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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1207-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LOUIS M. EVANGELISTA,
a/k/a LOUIS EVANGELISTA,

Defendant-Appellant.

Submitted February 14, 2022 – Decided May 19, 2022

Before Judges Rothstadt and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 16-11-3098 and 16-11-3101.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Louis M. Evangelista appeals from two April 12, 2019 judgments of conviction that the trial court entered after a jury convicted defendant of second-degree unlawful possession of a weapon without a permit (handgun), N.J.S.A. 2C:39-5(b)(1), second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(b)(1), and fourth-degree possession of prohibited weapons and devices (hollow nose bullets), N.J.S.A. 2C:39-3(f)(1), but acquitted him of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). At his ensuing sentencing, the trial court granted the State's motion to impose a sentence in the extended term and sentenced defendant to an aggregate term of fourteen years, with seven years of parole ineligibility.

On appeal, defendant challenges his conviction and sentence, specifically arguing the following two points:

POINT I

THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL WHEN THE STATE REPEATEDLY ATTEMPTED TO INTRODUCE HEARSAY TESTIMONY THAT IMPLIED NON-TESTIFYING POLICE OFFICERS HAD INFORMATION ABOUT THE CASE THAT ESTABLISHED THE GUILT OF DEFENDANT, IN VIOLATION OF THE SIXTH AMENDMENT OF

THE UNITED STATES CONSTITUTION AND
ARTICLE TEN OF THE NEW JERSEY
CONSTITUTION.

POINT II

THE SENTENCE IMPOSED BY THE SENTENCING COURT CONSTITUTED AN ABUSE OF DISCRETION BECAUSE IT INCLUDED A DISCRETIONARY EXTENDED TERM THAT WAS UNDULY HARSH GIVEN THE NATURE OF THE OFFENSE THAT DEFENDANT WAS CONVICTED OF AND THE COURT'S REPEATED USE OF THE SAME AGGRAVATING FACTORS, RESULTING IN A SENTENCE THAT WAS EXCESSIVE AND THUS REQUIRES DEFENDANT'S SENTENCE BE VACATED AND THE CASE REMANDED TO THE TRIAL COURT FOR A NEW SENTENCE HEARING.

We are not persuaded by these contentions.

I.

The facts leading to defendant's arrest and conviction as developed at his trial are summarized as follows. On August 20, 2016, two Newark police officers, Wayne Pugh and Gaetano Scala, were on patrol in the city. Prior to their leaving the station with the patrol car, Scala conducted a search of the vehicle to make sure it did not contain any items that had been left behind during its prior use. He was certain that there was nothing in the car when they left.

While on patrol, the officers responded to a reported shooting. According to the bulletin they received, they were looking for two men, one heavier than

the other, with the heavier individual not wearing a shirt while the other wore a black shirt.

The officers located the suspects near the scene of the shooting. When the police approached, the individual in the black shirt took flight on foot while the other remained. The officers handcuffed the shirtless suspect, who was later identified as defendant, and placed him in the back of the police car. The officers then unsuccessfully pursued the other individual who was never arrested.

It was undisputed that, at the time the officers placed defendant into the back of the police car, they did not search him. After returning to the scene of the alleged shooting and searching for weapons and other evidence, they were able to locate shell casings but no guns. Other officers joined them in securing and searching the area, including Newark police detective Thomas Del Mauro who retrieved the shell casings.

Thereafter, Pugh and Scala returned with defendant in the back seat to police headquarters. Upon removing defendant from the back seat, the officers were shocked to see a handgun in the back of the car, underneath the driver seat. Upon Pugh's discovery of the weapon, defendant said to the officers that the gun would not match the ballistics associated with the underlying shooting. At the

time of its discovery, the handgun, which had a twelve-round capacity, only contained eight bullets, including five hollow point bullets. Later testing would confirm that one of the retrieved casings was fired by the gun that the officers found in the rear of the car.

In November 2016, a grand jury returned an indictment charging defendant with second-degree possession of a handgun without a permit, second-degree possession of a firearm for unlawful purpose, and fourth-degree possession of hollow nose bullets. The second indictment separately charged defendant with the certain persons offense. The matter was later tried before a jury that convicted defendant on all charges except, as already noted, the one weapons offense. After the jury returned its verdict, the court sentenced him to the term already noted. This appeal followed.

II.

In his first argument on appeal, defendant challenges the trial court's denial of his motion for a mistrial. Specifically, he contends that the trial court erred by failing to grant that motion "or more forcefully respond[ing] to the State's improper attempts to introduce inadmissible hearsay." We find no merit to this contention.

Initially, in support of his contention, defendant identifies several incidences where his attorney interposed objections to testimony from the State's witnesses but then acknowledges that the trial court sustained the objections and properly instructed the jury to disregard the witnesses' response.

