SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0624-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

B.J.,

Defendant-Appellant.

Submitted May 16, 2017 – Decided July 25, 2017

Before Judges Fisher, Vernoia and Moynihan.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-07-2084.

Joseph E. Krakora, Public Defender, attorney for appellant (Monique Moyse, Designated Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Linda A. Shashoua, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals his convictions and aggregate sixty-year custodial sentence following a jury trial for attempted murder,

endangering the welfare of a child, terroristic threats, aggravated assault and weapons charges. Based on our review of the record in light of the applicable law, we affirm defendant's convictions and sentence, vacate the court's order requiring restitution, and remand for a restitution hearing.

I.

The criminal charges against defendant arise out of a January 24, 2013 incident during which he shot his eleven-year-old daughter Y.P. in the face with a handgun, and threatened and assaulted Y.P.'s mother S.P. (Sally),[1] and her mother's boyfriend W.M. (Warren). Defendant was arrested shortly after leaving the scene.

Defendant was charged in a fourteen-count indictment with: first-degree attempted murder of Y.P., N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a) (count one); second-degree endangering the welfare of a child, Y.P., N.J.S.A. 2C:24-4(a) (count two); first-degree attempted murder of Warren, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a) (count three); third-degree terroristic threats against Sally, N.J.S.A. 2C:12-3(a), (b) (count four); third-degree terroristic threats against Y.P., N.J.S.A. 2C:12-3(a), (b) (count five); third-degree terroristic threats against Warren, N.J.S.A. 2C:12-3(a), (b) (count six); fourth-degree aggravated assault

[1] We employ initials and pseudonyms to protect the privacy of the minor child and other victims in this matter.

against Y.P. by pointing a firearm at her, N.J.S.A. 2C:12-1(b)(4) (count seven); fourth-degree aggravated assault against Warren by pointing a firearm at him, N.J.S.A. 2C:12-1(b)(4) (count eight); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count nine); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count ten); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(b) (count eleven); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count twelve); third-degree unlawful possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a) (count thirteen); second-degree possession of a weapon by a certain person not to have weapons, N.J.S.A. 2C:39-7(b) (count fourteen).

Prior to defendant's jury trial, the court dismissed count thirteen. Defendant proceeded to trial on the first twelve counts of the indictment and after the jury returned its verdict, conducted a separate trial before the same jury on the certain persons charge contained in count fourteen.[2]

The evidence presented during the trials showed that Y.P. lived with Sally, Warren, her two sisters and an uncle, B.M. (Barry). Defendant, Y.P.'s biological father, visited Y.P. about once each month at her home.

[2] See State v. Ragland, 105 N.J. 189, 193-94 (1986).

During a January 24, 2013 visit, Warren let defendant in the home and defendant sat on the living room stairs. Warren was also in the living room seated with Y.P. on a sofa. Sally sat nearby.

After a few minutes, defendant pulled a handgun out of his pants and Y.P. reacted by saying, "he's got a gun, he's got a gun." Y.P. screamed at defendant, telling him to leave the house with the gun. Sally asked if the gun was real and defendant said it was not. Defendant told Y.P. to "shut up," but she continued screaming, saying, "Get the gun out of my mommy['s] house," and "you don't love me, you don't love my mother, you don't respect my mother to bring that gun into her house." Sally told defendant to leave the house with the gun, but defendant repeatedly stated, "It's a fake gun." He said, "Allah Akbar, we're all gonna die, we must die." Y.P. repeatedly stated to Warren, "Daddy, I'm scared."

Defendant moved toward the door, but then turned around and walked directly toward Y.P. He told her to "shut up," and shot her in the face. Sally and Warren fell back onto the sofa. Defendant stood over Warren and pointed the gun at him. Warren pled for defendant not to shoot him, and believed defendant pulled the gun's trigger but it did not fire.

