SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0587-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HASSAN A. LABAN a/k/a
HASSAN ABOOLAAN,
HASSAN ABULABAN,
SAMMY ABULABAN,
HASSAN ABULNABAN,
HASSAN ABULABAN, JR.,
HUSSAN ABULUBAN
HASSAN ABULUHAN,
HUSSAN ABULAHAN,
LORENZO BARLIIAS,
LORENZO BARILLAS,
HASSAM ABOLABON,
HAS LABAN, HASSAN
LABAN, and HASSAN
LABEN,

Defendant-Appellant.

Argued October 4, 2022 – Decided November 16, 2022

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 18-10-0603, 18-10-0604 and 18-10-0612.

Zachary G. Markarian, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Zachary G. Markarian, of counsel and on the briefs).

Jennifer E. Kmieciak, Deputy Attorney General, argued the cause for respondent, (Matthew J. Platkin, Attorney General, attorney; Daniel A. Finkelstein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Hassan A. Laban appeals his convictions for robbery, shoplifting, criminal mischief, and possession of controlled dangerous substances (CDS). Defendant was tried by a jury on the shoplifting and mischief charges. After the jury returned guilty verdicts on both counts, defendant pled guilty to robbery and drug possession. He was sentenced on the second-degree robbery conviction to a six-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7. Defendant was sentenced on the third-degree shoplifting conviction to a persistent offender extended term. The judge ordered that six-year prison sentence to run consecutive to the robbery sentence. The judge also imposed a three-year prison term on the third-degree CDS conviction and a one-year prison term on the fourth-degree criminal mischief conviction.

On appeal, defendant contends the trial court made several errors that, while not objected to below, influenced his decision not to testify. He also argues the court committed errors in imposing his sentences. After carefully reviewing the record in view of the arguments of the parties and the applicable legal principles, we affirm the convictions. With respect to sentencing, the State acknowledges the case must be remanded for the trial court to make additional findings as to the overall fairness of imposing consecutive sentences. In view of defendant's argument that it was error for the court to make findings before defendant's allocution, we deem it appropriate to remand for resentencing for the court to make new findings with respect to each applicable sentencing factor based on the entire record in addition to addressing the overall fairness of any consecutive term.

I.

This case arises from three separate incidents that resulted in three separate indictments.

On May 28, 2018, defendant and another person posed as police officers and unsuccessfully tried to rob two victims. Defendant was charged with two counts of second-degree robbery, N.J.S.A. 2C:15-1(a)(1).

On July 8, 2018, a Walmart employee observed defendant attempting to steal $920 worth of merchandise. When approached by employees, defendant dropped the merchandise and fled to his vehicle. A witness saw defendant attempting to elude the employees and tried to block in defendant's car using his own vehicle. Defendant struck the blocking car and narrowly missed the witness. Witnesses provided a description of defendant's car and license plate number to police. Defendant was charged with third-degree shoplifting, N.J.S.A. 2C:20-11(b)(1), and fourth-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1).

On July 25, 2018, a police officer pulled defendant over for a motor vehicle infraction. The officer discovered an open warrant for the shoplifting incident and arrested defendant. A search incident to arrest revealed CDS on defendant's person. An inventory search of the vehicle uncovered a "hatchet-style" knife in the driver-side door. Defendant was charged with third-degree possession of CDS, N.J.S.A. 2C:35–10(a)(1), and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d).

Following a four-day trial in March 2020, a jury convicted defendant of the shoplifting and criminal mischief charges. On April 16, 2020, defendant

pled guilty to second-degree robbery and third-degree possession of CDS pursuant to a post-trial plea agreement. The remaining charges were dismissed.

As noted, the trial judge sentenced defendant to consecutive six-year prison terms for the shoplifting and robbery convictions. The sentences for the CDS and criminal mischief convictions were ordered to run concurrently with the six-year terms.

