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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1387-21

IN THE MATTER OF
REGISTRANT C.J.

APPROVED FOR PUBLICATION
December 2, 2022
APPELLATE DIVISION

Argued November 7, 2022 – Decided December 2, 2022

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. 20130055.

Cody T. Mason, Assistant Deputy Public Defender, argued the cause for appellant C.J. (Joseph E. Krakora, Public Defender, attorney; Cody T. Mason, of counsel and on the briefs).

Alecia Woodard, Special Deputy Attorney General/ Acting Assistant Prosecutor, argued the cause for respondent State of New Jersey (Raymond S. Santiago, Acting Monmouth County Prosecutor, attorney; Alecia Woodard, of counsel and on the brief).

The opinion of the court was delivered by

MARCZYK, J.S.C. (temporarily assigned)

Registrant C.J.[1] appeals from the December 15, 2021 Law Division order classifying him as a Tier II sex offender under the registration and community notification provisions of "Megan's Law," N.J.S.A. 2C:7-1 to -23. C.J. contends the trial court improperly considered acquitted conduct at the hearing, and the court's decision was based on an inaccurate and incomplete review of the record.

This appeal raises the novel issue of whether it is appropriate for a trial court to consider acquitted conduct to determine a registrant's Megan's Law tier designation. We hold the trial court properly considered acquitted conduct because of the non-punitive, civil nature of a Megan's Law proceeding, the public safety purpose underpinning the statute, and the less demanding standard utilized to make a tier designation. Moreover, the Megan's Law tier designation process, which is remedial and not punitive, is distinguishable from imposing an enhanced criminal sentence based on acquitted conduct, which our Supreme Court recently held to be improper. State v. Melvin, 248 N.J. 321, 352 (2021). We remand, however, for the trial court to conduct a more comprehensive review of the record and to consider portions of the trial transcript and other documents identified by the registrant, which he contends

[1] We use initials pursuant to Rule 1:38-(3)(c)(9).

rebuts the acquitted conduct relied upon by the court to increase his tier classification.

I.

Preliminarily, we observe Megan's Law is intended "to protect the community from the dangers of recidivism by sexual offenders." In re Registrant C.A., 146 N.J. 71, 80 (1996) (quoting N.J.S.A. 2C:7-1(a)). In fact, "[t]he expressed purposes of the registration and notification procedures [under Megan's Law] are 'public safety' and 'preventing and promptly resolving incidents involving sexual abuse and missing persons.'" In re A.A., 461 N.J. Super. 385, 394 (App. Div. 2019) (quoting N.J.S.A. 2C:7-1). "The law is remedial and not intended to be punitive." Ibid. (citing Doe v. Poritz, 142 N.J. 1, 12-13 (1995)).[2]

[2] The Doe Court noted:

> The conclusion of our analysis is that the laws before us today not only have a regulatory purpose, and solely a regulatory purpose . . . that are not excessive but are aimed solely at achieving . . . that regulatory purpose. The fact that some deterrent punitive impact may result does not, however, transform those provisions into "punishment" . . . .
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> [142 N.J. at 75.]

In summarizing the relevant provisions of Megan's Law and the Registrant Risk Assessment Scale (RRAS) tier classification process, we note that depending on the type and time of offense, Megan's Law requires certain sex offenders to register with local law enforcement agencies and mandates community notification. In re T.T., 188 N.J. 321, 327-28 (2006) (citing N.J.S.A. 2C:7-2). The extent of community notification chiefly results from a registrant's designation as a Tier I (low), Tier II (moderate), or Tier III (high) offender. N.J.S.A. 2C:7-8(a), (c)(1) to (3).[3] Tier designations reflect a registrant's risk of re-offense, as determined by a judge assessing various information, including thirteen factors referenced in the RRAS. A.A., 461 N.J. Super. at 402.

