SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0772-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KAZMECK HOLLINGSWORTH, a/k/a DARNELL DRAYTON, KAZ HOLLINGSWORTH, DARNEL DRAYTON, MARCUS N. FISHER, KAZMACK HOLLINGSWORTH, KAZMECK HOLLINSWORTH, KWAZEEK FISHER, KWA-ZZEK FISHER, and BIZZ,

Defendant-Appellant.

Submitted February 7, 2017 – Decided August 18, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 10-02-0648.

Joseph E. Krakora, Public Defender, attorney for appellant (Gilbert G. Miller, Designated Counsel, on the brief).

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

PER CURIAM

In his appeal, defendant argues his convictions for aggravated assault and weapons offenses should be reversed because the trial judge erred in failing to grant a motion for a mistrial and because prosecutorial misconduct deprived him of a fair trial. He also argues the sentence imposed was manifestly excessive. We affirm.

I.

The evidence relevant to defendant's arguments can be summarized as follows.

The victim, R.D., was shot several times at approximately 2:30 a.m. on June 28, 2009. Responding to a 911 call, Camden Police Officer Craig Milbury found R.D. lying on the steps outside an apartment, bleeding. R.D. told Officer Milbury he was in pain and had been shot, but when asked, did not identify who had shot him. He was transported to the hospital where he underwent surgery. He later made a full recovery.

D.M., the victim's aunt, lived on the second floor of one of the apartments. She told Officer Milbury she did not see what happened to R.D. D.M. later gave a taped statement in which she stated she did not see what happened to R.D., but that he yelled out to her that he had been shot by defendant and M.H.

In statements to the police, D.M.'s daughter, Da.M., and M.M., a friend of the victim, said they saw defendant had a gun before R.D. was shot. They also both reported that M.H., defendant's cousin and the father of Da.M.'s child, was also present at the time of the shooting. Da.M. told police she saw defendant shoot R.D. However, she later wrote a letter to the trial court recanting that statement, insisting she "really didn't see everything that happened to [R.D.]."

R.D. gave a taped statement to defense investigator Eric Johnson in which he denied being shot by defendant.

The investigation of the crime scene revealed two shell casings near the curb of the street, blood on the sidewalk, and two bloody t-shirts on the steps where R.D. was found. No gun was recovered.

At trial, D.M. testified she was inside her apartment when she heard gunshots outside her open window. She looked out the window and saw R.D. collapse on the steps outside her apartment, bleeding and screaming to her that defendant and M.H. shot him. She also saw defendant and M.H. walking away from R.D. after he was shot.

M.M. testified she was sitting on the stoop with R.D., Da.M. and another friend when defendant, M.H. and a third unidentified person approached. She was then asked to identify defendant in

the court room:

> Q. Okay. So let's start with [defendant], do you see him sitting here in the courtroom today?
>
> A. Yeah.
>
> Q. Okay. Could you describe what he's wearing?
>
> A. The khaki inmate suit.

Defendant was not wearing an "inmate suit." He was wearing a khaki-colored shirt and jeans.

Defense counsel requested a sidebar conference and moved for a mistrial. The trial judge did not explicitly deny the motion but stated that, because defendant was "not wearing inmate garments," the proper response would be

> to indicate to the witness that, given how she's described his shirt it appears to me she's described the defendant. I'm going to have him stand up and ask if that's who she's referring to. And the jury will see and I'll indicate on the record that he's not — we'll indicate what he's wearing.

Defense counsel argued this response "just highlights the problem," and asked that the trial move on without any curative charge to the jury because it would be "ineffective." The trial judge honored the request, and stated,

> I'll just make sure to let the record reflect the fact that the defendant is not wearing a khaki inmate suit, he's wearing blue pants. Some of the jurors can see his pants, some

> probably can't. They're blue. He has on a tan colored shirt, which is not a Camden County issue shirt.

After the sidebar conference concluded, the trial judge stated to the jury, "the witness has indicated the person wearing the khaki colored shirt which is the defendant."