Defendant raises the following contentions on appeal:

> POINT I
>
> THE TRIAL COURT VIOLATED LABAN'S RIGHT TO TESTIFY IN HIS OWN DEFENSE BY PRECLUDING HIM FROM TESTIFYING REGARDING HIS DIMINISHED CAPACITY AND REQUIRING HIM TO TESTIFY AT A [N.J.R.E.] 104 HEARING BEFORE HE WOULD BE PERMITTED TO TESTIFY AT TRIAL.
>
> A. THE TRIAL COURT'S RESTRICTIONS ON LABAN'S TESTIMONY.
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> B. THE COURT WRONGFULLY PROHIBITED LABAN FROM OFFERING ANY TESTIMONY REGARDING HIS MENTAL HEALTH HISTORY OR THE DEFENSE OF DIMINISHED CAPACITY.
>
> C. THE COURT IMPROPERLY REQUIRED LABAN TO TESTIFY AT A [N.J.R.E.] 104 HEARING OUTSIDE THE PRESENCE OF THE JURY AS A PREREQUISITE TO

TESTIFYING IN HIS OWN DEFENSE AT TRIAL.

POINT II

THE COURT COMMITTED STRUCTURAL ERROR BY REJECTING MITIGATING FACTORS BEFORE ALLOWING LABAN TO SPEAK AT HIS SENTENCING. MOREOVER, LABAN'S SENTENCE IS EXCESSIVE BECAUSE THE COURT REFUSED TO FIND PERTINENT MITIGATING FACTORS AND DID NOT CONSIDER THE FAIRNESS OF THE OVERALL SENTENCE.

A. THE COURT COMMITTED STRUCTURAL ERROR BY FINDING THAT NO MITIGATING FACTORS APPLIED BEFORE ALLOWING LABAN THE CHANCE TO SPEAK IN ALLOCUTION.

B. THE COURT SUBSTANTIVELY ERRED IN REFUSING TO FIND MITIGATING FACTORS SUPPORTED BY THE RECORD.

C. THE COURT FAILED TO CONSIDER THE FAIRNESS OF THE OVERALL SENTENCE IN RUNNING LABAN'S SENTENCES CONSECUTIVE[LY].

II.

We first address defendant's contention that the trial court violated his constitutional rights by precluding him from testifying as to a diminished capacity defense under N.J.S.A. 2C:4-2. We begin our analysis by acknowledging that the right to testify is among the most important

constitutional rights afforded to a person charged with a crime. See State v. Buonadonna, 122 N.J. 22, 23 (1991). So too, a defendant has an absolute right not to testify and to have the jury instructed that it may not draw an adverse inference from the election to remain silent at trial. See Carter v. Ky., 450 U.S. 288, 300 (1981). It follows that the choice whether to testify in the presence of the jury is among the most important decisions a defendant must make. See State v. Savage, 120 N.J. 594, 631 (1990); Buonadonna, 122 N.J at 38–40.

The constitutional guarantee of the right to testify in one's own defense, however, does not preclude a trial court from imposing limitations on a defendant's trial testimony. See, e.g., Nix v. Whiteside, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely."). A defendant's testimony, for example, is not exempt from the Rules of Evidence. A trial court's decision to admit or exclude evidence, moreover, is entitled to deference. State v. Torres, 183 N.J. 554, 567 (2005). It follows that, "[o]n appellate review, the decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

The colloquy between the trial court and defendant regarding his decision whether to testify was unusual because he vacillated repeatedly. Defendant changed his mind on multiple occasions, prompting multiple extended discussions. The trial court's rulings and remarks during those conversations should not be reviewed in isolation. To provide a proper context for our legal analysis, we deem it appropriate to recount in detail the sequence of events that transpired and to reproduce extended portions of the trial transcript.