N.J.S.A. 2C:7-8(a) authorized the Attorney General to create guidelines and procedures to evaluate a registrant's risk of re-offense. See Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws (Guidelines) (rev'd

[3] If the risk of re-offense is deemed low, only law enforcement agencies likely to encounter the registrant are notified. T.T., 188 N.J. at 328 (citing N.J.S.A. 2C:7-8(c)(1)). If the risk of re-offense is considered moderate, schools and community organizations in the community also must be notified. Ibid. (citing N.J.S.A. 2C:7-8(c)(2)). But if the risk of re-offense is high, members of the public likely to encounter the registrant likewise must be notified. Ibid. (citing N.J.S.A. 2C:7-8(c)(3)).

Feb. 2007). The Guidelines, which contain the RRAS, have been upheld by our Supreme Court. C.A., 146 N.J. at 110.

Given the need for uniformity, the RRAS was developed for the State's use "to establish its prima facie case concerning a registrant's tier classification and manner of notification." T.T., 188 N.J. at 328 (quoting C.A., 146 N.J. at 110). "[T]he [RRAS] is presumptively accurate and is to be afforded substantial weight—indeed it will even have binding effect—unless and until a registrant 'presents subjective criteria that would support a court not relying on the tier classification recommended by the Scale.'" In re G.B., 147 N.J. 62, 81 (1996) (quoting C.A., 146 N.J. at 109).

The RRAS contains four discrete categories: Seriousness of the offense; offense history; personal characteristics; and community support. See State v. C.W., 449 N.J. Super. 231, 260 (App. Div. 2017) (citing In re Registrant V.L., 441 N.J. Super. 425, 429 (App. Div. 2015)). "The first two categories, '[s]eriousness of [o]ffense' and '[o]ffense [h]istory,' are considered static categories because they relate to the registrant's prior criminal conduct." C.A., 146 N.J. at 103. The next two categories, "[c]haracteristics of '[o]ffender' and '[c]ommunity [s]upport' are considered to be dynamic categories, because they are evidenced by current conditions." Ibid. The "static factors," relating to

past criminal conduct, are more heavily weighted under the RRAS than the dynamic factors. In re Registrant J.M., 167 N.J. 490, 500 (2001).

Within those categories is a non-exhaustive list of thirteen risk assessment criteria related to re-offense. C.A., 146 N.J. at 82. The "seriousness of offense" category takes into account: (1) degree of force; (2) degree of contact;[4] and (3) age of the victim(s). Id. at 103. The "offense history" category covers: (4) victim selection; (5) number of offenses/victims; (6) duration of offensive behavior; (7) length of time since last offense; and (8) any history of anti-social acts. Ibid. The "personal characteristics" category accounts for the registrant's: (9) response to treatment and (10) substance abuse. Id. at 103-04. The final category, "community support" considers a registrant's: (11) therapeutic support; (12) residential support; and (13) employment/educational stability. Id. at 104.

"Each factor is assigned a risk level of low (0), moderate (1), or high (3), and '[t]he total for all levels within a category provides a score that is then weighted based on the particular category.'" A.A., 461 N.J. Super. at 402 (alteration in original) (quoting C.A., 146 N.J. at 104). "An RRAS score

[4] The dispute in this matter stems from the State's assessment of this factor—degree of contact—and the trial court's subsequent determination C.J. penetrated the victim during the assault, which resulted in C.J. being designated as a Tier II as opposed to a Tier I registrant.

[totaling] 0 to 36 is low risk; 37 to 73 moderate risk; and 74 or more, high risk." T.T., 188 N.J. at 329 (citing Guidelines, Exhibit E at 4; Exhibit F).

Understanding the State is responsible for initiating the tier classification process, the Supreme Court has

> prescribed a two-step procedure for evidence production. In the first step, the prosecutor has the burden of going forward with prima facie evidence that "justifies the proposed level and manner of notification." In the second step, assuming the prosecutor's burden is met, the registrant then has the burden of producing evidence challenging the prosecutor's determinations on both issues.
>
> [C.A., 146 N.J. at 83 (internal citations omitted).]

The State ultimately bears the burden of proving—by clear and convincing evidence—a registrant's risk to the community and the scope of notification necessary to protect the community. In re Registrant R.F., 317 N.J. Super. 379, 383-84 (App. Div. 1998). "The responsibility for . . . determining the proper scope of notification is left to the trial court after a hearing on the matter." G.B., 147 N.J. at 69. Further, the court's determination is "independent and based on its own review of the case on the merits." C.A., 146 N.J. at 83-84.