Warren then charged at defendant in an effort to get the gun. As Warren and defendant wrestled over the gun, defendant repeatedly screamed, "What did I do? It wasn't real." Warren took the gun

from defendant and realized there were bullets jammed inside of it. He cleared the jam and replaced the gun's magazine. Sally attended to Y.P. and saw her face bleeding. Sally screamed, "[H]e shot my daughter. . . . My baby's dead," as defendant repeated, "Allah Akbar, we all must die."

Defendant ran from the house as Warren shot at him with the gun. Warren pursued defendant and continued to fire gunshots as defendant ran across the street toward an apartment complex.

Police officers arrived. Sally told the officers where defendant went and they located defendant walking away with blood on his shirt. The officers approached defendant, but he continued walking and disobeyed the officers' commands to stop and surrender. The officers tackled defendant and he kicked and punched them in an attempt to get away. The officers subdued defendant and placed him under arrest. The officers returned to Y.P.'s home, where Warren turned over defendant's handgun.

Y.P. was transported to the hospital. It was determined a bullet entered her left cheek, severed her spinal cord, and lodged in her left chest, causing a lung injury that required she be placed on a ventilator. She spent four months in the hospital, underwent multiple surgeries, and was discharged to a spinal cord injury center for rehabilitation. She is paralyzed below the waist,

confined to a wheelchair, and has diminished sensations in her arms and hands.

Following the presentation of the evidence, the jury found defendant guilty of first-degree attempted murder of Y.P. (count one), second-degree endangering the welfare of a child (count two), two counts of third-degree terroristic threats (counts five and six), two counts of fourth-degree aggravated assault (counts seven and eight), second-degree possession of a handgun for an unlawful purpose (count nine), second-degree unlawful possession of a handgun (count ten), and, following a second trial before the same jury, second-degree possession of a weapon by certain persons not to have weapons (count fourteen). The jury also found defendant guilty of lesser-included offenses of harassment, N.J.S.A. 2C:33-4, under count four, and resisting arrest, N.J.S.A. 2C:29-2(a)(1), under counts eleven and twelve. Defendant was found not guilty of the attempted murder of Warren alleged in count three.

The court sentenced defendant to an extended term fifty-year sentence on the first-degree attempted murder charge under N.J.S.A. 2C:43-7, subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2. The court imposed a consecutive ten-year sentence with a five-year period of parole ineligibility on defendant's conviction under count fourteen for second-degree possession of a weapon by certain persons not to have weapons. The

sentences imposed on the remaining counts were made concurrent to the attempted murder sentence. This appeal followed.

On appeal, defendant makes the following arguments:

> POINT ONE
>
> THE TRIAL COURT DENIED [DEFENDANT'S] RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN IT RULED THAT HE HAD WAIVED HIS RIGHT TO TESTIFY. (Not Raised Below).
>
> POINT TWO
>
> THE TRIAL COURT ERRED IN FAILING TO ORDER A COMPETENCY EVALUATION BECAUSE THE RECORD SUPPORTS A BONA FIDE DOUBT AS TO [DEFENDANT'S] COMPETENCY TO STAND TRIAL. (Not Raised Below).
>
> POINT THREE
>
> THE TRIAL COURT'S ERRONEOUS JURY CHARGES ON IDENTIFICATION AND FLIGHT DEPRIVED [DEFENDANT] OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL. (U.S. Const. [amends. V, VI, and XIV]; N.J. Const. [art. I, ¶¶ 1, 9, and 10).] (Not Raised Below).
>
> > 1. The trial court deprived [defendant] of due process and a fair trial when it failed to instruct the jury properly on identification when his sole defense was misidentification.
> >
> > 2. The trial court deprived [defendant] of due process and a fair trial when it failed to charge the jury properly on flight.
> >
> > . . . .

POINT FOUR

THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A MANIFESTLY EXCESSIVE SENTENCE AND FAILING TO HOLD A RESTITUTION HEARING.

A. The court erred by imposing the maximum sentence.

B. The court erred by failing to hold a restitution hearing.

II.