Prior to the start of proceedings on March 5, 2020—the third day of the trial and last day of testimony—defendant announced that he wanted to testify. However, shortly thereafter, defendant consulted with his attorney and decided he did not want to testify. Defendant explained that his change of heart was based on his viewing of a video of the shoplifting incident. Defendant stated that "[t]here are some details in there that I do remember and there are some details in there that I don't remember. . . . And I came up with almost a page-and-a-half of what I can recollect, . . . how I felt when the events were taking place and so on and so forth." Defendant also noted the fact that his criminal history would be revealed to the jury if he testified factored into his decision.

Defendant was afforded the opportunity to continue to think about whether to testify while the judge and the lawyers reviewed the jury instructions.

At the end of the charge conference, defendant announced that he changed his mind again and now wanted to testify. The judge proceeded to address which of defendant's prior convictions would be admissible for impeachment purposes. See State v. Hedgespeth, 249 N.J. 234, 242 n.3 (2021). The court then recessed the trial for lunch.

When the proceedings resumed, defendant advised the court that he still planned to testify. The following exchange ensued:

> THE COURT: All right. So I thought we would discuss the parameters of Mr. Laban's testimony. Now I could be wrong, but I am going to assume, but I hope I'm wrong, that Mr. Laban during his testimony plans to raise that he is bipolar and schizophrenic. In other words that he suffers from some mental illnesses. And further[,] he may want to provide some testimony that -- because of those mental illnesses that -- I'm paraphrasing[,] [h]e didn't know what he was doing on that particular day. I have no idea what he is going to say.
>
> So I have a little bit of an issue with that because of the notice provisions, of the court rules, and the statute. But again[,] I really shouldn't assume. So, [defense counsel], maybe you could answer –
>
> . . .
>
> [DEFENSE COUNSEL]: He does want the Jury to know that between 2010 and I guess 2018, the day of the incident, that he was suffering from a certain pain because of injuries resulting from a car accident. That he was prescribed Opioids by two doctors. Had been

on these Opioids for about two years until he was cutoff by the doctors. At that point he was already addicted[,] and he began to self-medicate by purchasing heroin and crack cocaine, $300 to $400 a day. And that on the day of the incident he was under the influence of drugs.

I don't think that he wants to offer that testimony in terms of a defense to ["]I didn't know what I was doing.["] It's that he wants to offer that information to the Jury to explain that he was nervous, and he was scared, and it was basically because of the drug addiction.

I think he did want to say that he was being treated for schizophrenia and -- depression was it?

DEFENDANT: Bipolar depression.

[DEFENSE COUNSEL]: Bipolar depression. And I want to satisfy my client's request to conduct his direct so that he can -- as he puts it[,] he wants to tell his story. So[,] I know, and he and I have discussed, that there's rules of evidence. The Court makes final decisions. And there are some things that can't be said. It's just not possible. But that was what I was intending to allow him to testify to.

I wasn't going to personally ask him now were you suffering from drug addiction or were you treated by any sort of physicians. I have no intention to ask him that. I don't have any medical records of it. I don't have any expert to corroborate that. But I think that Mr. Laban is entitled to tell his story of what was going on in his life that day.

Later in the proceedings, counsel reiterated:

[DEFENSE COUNSEL]: [A]ll I can do at this point is let Mr. Laban tell his story about he was abusing drugs because of a condition . . . first initiated by a car accident, and legal prescriptions of Opioids, and then that led into self[-]medicating with heroin and crack cocaine. That's what he wants to tell the Jurors.

In addition to -- he says that he was actually at the Walmart for purposes of returning items that day and received an emergent text message that day. And in his rush to respond to that urgency he walked out without thinking that he had not paid. And then became frightened when [the Walmart employees] swarmed on him. I think [the loss prevention manager] grabbed him by the arm. The reaction between both being high on heroin and people confronting him frightened him and that's why he ran. And that's what he wants to get out.

THE COURT: Okay. So from what you said then[,] do I understand that Mr. Laban is not intending to tell the Jury that he is bipolar and schizophrenic?