To dispute a proposed tier designation, a registrant can "introduce evidence at the hearing that the [RRAS] calculations do not properly encapsulate his [or her] specific case." G.B., 147 N.J. at 85. Or, the registrant

may "produce[] proof, whether in the form of reliable hearsay, affidavit, or an offer of live testimony, that is sufficient to raise a 'genuine issue of material fact,' that the tier classification and the manner of notification are inappropriate . . . ." C.A., 146 N.J. at 97.

In addressing a registrant's classification, the judge is free to consider reliable evidence besides the RRAS score, even if such evidence would not be admissible under our Rules of Evidence, because the "hearing process . . . is not governed by the [R]ules of [E]vidence." Id. at 83 (internal citations omitted). Thus, a reviewing judge "may take into account any [credible] information available." Id. at 87. "This may include, but is not limited to, criminal complaints not the subject of a conviction but which are supported by credible evidence, victim statements[,] admissions by the registrant, police reports, medical, psychological or psychiatric reports, pre-sentencing reports, and Department of Corrections discharge summaries." In re C.A., 285 N.J. Super. 343, 348 (App. Div. 1995) (internal quotation omitted).

The "[j]udicial determinations regarding tier classification and community notification are within the judge's discretion and based on all of the available evidence, not simply the 'numerical calculation provided by [RRAS].'" A.A., 461 N.J. Super. at 402 (second alteration in original) (quoting G.B., 147 N.J. at 78-79). In short, "the ultimate determination of a

registrant's risk of re[-]offense and the scope of notification is reserved to the sound discretion of the trial court." G.B., 147 N.J. at 79 (citations omitted). With these concepts in mind, we address the underlying facts of this matter.

II.

In July 2008, C.J., who was thirty-nine years old, lived in the same apartment building as K.R., who was thirteen years old. K.R. testified on July 10, 2008, registrant invited her to his apartment to play with his daughter. According to K.R., when she got upstairs, registrant said his daughter was not there, locked the door, told K.R. he "had wanted [her] for a long time[,]" and began to kiss her neck.

K.R. testified she took off her pants at registrant's request, and he then "guid[ed]" her to a couch. K.R. then testified registrant got on the couch, "touch[ed]" her "vaginal area" with his hand and mouth, and then penetrated her with his penis. K.R. testified, after the incident, she went to her apartment and disclosed the abuse to her sister, her aunt, and later the police. K.R. also testified her vagina was bleeding after the incident, and a forensic expert testified blood found on registrant's couch "matched" K.R.'s DNA profile.

C.J. was indicted in November 2008 and charged with two counts of second-degree sexual assault with penetration, N.J.S.A. 2C:14-2(c)(1) and 14-2(c)(4) (counts one and two); second-degree luring or enticing, N.J.S.A.

2C:13-6 (count three); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count four).

C.J. was subsequently tried before a jury over eight days in December 2011, and convicted of counts three and four, which charged him with enticing and endangering. He was acquitted of the sexual assault charges in counts one and two, but convicted of the lesser-included offense of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). C.J. was sentenced to an aggregate prison term of fifteen years, with seven and one-half years of parole ineligibility. He was also sentenced to parole supervision for life, N.J.S.A. 2C:43-6.4, and Megan's Law, N.J.S.A. 2C:7-2.

On June 24, 2021, the State provided notice to C.J. of his proposed tier classification under Megan's Law. The State concluded C.J. posed a "Moderate Risk of re-offense" and "should be classified as a Tier II offender." C.J. objected to the classification and a hearing was held on December 15, 2021. Following a hearing, the court determined the State had established C.J. penetrated K.R., despite C.J.'s objection that he had been found not guilty of sexual assault during his previous trial. The court classified C.J. as a Tier II offender. This appeal followed.[5]

[5] The trial court stayed the order affirming registrant's tier designation pending appeal.

III.