For example, defendant cites to the testimony that led to his motion for a mistrial. Specifically, on January 22, 2019, defense counsel moved for a mistrial in response to testimony being given by Pugh. Just prior to defendant objecting, the witness was describing the information he received when he arrived at the scene of the shooting. Specifically, Pugh was about to relate the description of the suspects that "somebody gave [them]." During the ensuing sidebar conference, the court sustained defendant's objections and agreed to instruct the jury to disregard the response that Pugh was attempting to give, which the court did.¹

Although not the subject of a motion for a mistrial, defendant made other objections during Pugh's testimony, including when he was asked about other officers' reactions to his failure to search defendant before placing him in the

¹ There was another mistrial sought on January 23, 2019, that related to an alleged violation of the sequestration order, which is not part of this appeal.

police vehicle. When defendant raised that objection, it was sustained, and the jury was properly instructed.

However, on another occasion, this time while Scala testified, defendant raised an objection, not as to the hearsay nature of the testimony but as to relevancy. The gist of the testimony was that detectives and superiors were shocked by the fact that defendant was not searched before being placed in the police vehicle, especially in light of Pugh's vast experience as a police officer. Defendant's relevancy objection focused on the fact that counsel believed the testimony being elicited was "designed to engender sympathy for the . . . police officers and to say, see, they wouldn't do this because look how embarrassed they are." After considering the parties' arguments, the trial court overruled the objection.

Thereafter, during Del Mauro's testimony, he described the events that occurred the day defendant was arrested and his role in securing evidence from the scene. Afterward, the prosecutor inquired as to Del Mauro's reaction to the weapon being discovered in the back of Pugh's police car. Defense counsel did not interpose any objection, and Del Mauro described how he was "a little disgusted at how something like that [happened]." Del Mauro also testified,

without objection, about ballistic results and the timing of when he received them.

According to defendant, the admission of testimony about the reaction of others to what Pugh and Scala allowed to happen was inadmissible hearsay that undermined his right to a fair trial and warranted a mistrial. We disagree.

At the outset we note that "a mistrial is an extraordinary remedy" granted "only when necessary 'to prevent an obvious failure of justice.'" State v. Yough, 208 N.J. 385, 397 (2011) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)). Denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Smith, 224 N.J. 36, 47 (2016). "Whether an event at trial justifies a mistrial is a decision 'entrusted to the sound discretion of the trial court.'" Ibid. As a result, a reviewing court should not disturb a trial court's ruling absent of showing of an "abuse of discretion that results in a manifest injustice." Ibid. (quoting State v. Jackson, 211 N.J. 394, 407 (2012)).

We will only "reverse a trial court's denial of a mistrial motion" if there was "a 'clear showing' that 'the defendant suffered actual harm' or that the court otherwise 'abused its discretion.'" Yough, 208 N.J. at 397 (quoting State v. LaBrutto, 114 N.J. 187, 207 (1989)). Even "when inadmissible evidence erroneously comes before the jury, [we will] not order a new trial unless the

error was 'clearly capable of producing an unjust result.'" Id. at 397-98 (quoting R. 2:10-2).

We apply a similar standard to a trial court's evidentiary rulings. We will defer to a trial court's evidentiary rulings absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). We review such evidentiary rulings "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that differential standard, we "review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). Even where we determine that an evidentiary determination constituted an abuse of discretion, "we must then determine whether any error found is harmless or requires reversal." Prall, 231 N.J. at 581.

With these guiding principles in mind, we turn to defendant's primary argument under State v. Bankston, 63 N.J. 263 (1973). According to defendant, he was denied his right to confrontation because the alleged hearsay statements made by Scala about other officers' and detectives' reaction to Pugh's failure to search defendant, which had been barred by the trial court during Pugh's

testimony, and by Del Mauro about what others told him about the discovery of the gun, casings, and ballistic results, contained inadmissible hearsay. Defendant asserts that the trial court's failure to provide the jury with limiting instruction or other protective safeguards to minimize the potential prejudice, deprived him of a fair trial.

According to defendant, the referenced statements by others who were not witnesses at his trial violated his Confrontation Clause rights under the Sixth Amendment. That provision requires in a criminal prosecution that the accused has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This requirement "is made obligatory on the states by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965). "A defendant's right to confront and effectively cross-examine the State's witnesses is essential to the due process right to a 'fair opportunity to defend against the State's accusations,' and is one of 'the minimum essentials of a fair trial.'" State v. Gilchrist, 381 N.J. Super. 138, 144 (App. Div. 2005) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

Under the New Jersey Supreme Court's holdings in Bankston and its progeny, the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-

testifying declarant to incriminate the defendant in a crime charged. E.g., 63 N.J. at 268-69. To protect the defendant from the confrontation problems associated with such evidence, restrictions have been placed on Bankston-type testimony: an officer may explain the reason he approached the suspect or went to a crime scene by stating he did so "upon information received," id. at 268, but the officer may not become more specific by repeating details of the crime, or implying he received evidence of the defendant's guilt, as related by a non-testifying witness. State v. Luna, 193 N.J. 202, 216-17 (2007).