[DEFENSE COUNSEL]: I would -- I don't know.

THE COURT: Okay.

[DEFENSE COUNSEL]: I think the Court is telling him not to.

THE COURT: Well I --

[DEFENSE COUNSEL]: [A]nd I have already told him I can't ask him that question. . . . [H]e now knows[,] and he should not slip up.

THE COURT: Okay. But I want to tell him why. So the rules are pretty specific, and I want to tell Mr. Laban

what those rules are so he knows that there are consequences if he breaks them.

So I'm looking at the New Jersey court rules and also the 2C criminal code. And they pretty much say the same thing[,] and I'm going to state what that is. So under New Jersey court rule 3:12-1, which is entitled Notice Under Specific Criminal Code Provisions[:] "[a] defendant shall serve written notice on the prosecutor if he or she intends to rely on a number of the following sections of the code of criminal justice." They include intoxication . . . and lack of requisite state-of-mind under 2C:4-2.

And that requirement is also reflected in the criminal code, which is N.J.S.A. 2C:4-3. Which is entitled Requirement of Notice. And it again states, much like the rule states, "[i]f a defendant intends to claim insanity under 2C:4-1, or the absence of a requisite state-of-mind pursuant to section 2C:4-2[,] he shall." Not may. Not might. "He shall serve notice of such intention upon the prosecuting attorney in accordance with the rules of court", which I just referenced.

Now there's some good language[—]when I say good[,] I mean which explains the reason for those two rules[—][i]n a case [from] 1984, but still a good law. State vs. Burnett, 198 N.J. Super. 53 (App. Div. 1984). And the court says the following. And it refers to the rule I just referenced. "The salutary purpose of the rule is to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated without requiring a substantial continuance. Our Constitution does not protect defendant from the consequences of the defense he makes, nor assure him a right so to defend as to deny the state a chance to check the truth of his position." Internal citations omitted. "Given the

ease with which the defenses of insanity and diminished capacity can be fabricated, the state's interest in protecting itself against a[n] 'eleventh hour' claim is both obvious and legitimate."

So the point of the rule is to put the state on fair notice. And I would say typically[,] if not always[,] in a case where a defendant would like to rely upon his mental health diagnosis to support a claim of diminished capacity[,] an expert would testify about that individual's treatment. I believe there is some in this case[—][d]iagnosis, Mr. Laban says he has two diagnos[es]. And any evidence to support again a claim that a defendant, in this case Mr. Laban, was not able to act purposely or knowingly.

So I just want to make Mr. Laban well aware he cannot, he will not, make any reference to being bipolar, schizophrenic, or anything of that sort. Because frankly it's just not fair to the state. There also must be competent evidence. And actually let me just quote from a different case. That's State vs. Murray, also another Appellate Division case, 240 N.J. Super. 378 (App. Div. 1990). And that case states that "[b]efore a jury issue can arise with respect to the existence of a mental disease or defect, and the absence of the requisite state-of-mind as a result thereof, a defendant must come forward with competent reliable evidence about the existence of such a disease or defect which a reasonable juror could credit." That is Murray at [p]age 399.

Now Mr. Laban might think[,] ["]well I could provide that evidence.["] But my reading of the case law, and there's another case that supports what I'm saying, State vs. Rivera, New Jersey Supreme Court, 205 N.J. 472 (2011). That there has to be more than Mr. Laban feeling free to get up and say ["]well I'm

schizophrenic, I'm bipolar.["] Again hypothetically[,] ["]I wasn't on my medication.["] Add to that that[,] ["]I was on heroin and I didn't act purposely or knowingly.["] Again I'm paraphrasing what the potential testimony could be. And again[,] . . . would [that] be fair to [the prosecutor] because how would she counter that? Now could she counter it with ["]but wait, Mr. Laban, can I just point to a couple of portions of the video tape.["] Sure. But still[,] in all[,] the state has a right to hire an expert, have that expert review reports, records, things of that nature to counter the presentation of that kind of a defense.