Defendant's arguments concerning the court's alleged trial errors are raised for the first time on appeal. We therefore consider the arguments under the plain error standard and will not reverse unless the errors are "clearly capable of producing an unjust result." R. 2:10-2. We reverse only where there is a possibility of an unjust result "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. G.V., 162 N.J. 252, 280 (2000) (quoting State v. G.S., 145 N.J. 460, 473 (1996)). We find no such errors here.

We first consider defendant's argument that the court was obligated to sua sponte order a competency hearing and determine his fitness to proceed during the trial. He claims that statements he made to the court and his trial counsel's purported inability to communicate with him raised a bona fide issue about his

competence, and the court erred by failing to order a competency hearing.

"The court decides whether a competency hearing is required; there are 'no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed.'" State v. Gorthy, 226 N.J. 516, 530 (2016) (quoting Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 103, 118 (1975)). "Where evidence raises a bona fide doubt as to a defendant's competence, a competency hearing must be held." State v. Purnell, 394 N.J. Super. 28, 47 (App. Div. 2007).

"However, absent any indication of incapacity to stand trial, the court is not bound to interrupt a trial." State v. Spivey, 65 N.J. 21, 36 (1974). "'Mere suggestion' of incapacity is not sufficient." Ibid. "No court would be bound to stop, or justified in arresting the progress of a trial by a mere suggestion of, but in the absence of any substantial evidence of the existence of a degree of mental disorder which would unfit the defendant from conducting his cause or instructing his counsel." Id. at 36-37 (quoting State v. Peacock, 50 N.J.L. 34, 36 (Sup. Ct. 1887), rev'd on other grounds, 50 N.J.L. 653 (E. & A. 1888)).

Although the court may sua sponte order a competency hearing, "the standard of review for failure to initiate the inquiry is a strict one." Id. at 37. The court's failure to raise the issue

"will not be reviewed on appeal, unless it clearly and convincingly appears that the defendant was incapable of standing trial." State v. Lucas, 30 N.J. 37, 73-74 (1959). To satisfy the standard, there must be a "'bona fide doubt' as to defendant's competence to stand trial." Spivey, supra, 65 N.J. at 37 (quoting Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815, 822 (1966)). "It is to be ordinarily expected that defense counsel, who is in a far better position than the trial judge to assay the salient facts concerning the defendant's ability to stand trial and assist in his own defense, would originate the request that such an inquiry be conducted." Ibid. (quoting Lucas, supra, 30 N.J. at 73-74).

The standard for determining competency to stand trial is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[,] and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824, 825 (1960). In New Jersey, competency requires that a defendant "appreciate his presence in relation to time, place and things," N.J.S.A. 2C:4-4(b)(1), and understand his presence in a courtroom facing criminal charges; the role of the judge, prosecutor, and defense attorney; his rights and the consequences of waiving them;

and his ability to participate in his own defense, N.J.S.A. 2C:4-4(b)(2). See Gorthy, supra, 226 N.J. at 531-32.

Based on our careful review of the trial record, we are not persuaded defendant's statements to the court raised a bona fide doubt about his competency. To be sure, defendant declared he was "not mentally fit," needed to "see a psychiatrist," and did not understand what was going on. But when viewed in context, the statements did not clearly and convincingly create a bona fide doubt as to defendant's competence under N.J.S.A. 2C:4-4(b)(1) requiring a sua sponte order for a competency hearing.

Despite his self-serving and conclusory assertions to the contrary, defendant demonstrated an understanding of the proceedings throughout the entirety of the trial. The record shows that during his limited direct interactions with the court, defendant referred to the judge as "Your Honor," and responded to the judge's inquiry concerning any pre-trial issues by asking if he could make a statement "for the record." When permission was granted, defendant challenged the subject matter jurisdiction of the court, declared he was appearing "without prejudice, and without [waiving] any rights, remedy, statutorial [sic] or procedural," and said he did not "want to participate" in the proceeding. When defendant was questioned by the court concerning his election not to testify, he made the self-serving statement

that he did not understand and was not "fit for trial," but he also declared the he did not want to "do nothing."