"The principle distilled from Bankston and its progeny is that testimony relating inculpatory information supplied by a codefendant or other non-testifying witness identifying the defendant as the perpetrator of a crime deprives the accused of his or her constitutional rights." State v. Farving, 331 N.J. Super. 58, 75 (App. Div. 2000); see also State v. Taylor, 350 N.J. Super. 20, 34-35 (App. Div. 2002) (holding police officer's testimony regarding various unidentified eyewitnesses' remarks about a suspect's description was inadmissible hearsay because offered to elicit accusations against the defendant by non-testifying witnesses); State v. Thomas, 168 N.J. Super. 10, 13-15 (App. Div. 1979) (reversing defendant's conviction where the prosecutor elicited

testimony from the detective that led to "inescapable inference" that informant had given him the defendant's name).

Applying these guiding principles here, we conclude defendant's argument that the testimony about the reaction of other officers to a veteran police officer's failure to search a suspect before placing them in custody in a police vehicle is not the type of testimony that Bankston and its progeny contemplated. Here, during his opening argument, defendant raised the inference that the police somehow planted the weapon in the car. The purpose of the elicited testimony was not to inculcate defendant but rather address his contention that it was impossible for him to have been put in the back of the police car with a weapon still on his person.

Moreover, the State's case against defendant was otherwise strong, supported by substantial credible evidence, especially in light of the ballistics evidence that tied the weapon to the shooting. Therefore, even if the admission of the testimony was in error, and it was not, it would not have caused any prejudice as it did not inculcate defendant in the commission of the crime. While hearsay is prejudicial to a defendant when the State's case is tenuous, "when a case is fortified by substantial credible evidence," its admission for

purposes other than inculcating the defendant is harmless error which we need not recognize. State v. Irving, 114 N.J. 427, 448 (1989); see also R. 2:10-2.

"[W]e will disregard any error or omission 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" Prall, 231 N.J. at 581 (quoting R. 2:10-2). The claimed error here was not "sufficient to raise a reasonable doubt as to whether [the challenged testimony] led the jury to a result it otherwise might not have reached." See ibid. (quoting State v. Daniels, 182 N.J. 80, 95 (2004)).

III.

Next, we turn to defendant's challenge to his sentence. According to defendant, the trial court erred in its imposition of a discretionary extended term and he received an excessive sentence because of the trial "court's repeated use of the same aggravating factors." We disagree.

At sentencing, it was undisputed that defendant was eligible to be sentenced to an extended term based on his prior record. After considering the parties' arguments, the trial court found that defendant was extended term eligible as a persistent offender under N.J.S.A. 2C:44-3(a).

In granting the State's motion, the court noted that defendant had a prior conviction in 2009 for a second-degree eluding offense and a fourth-degree

aggravated assault on a law enforcement officer, for which he received a three-year prison term. That was followed by a 2013 three-year sentence for a third-degree receiving stolen property. The court also reviewed defendant's background and history of arrests, including his juvenile offenses that resulted in five adjudications.

Moreover, the court observed that defendant was arrested on new charges after he was released pending trial in this matter, and he received a probationary term after pleading guilty to one such offense in July 2017. And, after pleading guilty in 2019 to others, he was pending sentencing on those new charges.

The court concluded that defendant had nine indictable convictions and fell within the preview of the statute permitting him to be sentenced in the extended term as a persistent offender. Having granted the State's motion, the court stated that defendant was facing a range of sentencing on the instant offenses from the lower end of the second-degree range, five years, to the maximum under the first-degree range, twenty years.

After considering the parties' arguments, the court addressed the term for defendant's sentence. The court found aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6) and (9). As to aggravating factor 3 (the risk that the defendant would commit another offense), the court relied upon defendant's

record of convictions and noted that defendant had in fact already committed other offenses while awaiting trial in this matter to which he had pled guilty and was awaiting sentencing. In addition, the court relied upon defendant having been unsuccessfully placed on probation at least one time as an adult and four times as a juvenile. The court concluded that neither State prison nor probation had "stopped this defendant from committing offenses." The court gave great weight to that factor.

Turning to aggravating factor six (the extent of the defendant's prior criminal record and the seriousness of the offenses), the court reiterated its findings as to defendant's record. Here too, the court gave that aggravating factor "significant weight." Addressing aggravating factor nine (the need to deter the defendant and others from violating the law), the court again found not only the need to deter "the general public," but that "defendant particularly needs to understand that this continued pattern of criminal activity which is now escalating . . . cannot be tolerated and must be dealt with in a significant matter."