When M.M.'s testimony resumed, she recalled R.D. and M.H. had an argument, during which defendant "told [M.H.] to step back" and then "lift[ed] up his shirt showing . . . the gun." After she saw the gun, M.M. ran inside and heard gunshots go off, but did not see who shot R.D. She also could not recall if defendant had pointed the gun at R.D.

Da.M. testified there was no third unidentified person, that only M.H. and defendant approached the stoop. She confirmed M.H. and R.D. had an argument and defendant told M.H. "to move, get out the way." She recalled seeing defendant point the gun at R.D.'s head before shooting him, but explained the gun did not go off and instead made a clicking sound when defendant pulled the trigger. Then, "everybody took off running" into the apartment. She remained, however, and saw defendant shoot R.D.

Da.M. denied seeing M.H., or anyone other than defendant, have a gun in their possession. Da.M. was also questioned about her retraction letter. She admitted to writing the letter, but testified she did see who shot R.D., despite the contents of the

letter.

R.D. testified he and defendant were on good terms, and denied ever having any problems with him. He knew defendant for about twenty years and said they were "childhood buddies." He considered defendant's two sons to be his "little cousins" and defendant to be "like family." When asked about the prospect of "snitching on a family member," R.D. stated, "I wouldn't do it if my heart depended on it . . . [e]ven if it was the truth" because "family [comes] before anything else."

R.D. admitted defendant was present when he was shot, but denied defendant was the one who shot him. Instead, he described the shooter as a dark-skinned male whom he did not know. He explained that, before he was shot, M.H., defendant, and another male named Tyheem first approached him. They were later joined by

> some fourth person . . . . And when I turned around the guy had a gun on me. My first reaction was to grab the gun. I didn't care who he was, what he was about, he had a gun. I grabbed the gun, we tussled, the gun went off, hit me twice.

R.D. also stated the shooter put the gun to his head and threatened to kill him, but when he pulled the trigger he realized he ran out of bullets and took off running. He ran after the shooter, but only made it to the sidewalk curb before retreating

back to the steps. He denied ever telling D.M. that defendant or M.H. shot him.

Sometime after the shooting, R.D. had a telephone conversation with defendant and his son. He described the telephone conversation in his testimony:

> Q. And at that point did the defendant tell you that, quote, [M.H.] got me in trouble?
>
> A. Yeah, he told me that everybody told on him, accused him as the shooter.
>
> Q. Okay. And did he ask you to give a taped statement to a defense investigator for him?
>
> A. No, he didn't ask me. What he asked me was, he asked me how can I help.
>
> I said well, you got to tell me who your lawyer is and I'll go to your lawyer and talk to your lawyer.
>
> He didn't — he said that he was waiting for his mom to get the lawyer and everything. And that's when his mom came and seen me and we went and seen the investigator Eric Johnson.
>
> . . .
>
> Q. When you had this phone conversation with the defendant did you tell the defendant that you would do whatever you could to help him out and make this case go away?
>
> A. I told him I'd do whatever it is to

help him get out of trouble, yeah, because he in trouble for nothing.

Q. Did you also tell him that you didn't want to testify though?

A. No, I didn't tell him — I never told him that until like 2011 . . . .

R.D. testified he went with defendant's mother to meet with defendant's private investigator so he could give a taped statement. He also admitted receiving $900 from defendant's family after he was shot.

Defendant did not testify at trial.

Defendant was acquitted of first-degree attempted murder, N.J.S.A. 2C:5-1, 2C:11-3(a)(1) (count one), and convicted of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) (count three); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count five); and second-degree possession of a handgun for an unlawful purpose by a certain person not to have weapons, N.J.S.A. 2C:39-7(b) (count six).

Defendant was sentenced to twenty-six years, which included two eighteen-year concurrent sentences for counts two and five subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2,

and an eight-year consecutive sentence for count six subject to a five-year parole disqualifier. Counts three and four merged with count two for sentencing.