Beyond his conclusory assertions, the record is devoid of evidence that any purported self-proclaimed mental condition or lack of understanding affected his ability to understand his surroundings, the nature of the proceedings, or his ability to participate in his own defense. Moreover, defendant's counsel, who was in the best position to assess defendant's competence, never raised the issue despite working directly with defendant, conferring with him before and during the trial, and consulting with him about his election not to testify. We find defendant's unsupported and self-serving declarations during the trial did not give rise to a bona fide doubt as to his competency to stand trial, and the court did not err by failing to sua sponte order a competency hearing.

III.

Defendant also contends for the first time on appeal that the court erred by finding he knew he had the right to testify at trial and waived his right to testify. He argues that although the court informed him on two separate occasions about his decision whether or not to testify, the court committed plain error by determining he waived his right to testify. We find the argument to be without sufficient merit to warrant a discussion in a written

opinion, R. 2:11-3(e)(2), other than to offer the following comments.

The decision to testify in a criminal case belongs to the defendant, and it "is an important strategical choice, [to be] made by defendant in consultation with counsel." State v. Savage, 120 N.J. 594, 630-31 (1990). When a defendant is represented by counsel, the court is not required to inform defendant of his right to testify or explain the consequences of the choice, and defendant's waiver of the right to testify "need not be on the record to withstand appellate scrutiny." State v. Buonadonna, 122 N.J. 22, 36 (1991).

Here, the record shows that although the court was not obligated to do so, on two occasions it explained to defendant that he had the right to testify at trial or to remain silent. Defendant's counsel was afforded ample time during the course of the trial to discuss defendant's decision and confirmed he conferred with defendant about his options. When the court asked defendant about his decision, defendant repeated his conclusory assertion that he was not fit for trial and said he did not "want to proceed with nothing." Counsel explained he discussed the issue with defendant and gave defendant "every opportunity . . . to think about it." Defendant, however, refused to respond to the court's repeated questioning about his decision, and the judge

indicated that he would accept the refusal to respond as an expression of a decision not to testify. Neither defendant nor his counsel objected to the court's interpretation of defendant's silence.

Moreover, the court's acceptance of defendant's silence as an election not to testify was not dispositive and did not preclude defendant from testifying if he chose to do so. The court did not bar defendant from testifying. Following the court's final colloquy with defendant and his counsel concerning defendant's decision about testifying, defendant had the opportunity to call witnesses, including himself, in support of his defense. Instead, defendant rested without calling any witnesses. Under such circumstances, we cannot conclude that the court's colloquy with defendant concerning his decision whether or not to testify, and its acceptance of defendant's silence as an election not to testify, was clearly capable of producing an unjust result.

IV.

Defendant next argues the court erred by failing to charge the jury on identification and by failing to provide a complete jury instruction on flight. Defendant acknowledges he did not request the omitted charges or object to the omission of them, but contends the alleged errors constitute plain error warranting reversal. We are not persuaded.

Where a party does not object to a jury charge, "there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012). Where there is no objection to a jury charge and the charge is challenged on appeal, we review the jury instructions for plain error and determine if the alleged error is "clearly capable of producing an unjust result." State v. Montalvo, ___ N.J. ___, ___ (June 8, 2017) (slip op. at 31) (quoting R. 2:10-2); accord Singleton, supra, 211 N.J. at 182. Establishing "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" Montalvo, supra, slip op. at 31 (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

We reject defendant's contention that the court's failure to provide an identification charge constitutes plain error. The model jury instruction on identification should generally be given in every case where identification is a legitimate issue. State v. Cotto, 182 N.J. 316, 325-26 (2005). "When identification is a 'key issue,' the trial court must instruct the jury on identification, even if a defendant does not make that request."

Id. at 325 (quoting State v. Green, 86 N.J. 281, 291 (1981)). Identification is a "key issue when '[i]t [is] the major . . . thrust of the defense,' particularly in cases where the State relies on a single victim-eyewitness." Ibid. (quoting Green, supra, 86 N.J. at 291); see, e.g., State v. Frey, 194 N.J. Super. 326, 329 (App. Div. 1984) ("The absence of any eyewitness other than the victim and defendant's denial of guilt, made it essential for the court to instruct the jury on identification.").