Considering the mitigating factors, N.J.S.A. 2C:44-1(b), the court found mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) (the excessive hardship imposed by incarceration on defendant or his dependents), relying on defendant's mother's poor health and the impact of defendant's incarceration on

her. Moreover, the court accepted defendant's representation about his having children and the need to support them. However, after weighing the aggravating and mitigating factors, the court concluded that it was clearly convinced "that the aggravating factors substantially outweigh[ed] the sole mitigating factor."

With that, the court imposed its sentence, which consisted of a term of imprisonment for fourteen years with a seven-year period of parole ineligibility as to the unlawful possession of a handgun; and, as to the fourth-degree unlawful possession of hollowed nose bullets, a concurrent term of eighteen months, with a nine-month parole ineligibility. Also, on the second indictment for certain persons not to possess weapons, it imposed a concurrent ten-year term, with a five-year parole ineligibility. In imposing that sentence, the trial court expressly stated that it rejected the State's request to impose consecutive terms, after the court considered the applicable factors under State v. Yarbough, 100 N.J. 627 (1985). According to the court, there was no basis to impose consecutive sentences.

Our review of the sentence is limited. We review a sentence imposed by a trial court under an abuse discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). In doing so, we consider whether: "(1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were . . .

'based upon competent credible evidence in the record;' [and] (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscious.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). However, "[t]he sentencing [court's] interpretation [of a statute] is not entitled to deference; our review is de novo." State v. Clarity, 454 N.J. Super. 603, 607 (App. Div. 2018) (citing State v. Grate, 220 N.J. 317, 329 (2015)).

Where, as here, a trial court determines that a defendant is eligible for sentencing in the extended term under N.J.S.A. 2C:44-3(a), which permits imposition of an extended prison term where a defendant was convicted of at least two separate crimes, the court's findings relying upon defendant's past criminal conduct and the inability of previously imposed sanctions, including a state prison sentence, to deter future criminal conduct are adequate to support the trial court's determination that an extended term sentence is appropriate. See State v. Carey, 168 N.J. 413, 425-27 (2001); State v. Hudson, 209 N.J. 513, 526-27 (2012).

N.J.S.A. 2C:44-3 "was intended to create the judicial discretion to impose an extended term on an individual incapable of living a law-abiding life for a significant period of time." Clarity, 454 N.J. Super. at 611. "Persistent –

offender statutes serve to deter individuals with criminal histories from further criminal behavior by giving notice that they may be subject to extended prison terms for subsequent crimes." Id. at 610-11.

Once a court determines that a defendant should be sentenced in the extended term, it "should then return its focus primarily to the offense." State v. Dunbar, 108 N.J. 80, 91 (1987). However, "other aspects of the defendant's record, which are not among the minimal conditions for determining persistent offender status, such as a juvenile record, parole or probation records, and overall response to prior attempts at rehabilitation, will be relevant factors in adjusting the base extended term." Id. at 92.

Here, the trial court's consideration of other aspects of defendant's record belies defendant's contention that the trial court erred in double-counting the same criminal history for his extended term sentence for finding the three aggravating factors. In State v. Tillery, the Court found "no error in the trial court's reliance on defendant's criminal record both to determine defendant's 'persistent offender' status under N.J.S.A. 2C:44-3(a) and to support the court's finding of aggravating factors three, six, and nine." 238 N.J. 293, 327 (2019). Indeed, the Court confirmed that "the defendant's criminal record may be relevant in both stages of the sentencing determination" as "defendant's prior

record is central to aggravating factor six, N.J.S.A. 2C:44-1(a)(6), and may be relevant to other aggravating and mitigating factors as well." Id. at 327-28. Likewise, in State v. McDuffie, 450 N.J. Super. 554, 576 (App. Div. 2017), we rejected, "as lacking merit," a defendant's claim that "the court impermissibly double-counted his criminal record, when granting the State's motion for a discretionary extended term, and again, when imposing aggravating factor six."

We explained in McDuffie that the defendant's "criminal history was not a 'fact' that was a necessary element of an offense for which he was being sentenced." Ibid. The sentencing court was not "required to ignore the extent of his criminal history when considering applicable aggravating factors," particularly where it was undisputed that defendant "had more than the requisite number of offenses to qualify for an extended term." Id. at 576-77.

Contrary to defendant's arguments here, we perceive no error in the court's granting of the State's motion to sentence defendant in the extended term. As in McDuffie, defendant here had more than one prior conviction upon which the court could rely in one instance to determine his status as a persistent offender and in another to determine the length of the sentence imposed. We have no cause to disturb defendant's sentence.

To the extent we have not specifically addressed any of defendant's remaining arguments, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION