She also noted count one involved penetration. Count five also occurred when C.H. was older, it took place outside the residence, and involved a different offense.

Also, defendant was sentenced to a consecutive term of ten years on count seven. The judge stated:

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On the endangering, which is the last count, count seven. That count provides that [defendant] had a legal duty to care for [C.H.]. And [defendant] caused [C.H.] harm; [defendant] made ... [C.H.] suffer this, time and time again. And it's all because [he] had a parental duty not to do it. And [he] had a parental duty to protect her, love her, cherish her but [he] violated that parental duty.

....

So, this endangering is not included in the aggravated sexual assault. It doesn't merge with the aggravated sexual assault, with the sexual acts of penetration, because this is a whole nother (sic) duty that [defendant had] to this child. And that was to be one of a parent, and not to ... hurt this child.

***10** And pursuant to *State [v.] Miller,* 108 *N.J.* 112 (1987), ... it does not merge into any of the sexual assault counts. *These are different because it's a different, specific violation ... of a specific duty.* So that count will run consecutive to counts one and five.

[(Emphasis added).]

We do not discern an abuse of discretion or deviation from the legal principles that govern sentencing. The court carefully considered the facts of each conviction, the permissible range of each sentence, weighed the aggravating and non-existent mitigating factors, and followed the guidelines in *Yarbough.* Although the crimes involved the same victim, the facts support the judge's conclusion to impose consecutive sentences. We have no basis to interfere with the sentence imposed. *Cassady, supra,* 198 *N.J.* at 183–84.

C.

In his pro se brief, defendant first argues there was insufficient evidence to establish probable cause in support of the warrant for arrest. He maintains his arrest was illegal, requiring his conviction to be set aside. Defendant believes the "victim's unfounded statements," along with the statements of her friends and "alleged inconsistencies" in his statement to police were insufficient to provide probable cause for a warrant. He is incorrect.

Probable cause is less than proof needed to convict, but more than a mere suspicion. *Schneider v. Simonini,* 163 *N.J.* 336, 349–50 (2000). It exists where, given the totality of the circumstances, there is a " 'fair probability that contraband or evidence of a crime will be found in a particular place.' " *State v. Moore,* 181 *N.J.* 40, 46 (2004), (*quoting Illinois v. Gates,* 462 *U.S.* 213, 238, 103 *S.Ct.* 2317, 2332, 76 *L. Ed.*2d 527, 548 (1983)). The central component of probable cause "is a well-grounded suspicion that a crime has been or is being committed." *State v. Nishina,* 175 *N.J.* 502, 515 (2003). This standard for probable cause is identical under both the Fourth Amendment of the Federal Constitution and Article I, Paragraph 7 of the New Jersey Constitution. *State v. Novembrino,* 105 *N.J.* 95, 122 (1987), (*quoting Gates, supra,* 462 *U.S.* at 238, 103 *S.Ct.* at 2332, 76 *L. Ed.*2d at 548.)

"When a search or seizure is made pursuant to a warrant, the probable cause determination must be made based on the information contained within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously." *Schneider, supra,* 163 *N.J.* at 363. Such warrants must be based on "sufficient specific information to enable a prudent, neutral judicial officer to make an independent determination that there is probable cause to believe that a search would yield evidence of past or present criminal activity." *State v. Keyes,* 184 *N.J.* 541, 553 (2005) (citing *Novembrino, supra,* 105 *N.J.* at 120).

***11** The warrant [2] recited C.H.'s interview, recounting in detail six specific incidents of abuse; P.S.'s interview, in which she stated how she learned of defendant's abuse of C.H., which she believed; R.H.'s statement that on one occasion defendant repeatedly asked her "what is good with that ass," which "bothered" her; and C.A.'s and E.W.'s statements recounting when and what C.H. told them about the abuse. Additionally, it included defendant's interview comments. When asked "what he would like to see happen to somebody that did this to a child[,]" defendant responded that he "would want to see if she provoked it, caused it or if she was being stalked." When asked whether he would take a lie detector test, defendant stated that he was "tired and stressed" and that "he might take a lie detector test in two to three months from now."

2 Defendant failed to submit the warrant. However, the following information was contained in the police investigation report.

We have no difficulty concluding probable cause to obtain a warrant for defendant's arrest was presented within the four-corners of the affidavit. Police considered C.H.'s statement and interviewed several witnesses who provided information consistent with C.H.'s account of events.

D.

Defendant next argues prosecutorial misconduct occurred during the State's opening statement, examination of its witnesses and in summation, which amounts to "erroneously and repetitiously [sic] vouch[ing] for the victim's credibility." In support of this argument, defendant identifies several statements in the prosecutor's opening and summation which he maintains deprived him of a fair trial.

Where, as here, there is no objection to the prosecutor's statements at trial, defendant cannot prevail without showing plain error—error clearly capable of prejudicing defendant's right to a fair trial. *State v. Timmendequas,* 161 *N.J.* 515, 576–77 (1999), *cert. denied,* 534 *U.S.* 858, 122 *S.Ct.* 136, 151 *L. Ed.*2d 89 (2001). This standard is a " 'fair trial' test." *Id.* at 575. "[T]o justify reversal, the prosecutor's conduct must have been clearly and unmistakably improper, and must have substantially prejudiced the defendant's fundamental right to have a jury fairly evaluate the merits of his or her defense." *State v. Ingram,* 196 *N.J.* 23, 43 (2008) (citation and internal quotation marks omitted).

Defendant lists these statements as prejudicial. In his opening, the prosecutor stated:

> So, Mr. Prosecutor, how are you going to prove your case? What I'm going to start with is telling you what you're not going to hear; all right. If any of you ... I call it the "CSI [effect]"—you know, if any of you are here waiting for that DNA ... forensic evidence, including semen, and hair, and blood, and fiber—you're not going to have that in this case.
>
> If you're looking for videotapes of the crimes, it's not going to happen. If you're looking for confessions, it's not going to happen, all right. That's the kind of evidence that you are not going to hear in this case.
>
> ***12** So, what evidence do we have? What the State is offering to you, ladies and gentlemen, is evidence—what's known as "direct evidence". It's evidence from the only witness to the crime. Evidence from the victim; the one who lived it and experienced it; and who will come to this courtroom, as she had done previously, and testify under oath and tell you what happened in her life.

Additionally, defendant attacks the following statements:

> So when she's being cross-examined, I'm going to ask you to judge her, but to also understand her and understand the totality of the facts in this case. Because as he [defendant] is entitled to a fair trial, and he will get; she, too, is entitled to a fair trial, and she will get.
>
> ....
>
> Last, when all is said and done, four things will ring true in this courtroom, and I want you to make note of them. The first, [defendant], not only had the opportunity to commit these crimes, he had unfettered access to the child on numerous occasions, to complete these crimes without being caught.
>
> Second, the child in this case, [C.H.] now 14, a freshman in high school. You will find her to be credible and believable, worthy of your conviction, after she's done testifying.
>
> Third, you will also conclude that [C.H.] has absolutely no motive in this case to make up such an allegation, against someone who was so close to her, to her mother, and to her younger sister—the father of [S.S.]
>
> And lastly, ladies and gentlemen, you will conclude that the defendant, indeed, is guilty of the sexual abuse of [C.H.].

We do not view these comments as rising to the level of impermissible vouching for C.H.'s credibility. *See State v. Scherzer,* 301 *N.J.Super.* 363, 445 (App.Div.) (stating although a "prosecutor may argue that a witness is credible ... [he or she] may not personally vouch for the credibility of a State witness or suggest that the witness's testimony has been 'checked out' " (citing *State v. Marshall,* 123 *N.J.* 1, 156 (1991)), *certif. denied,* 151 *N.J.* 466 (1997). Unlike the statements this court examined

in *State v. Walden,* 370 *N.J.Super.* 549, 561 (App.Div.), *certif. denied,* 182 *N.J.* 148 (2004), we cannot find these comments equate to "an expression of the prosecutor's personal belief in [the witness's] truthfulness[,]" or any statement, which "implie[d] that the jury can accept the witness's credibility based upon information outside the trial evidence" or the prosecutor's say so. The strategy is permissible. *See State v. Cagno,* 409 *N.J.Super.* 552, 604 (App.Div.2009) (finding acceptable a rhetorical strategy that did not assure the jury that the witness was credible, "but instead *ask[ed]* the jury to find that the witness was credible."), *aff'd,* 211 *N.J.* 488 (2011).

Defendant also challenges the prosecutor's repeated summation comments, including C.H. "has no interest in the outcome[,]" "she has nothing to gain [,]" and similar statements. These remarks properly responded to defendant's trial strategy that assaulted C.H.'s credibility, by suggesting she repeatedly lied and added details as time went by, essentially "adding clothes" to her initial "naked" lie. This is nothing more than fair comment. *State v. Hawk,* 327 *N.J.Super.* 276, 284 (App.Div.2000) (citing *State v. C.H.,* 264 *N.J.Super.* 112, 135 (App.Div.), *certif. denied,* 134 *N.J.* 479 (1993)).

***13** Defendant also attacks the testimony of Detective Capone and E.W., suggesting they were asked to vouch for C.H. Certainly, the jury has "sole and exclusive province" to determine whether a witness is credible, and "the mere assessment of another witness's credibility is prohibited." *State v. Frisby,* 174 *N.J.* 583, 594 (2002). Having examined the record, defendant's contention is rejected.

During his redirect examination, the following colloquy occurred between the prosecutor and Detective Capone:

> Q: Did [C.H.] or anyone during the course of the investigation give you any reason to doubt or find what she was saying was inconsistent during your investigation?
>
> A: At no time. [C.H.], I mean she—She would have no benefit or no gain from—

Defendant objected to this testimony as non-responsive, which the trial judge sustained. The prosecutor rephrased his question, asking Detective Capone, "Did she give you any reason to, in the investigation, to doubt or call into question what she had been telling you?" Detective Capone responded: "No."

Here, the objectionable testimony was addressed. Reversal is not required as we cannot find that this unsolicited, errant remark provided "some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict that it otherwise might not have reached." *State v. Galicia,* 210 *N.J.* 364, 388 (2012) (alteration in original) (citations and internal quotation marks omitted).

Further, at the conclusion of trial, the jury was instructed that facts inserted into questions that were sustained "does not make those facts true" and that it was their duty alone to judge the credibility of the witnesses. We are satisfied this amounts to mere harmless error.

Similarly, defendant argues E.W. improperly bolstered C.H.'s credibility in two exchanges with the prosecutor. During her direct examination, E.W. testified C.H. told her defendant touched "her breast area and private area." The prosecutor then asked:

> Q: How did you react to this information?
>
> A: Uh, first, it was disbelief, but I know she wouldn't lie to me, so I believed her. And, after that, I kind of dropped the subject since it was weird to talk about.

On redirect, the prosecutor asked E.W.:

> Q: [D]o you have any reason to—to know why [C.W.] would ever make up such a thing like this?
>
> A: She's not a person to lie. She's never told me a lie before.

Defendant's objection followed and the trial judge excused the jury to consider arguments. The judge sustained the objection, and issued the following curative instruction upon the jury's return:

> [Y]esterday you heard testimony from two witnesses, [C.A.] and [E.W.], ... And you had testimony from them as to whether or not they believed the victim and whether or not they believe[d] the allegations. There are certain rules that we have to follow and everybody has to follow them and that's one thing that is in your province only.

> ***14** The only persons [who] are permitted to determine the credibility of any witness is the jurors. So, the testimony that you heard yesterday that it is their opinion that the victim was telling the truth is not to be considered during the course of your deliberations. You have to make your own independent evaluation in credibility findings of each and every witness. Is that understood?

The judge addressed the improper remarks. Juries are presumed to follow the court's instructions. *See State v. Short,* 131 *N.J.* 47, 65 (1993) ("In those and many other circumstances we trust juries to follow instructions."). Reversal is not warranted. *See State v. Murphy,* 412 *N.J.Super.* 553, 560–61 (App.Div.2010) (devising the three-part test to determine "whether an improper comment denied defendant a fair trial and warrants reversal," to include whether timely objections were made; whether the errant remarks were withdrawn; and whether the remarks were stricken from the record and the jury instructed to disregard them).

We do not find prejudice that denied defendant a fair trial. The trial judge took great pains to instruct the jury to disregard opinion comments and struck the testimony. *See State v. Koedatich,* 112 *N.J.* 225, 323 (1998) (concluding that defendant's right to a fair trial was honored because "the defense objected, the objections were sustained, and the court issued curative instructions"). The judge repeated these directions when issuing her final instructions. Overall her directions to disregard the testimony were swift, direct and complete. *See State v. Vallejo,* 198 *N.J.* 122, 134 (2009) (for a curative instruction to be effective, "it must be firm, clear and accomplished without delay."). Defendant is entitled to a fair trial, not a perfect one. *State v. R.B.,* 183 *N.J.* 308, 333–34 (2005).

Affirm.

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