C.J. raises the following issues for our consideration:

> POINT I
>
> THE COURT IMPROPERLY ALLOWED THE STATE TO INCREASE REGISTRANT'S MEGAN'S LAW TIER DESIGNATION BASED ON A CLAIM OF PENETRATION BECAUSE A JURY ACQUITTED REGISTRANT OF THAT CLAIM AND BECAUSE THE COURT FAILED TO FULLY AND ACCURATELY CONSIDER THE TRIAL RECORD.
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> > A. The Court's Consideration of Acquitted Conduct Violated Registrant's Rights to Due Process and Fundamental Fairness.
> >
> > B. The Court Further Erred When It Found that Registrant Committed the Conduct for Which He Was Acquitted Based on an Incomplete and Inaccurate Review of the Record.

C.J. primarily challenges the State's scoring on factor two—the degree of contact—because the State assessed the maximum score of fifteen points against him on this factor, based on the allegation he "penetrated [the victim] with his penis and fingers." Because of this aggregate score, C.J. was classified as a Tier II offender as opposed to Tier I. C.J. contends because he was acquitted of penetration, the State should not have utilized the evidence concerning penetration to increase his tier designation. He notes the jury found every element of the sexual assault charges—other than penetration—in

convicting him of the lesser-included offense of criminal sexual contact. That is, C.J. contends his conviction of criminal sexual contact required a finding of force, along with the other elements of sexual assault—except penetration—so the court could not utilize penetration in its tiering calculus. Therefore, he asserts the State's reliance on penetration to increase his tier classification is improper.

C.J. argues consideration of the acquitted conduct violated his rights to due process and fundamental fairness. He concedes our Supreme Court in C.A., held that a registrant's tier designation could be based on allegations of underlying criminal charges that were dismissed as part of a plea deal. 146 N.J. at 84-86. However, C.J. submits acquittals and dismissals should not be treated the same because a judge's consideration of underlying dismissed charges does not undermine the finality of a jury verdict, but the use of acquitted conduct is arbitrary and erodes the public's faith in the jury process.

C.J. primarily relies on Melvin for the proposition that the findings of a jury should not be nullified by a judge through a lower fact-finding standard. 248 N.J. at 352. C.J. argues sentencing hearings are comparable to tier hearings, and Melvin should apply in Megan's Law proceedings to prohibit trial courts from using acquitted conduct to increase a registrant's tier designation.

Lastly, C.J. contends the trial court should have considered the entire trial record and held an evidentiary hearing given the jury's acquittal on the sexual assault counts. He further asserts the victim's statements were inconsistent, and the hearing judge erred in finding C.J had penetrated K.R.

The State counters "non-conviction offenses"—whether dismissed charges or acquitted conduct—are properly considered by a trial court in evaluating a registrant's risk of re-offense, provided there is sufficient evidence in the record. C.A., 146 N.J. at 89. The State maintains a registrant's acquittal in a criminal case does not preclude the State from utilizing the acquitted conduct in a Megan's Law hearing where the burden of proof—clear and convincing evidence—is different than the standard used in a criminal trial. The State distinguishes Melvin because that case involved a criminal sentencing issue, and is therefore distinguishable from Megan's Law tier classification proceedings, which are designed for remedial (instead of punitive) purposes.

The State further maintains it met its burden of proof based on the documentary evidence submitted, including the victim's statements, police reports, and K.R.'s trial testimony. Moreover, the State contends the victim's testimony was consistent and established the act of penetration occurred based on her reporting the same story to multiple individuals at different times.

The State further argues an evidentiary hearing was not required because C.J. did not provide any evidence that contradicted the evidence there was penetration, other than the jury's verdict. The State argues the acquittal on the sexual assault count could have been based on the victim not mentioning the use of force during the sexual assault and, therefore, it is improper to speculate the jury determined there was no penetration. The State contends simply because the jury acquitted C.J. of sexual assault does not trump the reviewing judge's discretion in considering penetration evidence for the purposes of Megan's Law tiering.

IV.

We review a Megan's Law registrant's tier designation and scope of community notification for an abuse of discretion. See, e.g., In re Registrant A.I., 303 N.J. Super. 105, 114 (App. Div. 1997). "[A]n abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." State v. R.Y., 242 N.J. 48, 65 (2020) (internal quotation marks omitted) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). We owe no special deference to a judge's "interpretation of the law and the consequences that flow from established facts . . . ." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A.

We first address the trial court's use of acquitted conduct in determining C.J.'s tier classification. In Melvin, the defendant was found guilty of second-degree unlawful possession of a weapon and acquitted of first-degree murder and first-degree attempted murder. 248 N.J. at 326. At sentencing, the trial court, relying on United States v. Watts, 519 U.S. 148 (1997), for the proposition that a trial court has broad discretion at sentencing to consider all circumstances of the case. It determined—notwithstanding the jury's acquittal of Melvin on first-degree murder—the evidence supported the conclusion Melvin shot the victims. Melvin, 248 N.J. at 326. Based on the trial judge's determination Melvin shot three individuals, he imposed a sixteen-year term of imprisonment with an eight-year parole ineligibility period. Ibid.

Melvin also involved the consolidated appeal in the matter of State v. Paden-Battle, 464 N.J. Super. 125 (App. Div. 2020). There, the jury found Paden-Battle guilty of kidnapping, conspiracy to commit kidnapping, and felony murder. Melvin, 248 N.J. at 326. However, the jury acquitted Paden-Battle of first-degree murder. Ibid. At sentencing, the trial judge, again relying on Watts, determined Paden-Battle, despite being acquitted of the murder charge, was the mastermind who orchestrated the victim's murder.

Melvin, 248 N.J. at 326. The trial court sentenced Paden-Battle to a sixty-year prison term.[6]

The Melvin Court noted the doctrine of fundamental fairness reflects the "State Constitution's heightened protection of due process rights." Id. at 347. The doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against government procedures that tend to operate arbitrarily[.]" Id. at 348 (citing State v. Saavedra, 222 N.J. 39, 67 (2015)). The Court noted the doctrine of fundamental fairness has been applied sparingly and only where the interests involved are compelling and a defendant would be subject to oppression, harassment, or egregious deprivation. Ibid. (citing Doe, 142 N.J. at 108). In applying the doctrine of fundamental fairness, the Melvin Court noted:

> [W]e cannot allow the finality of a jury's not-guilty verdict to be put into question. To permit the re-litigation of the facts in a criminal case under the lower preponderance of the evidence standard would render the jury's role in the criminal justice process null and would be fundamentally unfair. . . . [W]e simply cannot allow a jury's verdict to be ignored through judicial fact finding at sentencing.
>
> [Id. at 349 (emphasis added).]

[6] We affirmed Melvin's sentence, but vacated Paden-Battle's and remanded for resentencing. Ibid. The Supreme Court granted certification in both cases and ultimately reversed in Melvin and affirmed in Paden-Battle. Ibid.

The Court further noted that jury findings cannot be "nullified through lower-standard judicial fact findings at sentencing." Id. at 352 (emphasis added).

The Melvin Court was concerned with the use of acquitted conduct to increase a defendant's punishment—at sentencing. Ibid. A criminal sentence is punishment for illegal activity as distinguished from Megan's Law, which our Supreme Court has determined is not designed to punish a defendant. As noted, Megan's Law is intended "to protect the community from the dangers of recidivism by sexual offenders." C.A., 146 N.J. at 80; N.J.S.A. 2C:7-1(a). As opposed to punishing a defendant, "[t]he expressed purposes of the registration and notification procedures [under Megan's Law] are 'public safety' and 'preventing and promptly resolving incidents involving sexual abuse and missing persons.'" A.A., 461 N.J. Super. at 394 (citing N.J.S.A. 2C:7-1). "The law is remedial and not intended to be punitive." Ibid. (citing Doe, 142 N.J. at 12-13).

The Melvin decision was limited to the use of acquitted conduct in the context of criminal sentencing, and the Court did not indicate acquitted conduct could not be utilized in non-sentencing or non-criminal proceedings. We find Melvin to be distinguishable from the facts in this matter, as the Melvin Court was concerned with the trial court imposing an enhanced criminal sentence based on acquitted conduct, thereby ignoring the jury's

verdict through judicial fact-finding at sentencing. Id. at 349. As we have previously stated, "[t]he tier classification of a Megan's Law offender . . . is wholly separate from the disposition or sentence." State ex rel. D.A., 385 N.J. Super. 411, 419 (App. Div. 2006). We are not persuaded Melvin is applicable in the context of a Megan's Law tier classification hearing where the defendant is not being punished. Moreover, based on our analysis above, the trial court's use of acquitted conduct in this situation did not subject C.J. to an egregious deprivation and, therefore, did not run afoul of the doctrine of fundamental fairness.

Our Supreme Court in C.A. addressed the issue whether a "non[-]conviction offense" may be considered in determining a convicted sex offender's tier classification under the Registration and Community Notification Laws and whether the prosecutor's use of documentary hearsay evidence to prove the alleged offense offends procedural due process and the doctrine of fundamental fairness. 146 N.J. at 79. While C.A. deals with the utilization of non-conviction offenses for dismissed charges at a Megan's Law hearing, as opposed to acquitted conduct, the Court's analysis of the issue is still instructive and lends support to our conclusion that acquitted conduct can be considered in Megan's Law hearings.

C.A. was sentenced to probation for a fourth-degree sexual assault and burglary on June 14, 1991, and he received a two-year probationary term. Id. at 84. Two days later, a second victim, A.Z., alleged she was sexually assaulted by C.A. Ibid. C.A. was indicted for sexual assault and other charges stemming from the assault of A.Z. Id. at 85. A third victim alleged C.A. sexually assaulted her on January 30, 1992. Ibid. Pursuant to a plea agreement, C.A. pled guilty to third-degree sexual assault for the January 30 incident, and the earlier indictment for the sexual assault of A.Z. was dismissed. Id. at 86. C.A. was sentenced to a five-year custodial sentence with a two and one-half year parole disqualifier. Ibid. When C.A. was preparing to be released in October 1995, the State notified him he received a score of 83 under the tier classification scale and that he would be sentenced as a Tier III sex offender. Ibid. C.A. argued the court should not be permitted to consider the allegations concerning A.Z. because the charge was dismissed, it was not an offense for the purposes of the Registration and Community Notification Laws, and could not be counted in computing his scale score. Ibid. He further argued the documentary evidence was not reliable, and requested a hearing as to the A.Z. allegations. Ibid.[7]

[7] We affirmed regarding the use of non-conviction offenses, but remanded for a hearing because the documentary evidence should only be admitted when

Our Supreme Court noted, "experts generally agree that the best predictor of a registrant's future criminal sexual behavior is that registrant's prior criminal record. Accordingly, prior non[-]conviction offenses should be considered in the risk calculation provided . . . there is sufficient reliable evidence that the offense did happen." Id. at 90. The Court further noted, "[w]e emphasize that the focus on prior offenses is not due to any attempt at punishment but is rather a scientific attempt to better protect the public safety from registrants likely to re-offend." Id. at 105. Significantly, the Court indicated notification pursuant to Megan's Law is not punishment for a criminal action, but rather is a civil remedy to ensure public safety. Id. at 91 (citing Doe, 142 N.J. at 40-74).

The Court went on to examine other jurisdictions that have utilized non-conviction offenses in determining the risk of re-offense or recidivism and in sustaining civil remedies. Id. at 91-92. The Court then focused on cases in New Jersey. Ibid. Specifically, the Court noted:

> We have approved of civil penalties for conduct when the individual was acquitted on charges of

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adjudged reliable based on the totality of the circumstances surrounding the statements being considered. Id. at 87. We further held that neither side could serve process upon the victim without leave of the court, which should only be granted upon a clear and convincing demonstration of a compelling need for a witness's testimony. Id. at 87-88. The Supreme Court subsequently granted certification. 143 N.J. 328 (1996).