Defendant presents the following arguments in his appeal:

> POINT I
>
> THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT'S APPLICATION FOR A MISTRIAL WHEN [M.M.] IDENTIFIED AND DESCRIBED HIM IN COURT AS WEARING PRISON GARB AND COMPOUNDED THE PREJUDICE TO DEFENDANT ARISING FROM THE REMARK BY REPEATING [M.M.]'S IDENTIFICATION.
>
> POINT II
>
> THE PROSECUTOR ENGAGED IN MULTIPLE INSTANCES OF MISCONDUCT ON SUMMATION WHICH SINGULARLY AND CUMULATIVELY DEPRIVED DEFENDANT OF A FAIR TRIAL.
>
> POINT III
>
> DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE.

II.

Defendant argues he suffered irreparable damage as the result of M.M.'s description of him as wearing an "inmate suit" and that the trial judge compounded the prejudice to him "by affirming [M.M.]'s identification and description of his attire to the jury." This argument merits only limited comment. R. 2:11-3(e)(2).

In State v. Artwell, the Supreme Court described distinctive

prison garb as "clothing that allows the jury to 'visibly identify' the wearer as a prisoner, such as a one-piece jumpsuit, 'detention greens,' or any clothing with markings identifying it as a correctional uniform." 177 N.J. 526, 534 n.1 (2003) (citations omitted). It is undisputed that defendant was not wearing distinctive prison garb. Therefore, this is not a case in which the defendant was denied his right to a fair trial because he was required to "appear at trial in distinctive prison garb." Id. at 534-35 (citing State v. Carrion-Collazo, 221 N.J. Super. 103, 112 (App. Div. 1987), certif. denied, 110 N.J. 171 (1988)). What occurred here is that a witness made a factual error in her testimony that, if accepted by the jury, could inure to defendant's detriment. The trial judge endeavored to correct that error and defense counsel did not consent to the use of curative action rather than a mistrial.

"A mistrial is an extraordinary remedy," State v. Goodman, 415 N.J. Super. 210, 234 (App. Div. 2010), certif. denied, 205 N.J. 78 (2011), that should only be granted "to prevent an obvious failure of justice," State v. Harvey, 151 N.J. 117, 205 (1997), cert. denied, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000). Because the trial court "has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting," State v. Winter, 96 N.J. 640, 647

(1984), "[a]n appellate court should defer to the decision of the trial court . . . [and] will not disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice," Harvey, supra, 151 N.J. at 205 (citation omitted); see also State v. Jackson, 211 N.J. 394, 407 (2012).

Because the witness's factual error was one that could easily be remedied, it was well within the trial judge's scope of discretion to suggest a course of action that corrected the factual error without resorting to the nuclear option of declaring a mistrial. Moreover, the error was made in the course of the witness identifying defendant. There is no suggestion she was otherwise unable to do so or relied upon her impression that he was wearing an "inmate suit" in making the identification. We discern no abuse of discretion in the trial judge's decision to pursue corrective action rather than declare a mistrial.

III.

Defendant argues he should be granted a new trial because the prosecutor's statements in summation constituted prosecutorial misconduct sufficiently egregious to deprive him of a fair trial. To support this argument he cites statements characterizing the State as the "real victim" in the case, and arguing defendant and

the victim conspired to fabricate the victim's testimony that defendant did not shoot him.

Defense counsel's summation relied heavily on the victim's testimony as proof that defendant did not shoot him and advanced the theory that the actual shooter was M.H.

The State's summation first addressed the victim's testimony that defendant was innocent with the assertion that

> this case is called the State of New Jersey versus Kazmeck Hollingsworth. It's not [the victim] versus Kazmeck Hollingsworth. [The victim] in some sense was the victim in this case because he's the person that was shot that day. The real victim in this case is the State of New Jersey, the citizens of New Jersey.

Defense counsel objected to the characterization of the State as the victim. The trial judge overruled the objection, stating the State was the plaintiff in this case and "crimes are considered an offense generally against the citizens of the State."

The prosecutor later argued R.D.'s testimony exonerating defendant was a "lie" he crafted "around the truth" whereby "he just switched who it was that he saw pulling the trigger at him." She cited R.D.'s testimony that he considered defendant family and "that snitching on a family member is the worst thing you could do." She also suggested R.D.'s testimony was the product of fabrication by him and defendant, noting in his telephone

conversation with defendant, R.D. stated "he would, quote, do what he could to help him out and make this case go away." The prosecutor explained,

> [R.D.] says some, quote, mystery fourth person comes up [to them]. This is the shooter, the mystery fourth person.
>
> And then he says well, initially we were actually calling him the third person. But since there was actually three of us already there, it was actually the fourth person. Yeah. Who are you talking about? Who was it that you were discussing who this mystery third person was? [R.D.] told you he talked to the defendant after the shooting. He was talking about the defendant, that's what they were putting together their story to say some mystery third person.
>
> [(Emphasis added).]

Defense counsel objected, arguing the contents of the telephone conversation were not in the record, and requested a jury charge that counsel's statements were not evidence. The trial judge overruled the objection because R.D. had testified about the conversation and the prosecutor's comments about its contents were reasonable inferences drawn from the evidence. He found the comment similar to defense counsel's own argument that the shooter was M.H. rather than defendant, an inference suggested as an alternative explanation of the record.

Defense counsel also requested that the jury "be instructed forcefully that [the] conversation is not in the record." The

trial judge agreed to instruct the jury once again that it can rely only on its own recollection of the evidence and cannot consider counsels' statements evidence, and did so during the final jury charge.

When "a claim [is made] of prosecutorial misconduct with respect to remarks in summation, the issue presented is one of law" and, thus, reviewed de novo. State v. Smith, 212 N.J. 365, 387 (2012), cert. denied, 568 U.S. 1217, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). The issue raised in claims of prosecutorial misconduct "is two-fold: whether the prosecutor committed misconduct, and, if so, 'whether the prosecutor's conduct constitutes grounds for a new trial.'" State v. Wakefield, 190 N.J. 397, 446 (2007) (quoting State v. Smith, 167 N.J. 158, 181 (2001)), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

"[P]rosecutors are afforded considerable leeway" when they address the jury, provided "their comments are reasonably related to the scope of the evidence." State v. Cole, ___ N.J. ___, ____ (2017) (slip op. at 32) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). "Prosecutors should not make inaccurate legal or factual assertions during a trial. They are duty-bound to confine their comments to facts revealed during the trial and reasonable inferences to be drawn from that evidence." Frost, supra, 158

N.J. at 85 (citation omitted). In addition, a prosecutor may not express a personal belief or opinion as to the truthfulness of a witness's testimony. State v. Marshall, 123 N.J. 1, 156 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993); State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993).

A prosecutor is, however, "entitled to argue the merits of the State's case 'graphically and forcefully,' and is not required to present those arguments as if he were addressing a lecture hall." Smith, supra, 212 N.J. at 403 (quoting State v. Feaster, 156 N.J. 1, 58 (1998), cert. denied, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001)). They "may strike hard blows [but] not . . . foul ones." Feaster, supra, 156 N.J. at 59 (quoting Bergee v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 2d 1314, 1321 (1935)).

"Notwithstanding the high standard to which a prosecutor is held as he or she gives an opening statement or summation, 'not every deviation from the legal prescriptions governing prosecutorial conduct' requires reversal." Jackson, supra, 211 N.J. at 408-09 (quoting State v. Williams, 113 N.J. 393, 452 (1988)). A prosecutor's improper "comments are deemed to have violated the defendant's right to a fair trial when they 'so infect[] the trial with unfairness as to make the resulting

conviction a denial of due process.'" Id. at 409 (alteration in original) (quoting State v. Koedatich, 112 N.J. 225, 338 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989)).

In our review of the prosecutor's comments, the factors to be considered include: "whether 'timely and proper objections' were raised; whether the offending remarks 'were withdrawn promptly'; . . . whether the trial court struck the remarks and provided appropriate instructions to the jury [; and] . . . whether the offending remarks were prompted by comments in the summation of defense counsel." Smith, supra, 212 N.J. at 403-04 (citations omitted).

Defense counsel registered his objection to each of the comments challenged on appeal. The trial judge overruled each of the objections but did give an additional instruction to the jury regarding the fact that statements by counsel are not evidence, as requested by defense counsel.

It is a bit strained to contend that the State was the real victim here, rather than R.D. While it is true that, as a general rule, it is the State that brings a criminal prosecution, R.D.'s status as the person who was shot and left bleeding in the street surely cements his role as victim. To the extent this feeble effort to diminish the weight of R.D.'s apparent lack of animosity

toward defendant was error, it was harmless beyond a reasonable doubt for it surely lacked the capacity to infect the trial with any unfairness. See State v. Ingram, 196 N.J. 23, 49 (2008) (applying "harmless beyond a reasonable doubt" standard to constitutional errors (quoting State v. Castagna, 187 N.J. 293, 312 (2006))).

The other comments challenged on appeal concern the prosecutor's arguments that R.D. was not being truthful in asserting defendant did not shoot him and that he colluded with defendant to fabricate his testimony that another, unidentified person was the shooter. We stress that these comments did not include an expression of personal belief that R.D. was lying.

The evidence in the case included R.D.'s aunt's testimony that she heard him exclaim at the time he was shot that he had been shot by defendant and M.H. R.D.'s denial was reasonably viewed within the context of his own testimony that he considered defendant "family," that he wouldn't "snitch" on family "if [his] heart depended on it . . . [e]ven if it was the truth," and his own description of his conversation with defendant in which he stated he told defendant he would "do whatever it is to help him get out of trouble." In addition, R.D. testified he went with defendant's mother to meet with defendant's private investigator

so he could give a taped statement. Finally, he admitted receiving $900 from defendant's family after he was shot.

Given this context, we conclude the prosecutor's comments fell within the permissible range of reasonable inferences drawn from the evidence and provide no grounds for reversal.

IV.

Finally, we turn to defendant's challenge to his sentence as manifestly excessive.

At sentencing, the trial judge found aggravating factor one, N.J.S.A. 2C:44-1(a)(1), applied because the victim was shot "multiple times" and was unarmed. He also found aggravating factors three, six, and nine, N.J.S.A. 2C:44-1(a)(3), (6), (9), and no mitigating factors. He determined the aggravating factors "substantially and convincingly" outweighed the mitigating factors. The trial judge merged counts three and four with count two, finding there to be "just one assault here that occurred," requiring only one conviction "as a matter of constitutional fairness."

Defendant, who was thirty-six years old at the time of the shooting, has an extensive adult criminal record. According to his presentence report, this offense was his seventh indictable conviction in New Jersey and he had one felony conviction in federal court. Four of the New Jersey convictions and the federal

conviction were related to the illegal possession of firearms. He served six terms in New Jersey state prisons. He also served two federal sentences and was on supervised release at the time of this offense. Defendant does not dispute the fact that a mandatory extended term was required because his criminal history included two predicate Graves Act offenses. See N.J.S.A. 2C:43-6.

The trial judge applied the Yarbough[1] factors to determine whether the sentence for the certain persons offense (count six) should be consecutive or concurrent. The trial judge recognized the conduct charged in count six did not involve "a different time and separate place" from the aggravated assault or "multiple victims." However, he observed the two counts charged were "separate offenses with distinct elements . . . intended to prohibit different conduct." He also added that imposing a concurrent sentence for count six would "bypass[] in substantial measure" any "legislative intent to deter by way of the enactment of the certain persons statute" because count six "would then be essentially subsumed by the greater second degree aggravated assault sentence in" count two. Defendant's five separate convictions under counts two through six were characterized as "somewhat numerous," even though some were merged. Based upon

[1] State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

this reasoning, the trial judge imposed concurrent eighteen-year sentences on counts two and five, both subject to NERA, and a consecutive eight-year sentence with a five-year period of parole ineligibility on count six.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). The Supreme Court directs appellate courts to determine whether:

> (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."
>
> [State v. Fuentes, 217 N.J. 57, 70 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)) (alteration in original).]

Appellate courts are "bound to affirm a sentence, even if [they] would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. O'Donnell, 117 N.J. 210, 215 (1989). An appellate court should modify a sentence "only when the trial court's determination was 'clearly mistaken.'" State v. Jabbour, 118 N.J. 1, 6 (1990) (quoting State v. Jarbath, 114

N.J. 394, 401 (1989)).

Defendant contends the trial judge lacked a factual basis for finding aggravating factor one and that this finding constituted impermissible double-counting. Defendant also argues the imposition of consecutive sentences was a manifest abuse of discretion. He states the trial judge's finding that defendant had numerous offenses was erroneous because it was relying upon two convictions that merged and it erred in considering the certain persons offense as having a separate purpose under Yarbough. Finally, he argues the sentence was improper because the trial judge "did not consider the real-time consequences of NERA" in imposing his sentence.

After reviewing these arguments in light of the record and applicable legal principles, we conclude that defendant's arguments regarding the imposition of a consecutive sentence for the certain persons offense, his contention the trial judge committed reversible error in failing to consider the consequences of NERA[2] and his criticism of the judge's reference to his offenses

[2] The trial judge did observe the impact of NERA on the time defendant would serve, identifying the aggregate amount of time he would be ineligible for parole. Moreover, the trial judge had no discretion to impose a lesser parole ineligibility term given NERA's mandate of "a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole." N.J.S.A. 2C:43-7.2(a). In addition, "the impact of the eighty-five percent period of parole ineligibility on the time defendant

as "numerous" lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

We agree with defendant that the record of this case did not support a finding of aggravating factor one. That factor directs the sentencing court to examine "[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." N.J.S.A. 2C:44-1(a)(1). The fact that R.D. was shot multiple times while unarmed falls short of "the extraordinary brutality" contemplated in Fuentes, supra, 217 N.J. at 75. For this factor to apply, the cruelty must be such that the infliction of pain is an end in itself. O'Donnell, supra, 117 N.J. at 216. There was no double-counting here, however, because it is not an element of aggravated assault that the victim is unarmed. See State v. Lawless, 214 N.J. 594, 608 (2013); State v. Pineda, 119 N.J. 621, 627 (1990).

The trial judge stated he gave "substantial weight" to all the aggravating factors he found and stated he gave factor one "very heavy weight." He noted further that in weighing the factors, he considered them "on a qualitative as well as

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would spend in custody [is] not [a] statutory mitigating factor[] and thus [does] not need to be addressed by [the judge] in sentencing." State v. Bieniek, 200 N.J. 601, 610 n.1 (2010).

quantitative basis" and concluded the aggravating factors outweighed the non-existent mitigating factors "substantially and convincingly."

If aggravating factor one is removed from the equation, the record provides ample evidence to support the remaining aggravating factors, none of which are disputed by defendant. He also does not contend the trial judge erred in failing to find any mitigating factor or in finding the aggravating factors preponderated "substantially and convincingly."

Given the deference paid to a trial judge's discretion in imposing sentence, "we will exercise that reserve of judicial power to modify sentences when the application of the facts to the law is such a clear error of judgment that it shocks the judicial conscience," a power that is not to be invoked frequently. Roth, supra, 95 N.J. at 364. Here, even though it was error to find aggravating factor one, the sentence imposed is supported by the remaining factors and the weight the trial judge accorded them. We do not conclude the error amounted to a clear error in judgment that shocks the judicial conscience but rather, we determine, under the circumstances of this case and this defendant, such error was harmless.

Affirmed.