Here, identification was not a key issue at trial because defendant's identity was not disputed. Defendant was identified at trial by his daughter Y.P., who testified that defendant held a gun, told her to "shut up," and shot her in the face. Defendant was also identified by Sally, Warren and Barry, each of whom knew defendant for long periods prior to the incident.

Defendant argues identification was a key issue because it is unclear whether Y.P. was injured by a gunshot fired by defendant or one fired by Warren following his tussle with defendant for the handgun. But that is not an identification issue; it is a causation issue. Where, as here, identification was not an issue at all, the court did not err by failing to sua sponte give an identification charge. See State v. Gaines, 377 N.J. Super. 612, 625-27 (App. Div.) (finding failure to provide identification charge is not plain error where identification was not a key issue and there was

overwhelming identification evidence), certif. denied, 185 N.J. 264 (2005); cf. State v. Davis, 363 N.J. Super. 556, 561 (App. Div. 2003) (holding an identification instruction was required where a misidentification defense "although thin, was not specious").

Moreover, the jury was otherwise clearly instructed that the State must prove beyond a reasonable doubt defendant committed the crimes for which he was charged. Under all of the circumstances presented, we are not convinced the court's failure to sua sponte give an identification charge had the clear capacity to bring about an unjust result. Montalvo, supra, slip op. at 31.

V.

Defendant also contends the court erred by providing an incomplete charge on flight. The model jury charge on flight requires that where the defense has not denied that the defendant departed the scene "but has suggested an explanation" for the defendant's departure, the court shall advise the jury of the explanation. The court must also instruct the jury that if it determines the explanation is credible, an inference of the defendant's consciousness of guilt should not be drawn by the departure. See Model Jury Charge (Criminal), "Flight" (May 2010).

Defendant argues there was evidence showing he left the scene because Warren was shooting at him, and the jury should have been

advised that if it accepted defendant's reason for his departure, it should not infer his departure showed consciousness of guilt. We are not convinced it was plain error for the court to omit that portion of the flight charge. We presume the omission of the instruction was "unlikely to prejudice the defendant's case" because defendant did not request it or object to the instructions that did not include it. Singleton, supra, 211 N.J. at 182.

Moreover, the jury was instructed it could only consider defendant's flight as evidence of consciousness of guilt if it determined "defendant's purpose in leaving was to evade accusation or arrest for the offense[s] charged in the indictment." Model Jury Charge (Criminal), "Flight" (May 2010). The jury instruction given by the court provided "sufficient guidance" to the jury and did not create any "risk that the . . . ultimate determination of guilt or innocence [was] based on speculation, misunderstanding, or confusion." State v. Olivio, 123 N.J. 550, 567-68 (1991). We presume the jury followed the court's instructions, State v. Burns, 192 N.J. 312, 335 (2007), and are satisfied the jury would not have inferred consciousness of guilt if it also determined defendant departed because he was being shot at by Warren. We therefore discern no basis to conclude the omission of the instruction was clearly capable of producing an unjust result. R. 2:10-2.

VI.

Defendant last argues his sixty-year aggregate sentence is excessive and that the court erred by ordering that he make restitution without first conducting a restitution hearing. He claims the court erred by failing to find the following mitigating factors: two, defendant did not contemplate that his conduct would cause harm, N.J.S.A. 2C:44-1(b)(2); four, there were substantial ground tending to excuse his conduct, though failing to establish a defense, N.J.S.A. 2C:44-1(b)(4); and eight, defendant's conduct was the result of circumstances unlikely to recur, N.J.S.A. 2C:44-1(b)(8). He also contends the court placed too much weight on aggravating factor nine, the need to deter the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). Defendant claims the court's failure to find the mitigating factors and its error in weighing aggravating factor nine resulted in an excessive sentence.

We review a "trial court's 'sentencing determination under a deferential standard of review.'" State v. Grate, 220 N.J. 317, 337 (2014) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)). We may "not substitute [our] judgment for the judgment of the sentencing court." Lawless, supra, 214 N.J. at 606. We must affirm a sentence if: (1) the trial court followed the sentencing guidelines; (2) its findings of fact and application of aggravating

and mitigating factors were based on competent, credible evidence in the record; and (3) the application of the law to the facts does not "shock[] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)); see also State v. Case, 220 N.J. 49, 65 (2014).

A sentencing court must find mitigating factors that are supported by the record, and should accord them such weight as it deems appropriate. Grate, supra, 220 N.J. at 338; Case, supra, 220 N.J. at 64-65. Defendant contends the court erred by failing to find mitigating factors two, four and eight, but did not request that the court find those factors at the time of sentencing. See State v. Blackmon, 202 N.J. 283, 297 (2010) ("Although there is more discretion involved in identifying mitigating factors than in addressing aggravating factors, those mitigating factors that are suggested in the record, or are called to the court's attention, ordinarily should be considered and either embraced or rejected on the record.") (emphasis added); State v. Bieniek, 200 N.J. 601, 609 (2010) (encouraging trial courts to address each mitigating factor raised by defendants).

Nevertheless, the court considered each of the mitigating factors and determined none were supported by the record. And the record supports the court's determination. Defendant's assertion the court should have found mitigating factor two is undermined

by the evidence that he carried a handgun, used it to shoot his daughter, and caused her debilitating injuries. Defendant's claimed entitlement to findings of mitigating factors four and eight is based on what he alleges a mental health evaluation, which was never requested or performed, might have shown. Thus, there was no evidence before the court supporting a finding of mitigating factors two, four and eight.

We also reject defendant's contention the court erred in its weighing of aggravating factor nine. Defendant's assertion that aggravating factor nine is of "limited penal significance" lacks merit. Our Supreme Court has noted that the need for deterrence is one of the most important factors in sentencing. State v. Fuentes, 217 N.J. 57, 78-79 (2014). In Fuentes, the Court stated that in considering aggravating factor nine, a sentencing court must make a qualitative assessment of the defendant's risk of recidivism in light of the defendant's history, including but not limited to the defendant's criminal history. Id. at 79. Here, the court fulfilled this mandate by considering defendant's personal history and extensive juvenile adjudications and adult criminal history in determining the need for deterrence.

We are not persuaded by defendant's argument that his sentence is excessive. To be sure, the court imposed a long sentence, but defendant was subject to a mandatory extended term sentence of

between twenty years and life in prison, N.J.S.A. 2C:43-7. The record shows the court carefully considered defendant's prior criminal record and the circumstances of the offenses for which he was convicted, correctly found and weighed the aggravating and mitigating factors, and imposed a sentence in accordance with the applicable legal principles that does not shock our judicial conscience. Bolvito, supra, 217 N.J. at 228.

We are, however, persuaded the court erred by ordering that defendant pay $971.29 in restitution. To properly determine the amount of restitution, a sentencing court must "take into account all financial resources of the defendant, including the defendant's likely future earnings, and . . . set the amount . . . that is consistent with the defendant's ability to pay." N.J.S.A. 2C:44-2(c)(2). Where necessary, the court must conduct a hearing to determine "the amount the defendant can pay and the time within which he can reasonably do so." State v. Topping, 248 N.J. Super. 86, 90 (App. Div. 1991) (quoting State v. Paladino, 203 N.J. Super. 537, 547 (1985)). The record lacks any showing the court considered either defendant's financial resources or ability to pay. We are therefore constrained to vacate the restitution order and remand for reconsideration of defendant's obligation, if any, to make restitution.

Defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We affirm defendant's convictions and sentences, vacate that portion of the judgment of conviction ordering that defendant make restitution, and remand for reconsideration of the State's request for restitution in accordance with this opinion. We do not retain jurisdiction.