Now the intoxication I view that a little bit differently, even though the rule is pretty specific as I just read it. I'm not going to read it again. So -- and of course the court also can relax the rules in the interest of justice. So I understand that -- it seems, [defense counsel], from what you said that the kind of the core, the heart of Mr. Laban's defense, if he chooses to testify about intoxication, is that he was in a hurry, didn't realize he was leaving the store without paying, but coupling that with his reaction was based upon the fact that he was intoxicated by using drugs. Do I have that about right?

[DEFENSE COUNSEL]: That is correct, Judge.

The court then proceeded to conduct a Rule 104[1] hearing concerning the intoxication defense.[2] At the outset of that hearing, the court reiterated that defendant was not to mention his mental health diagnoses. The judge explained:

> Yet I want you to be able to present a defense, but you cannot, you will not talk about being bipolar, schizophrenic. And if you suffer from them[,] you have my sympathies. They are very serious disorders. But for the reasons I mentioned, specifically the rules, the cases, you cannot tell the Jury about that. As much as you may want to, don't do it, sir, because I'll stop you and I'll strike your testimony. And I don't want to have to strike all of your testimony. I don't want to have to strike any of it.

Defendant at this juncture confirmed that he still wanted to testify, whereupon the Rule 104 hearing regarding intoxication began. During the hearing, the following exchange between defense counsel and defendant occurred regarding defendant's mental health history:

> Q: Did you get the help?
>
> A: Yes and no.

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[1] See N.J.R.E. 104 ("The court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. . . . The court may hear and determine such matters out of the presence or hearing of the jury.").

[2] The intoxication defense is set forth in N.J.S.A. 2C:2-8. We address defendant's contention that it was improper for the trial court to require defendant to provide a preview of his trial testimony in Section III of this opinion.

> Q: Well --
>
> A: I went there and I guess it was a withdrawal clinic. And I was there for maybe approximately three weeks. Little did I know now I'm diagnosed with a mental disease.
>
> Q: Okay. Now you remember the Judge's instructions about any sort of mental health issues right.
>
> A: Correct.
>
> Q: Because I think that's what you're getting into now. So I want to personally tell you let's not talk about any sort of schizophrenia or depression. Let's stick with the narcotics, the drugs.

Following the 104 hearing, the court addressed security and logistical concerns relating to defendant's testimony given that he had been in shackles while testifying outside the presence of the jury. Defendant reaffirmed that he wanted to testify and remained on the witness stand. After the jury was brought back into the courtroom, defendant asked to speak with his attorney. Following a brief recess, defendant advised the court that he no longer wanted to testify. The following exchange occurred:

> DEFENDANT: Your Honor, and I know before I guess we had the 10[4] hearing you said something about not being able to bring in my mental illness and so on and so forth. And basically -- I mean it shows a time when I was weak. This whole testimony right now it just shows a time when I was weak[,] and I really don't want

> to project that. And I really don't know what to expect. This is my first time testifying.
>
> THE COURT: Well you know a little bit about what to expect because your attorney asked you questions that he probably would ask in front of the Jury. [The prosecutor] asked some questions that she would ask in front of the Jury, probably some more. I mean I've given you a fair amount of leeway[,] [though] you may not think so[,] because this information that you've testified to I don't think [the prosecutor] had any notice of it. She had heard in the last few weeks about your substance abuse history. But you testified at great length today, so I'm willing to allow you to present most of what you testified to here. But not about any mental health diagnosis. You can't refer to it, you can't hint at it.
>
> DEFENDANT: And just so I know -- I'm just having second thoughts.
>
> THE COURT: Just you're having second thoughts?
>
> DEFENDANT: Yes. I'm just having second thoughts about testifying.
>
> THE COURT: You're having second thoughts about testifying[,] is that what you said?
>
> DEFENDANT: Right. I mean that's a time -- that's two years ago. I mean that's a long time ago. And that's a time in my life I'm trying to forget. And I really don't want anybody to know it other than the people that are already here.

At the conclusion of the extended discussion, the trial court asked defendant, "[o]kay[,] [k]nowing that I would let you testify pretty much about

what you just said here during the hearing[,] [k]nowing that[,] you still don't want to testify?" The defendant then made the final decision not to testify.

We believe the record clearly shows that defendant was not precluded from testifying at trial. Rather, he was only precluded from offering inadmissible lay testimony concerning diagnoses of mental illness.[3] We conclude the trial court did not commit error, much less plain error, in limiting the scope of defendant's testimony in support of a diminished capacity defense under N.J.S.A. 2C:4-2.

We emphasize that the trial court did not base its ruling solely on the fact that defendant had not presented timely written notice of his intention to rely on a diminished capacity defense as required by Rule 3:12-1. Accordingly, defendant's reliance on State v. Bradshaw, 195 N.J. 493 (2008), is misplaced. In that case, our Supreme Court held that the trial judge improperly excluded the defendant's alibi defense based on a violation of the notice-of-alibi rule. Id. at 509. Here, in contrast, the trial judge precluded defendant from testifying about mental illness because defendant did not provide competent evidence of a

[3] Prior to trial, defendant sought to develop evidence concerning his history of mental illness, but his attorney and the Office of the Public Defender (OPD) determined that a diminished capacity defense was not viable. OPD refused to hire an expert witness.

mental illness. See Murray, 240 N.J. Super. at 399 (requiring "competent reliable evidence" of the existence of a mental illness before a diminished capacity defense is presented to the jury).

Importantly, the trial judge patiently explained to defendant the narrow limitation on his testimony and the reasons for imposing that limitation. The record thus shows that defendant was not foreclosed from testifying as to the events that occurred at the Walmart. Furthermore, notwithstanding the defendant's failure to comply with Rule 3:12-1, the judge permitted him to testify as to intoxication. We are thus satisfied that the judge explained to defendant that the only limitation on the scope of his testimony was that he could not discuss his claimed diagnoses of schizophrenia and bipolar depression.

We thus conclude the trial court's ruling was not clearly capable of producing an unjust result. R. 2:10-2.

III.

We turn next to defendant's contention that the trial court committed plain error by requiring defendant to "preview the remaining contents of the testimony defendant intended to offer at trial at a [Rule] 104 hearing, subject to cross-examination by the prosecution." "[T]he requirement that a defendant outline his testimony through an offer of proof is beset with pitfalls." State v.

Whitehead, 104 N.J. 353, 361 (1986). In Whitehead, the Court held that a defendant was not required to testify at trial or provide a proffer of testimony in order to appeal a trial court's decision that prior convictions could be used to impeach his testimony. Id. at 361–62. The Court explained that "requiring the defendant to make an offer of proof exposes him to the tactical disadvantage of prematurely disclosing his testimony." Id. at 361.

However, we are not aware of any per se rule that categorically precludes a trial court from convening a 104 hearing regarding evidence or testimony to be offered by a defendant in his or her own defense. Rather, in State v. Breakiron, our Supreme Court explained it is within the trial court's "sound discretion" to determine whether a defendant's burden regarding the existence of a mental illness or defect must be met at an evidentiary hearing. 108 N.J. 591, 619–20 (1987). In this instance, we believe the trial court acted within its discretion in conducting a Rule 104 hearing concerning defendant's proposed intoxication defense in view of his failure to comply with the notice requirement set forth in Rule 3:12-1.

Defendant does not dispute he failed to provide written notice of his intention to assert an intoxication defense in discovery. The remedy of convening a Rule 104 hearing was appropriate in this instance, especially

considering that the gravamen of defendant's intoxication defense was he suffered from an addiction. A hearing was thus appropriate to determine whether the trial must be adjourned to afford the prosecution an opportunity to explore the eleventh-hour defense of intoxication.

We reiterate and stress, moreover, that the trial court did not preclude an intoxication defense. We also emphasize that counsel did not object to the remedy the court fashioned for the discovery violation. We thus conclude that the trial court's decision to convene a Rule 104 hearing was not clearly capable of producing an unjust result. R. 2:10-2.

IV.

We next address defendant's arguments regarding the sentence that was imposed. We review sentences under an abuse of discretion standard. State v. Pierce, 188 N.J. 155, 166 (2006). Under that standard, a "reviewing court must not [simply] substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). Rather,

> [t]he appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the

> sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364–65 (1984)).]

In imposing a sentence, the court must make an individualized assessment of the defendant based on the facts of the case and the aggravating and mitigating sentencing factors. State v. Jaffe, 220 N.J. 114, 121–22 (2014). To facilitate appellate review, the sentencing court must "state reasons for imposing such sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting [the] sentence." R. 3:21-4(h); accord Fuentes, 217 N.J. at 73; see also N.J.S.A. 2C:43-2(e) (requiring the sentencing court to state the "factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence"). An appellate court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). However, deferential review of a sentence "presupposes and depends upon the proper application of sentencing considerations." State v. Melvin, 248 N.J. 321, 341 (2021) (quoting Case, 220 N.J. at 65); accord State v. Trinidad, 241 N.J. 425, 453 (2020).

Defendant contends the trial court committed structural error by essentially ruling on certain aggravating and mitigating factors before defendant

exercised his right of allocution. Our review of the record suggests the trial court made no binding findings before providing defendant an opportunity to personally address the court. For example, the judge discussed mitigating factor four[4] at length after defendant spoke. However, because we are constrained for other reasons to remand for the trial court to make additional sentencing findings, we deem it appropriate for the court to make—and as appropriate reaffirm—findings on all applicable aggravating and mitigating factors accounting for defendant's allocution.

Although the trial court made specific findings with respect to many of the applicable aggravating and mitigating sentencing factors, we also agree with defendant's contention—which the State does not dispute—that the court did not make specific findings with respect to mitigating factor six, N.J.S.A. 2C:44-1(b)(6) ("[t]he defendant has compensated or will compensate the victim of defendant's conduct for the damage or injury that the victim sustained, or will participate in a program of community service"); and mitigating factor nine, N.J.S.A. 2C:44-1(b)(9) ("[t]he character and attitude of the defendant indicate that defendant is unlikely to commit another offense"). Furthermore, it is not

[4] N.J.S.A. 2C:44-1(b)(4) ("[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense").

disputed that the trial court did not make findings regarding the overall fairness of the consecutive sentences imposed as required by State v. Torres, 246 N.J. 246 (2021).

Because a remand is required, we choose not to address defendant's contentions that that trial court erred in declining to apply mitigating factor one, N.J.S.A. 2C:44-1(b)(1) ("[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner."); mitigating factor four, N.J.S.A. 2C:44-1(b)(4) ("[a] lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30, or the defendant took advantage of a position of trust or confidence to commit the offense."); and mitigating factor eight, N.J.S.A. 2C:44-1(b)(8) ("[t]he defendant committed the offense against a police or other law enforcement officer . . . the defendant committed the offense because of the status of the victim as a public servant; or the defendant committed the offense against a sports official . . .").

We deem it prudent, if only out of an abundance of caution, for the court on remand to make new findings in light of the entire record. The court on remand should make its findings as to all applicable aggravating and mitigating

circumstances and as to the overall fairness of imposing consecutive sentences based on the existing record. To facilitate the trial court's analysis, we direct the parties to provide the court with copies of the briefs filed on appeal, if they have not already done so.

To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion in this opinion. Rule 2:11-3(e)(1)(E).

Affirmed in part and remanded in part. We do not retain jurisdiction.