> committing that offense. Thus, in In re Pennica, 36 N.J. 401, 418 (1962), we held that "acquittal of a member of the bar following trial of a criminal indictment is not res judicata in a subsequent disciplinary proceeding based on substantially the same charge or conduct." Similarly, in In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971), the Appellate Division allowed civil disciplinary proceedings against a civil servant despite a prior acquittal on those same charges. See also [N.J. Div. of Youth & Fam. Servs.] v. V.K., 236 N.J. Super. 243, 252 (App. Div. 1989) (sustaining civil decision terminating parental rights due to abuse, despite parent's prior acquittal on same charges); [Twp. of E.] Hanover v. Cuva, 156 N.J. Super. 159, 163 (App. Div. 1978) (approving civil injunction for violation of township ordinance despite prior acquittal on same charge); Kugler v. Banner Pontiac–Buick, Opel, Inc., 120 N.J. Super. 572, 579–80 (Ch. Div. 1972) (allowing civil penalty for violation of Consumer Fraud Act despite acquittal on same charge); Freudenreich v. Mayor & Council of Fairview, 114 N.J.L. 290, 292-93 (E & A 1934) (permitting disciplinary action for police officer despite prior acquittal); cf. Helvering v. Mitchell, 303 U.S. 391 (1938) (sustaining civil suit to recover tax deficiency despite prior acquittal).
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> [146 N.J. at 91-92 (emphasis added).]

Notably, in canvassing our jurisprudence, the Court focused on acquitted conduct—not non-conviction offenses or dismissed charges—being utilized in subsequent proceedings. Ibid. C.A. ultimately held use of non-conviction offenses does not run afoul of the doctrine of fundamental fairness and this alleged conduct was properly considered by the trial court when determining

the risk of re-offense under Megan's Law. Id. at 92. The Court's reference to acquitted conduct while discussing Megan's Law proceedings and what evidence can be considered in civil proceedings subsequent to a criminal matter further leads us to conclude that acquitted conduct can be used for the purposes of a Megan's Law hearing.

We agree criminal defendants should not have their sentence increased based on acquitted conduct under Melvin. The criminal sentencing process, however, serves a different purpose than a Megan's Law tier designation. Sentencing is designed to punish a defendant, whereas Megan's Law is focused on public safety concerns. The C.A. Court noted:

> [a] fine balance must be drawn between the registrant's rights to due process and fundamental fairness and the community's right of protection against the registrant's risk of re-offense, but the balance to be drawn is not the same balance as drawn in a criminal proceeding. In recognition of the countervailing governmental interests, [Doe] did not grant registrants the full panoply of rights applicable to a criminal proceeding.
>
> [Id. at 94 (citing Doe, 142 N.J. at 34) (emphasis added).]

In short, the Court recognized the distinction between criminal proceedings and a civil Megan's Law tier proceeding.[8]

Based on the foregoing, we are satisfied the trial court, utilizing a less demanding standard of proof than used at a criminal trial, properly considered C.J.'s acquitted conduct during the hearing given the focus of the Megan's Law tier classification hearing. This is because the trial court's consideration of the conduct was not an attempt to further punish C.J., but rather for a legitimate public safety purpose consistent with C.A. That does not, however, end our inquiry.

B.

Having determined the trial court properly considered acquitted conduct in arriving at C.J.'s tier designation, we address C.J.'s argument the trial court based its decision on an incomplete and inaccurate review of the record.

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[8] We also observe another jurisdiction, addressing the issue before us, has held that an acquittal of a sex offense charge did not preclude the consideration of that conduct at a subsequent classification hearing. Soe, SORB No. 252997 v. Sex Offender Registry Bd., 466 Mass. 381, 396 (2013). Additionally, the Supreme Judicial Court of Massachusetts in Doe, SORB No. 3177 v. Sex Offender Registry Board, noted "[a]n acquittal at a criminal trial simply means that a jury did not find the defendant guilty of the charged sex offense beyond a reasonable doubt . . . ." 486 Mass. 749, 755 (2021). The Court further noted "it does not demonstrate that the evidence at the classification hearing did not warrant a finding [under a lesser standard] that the sex offender committed the charged offense." Ibid.

We begin by noting the Supreme Court "vested reviewing courts with the obligation of providing procedural due process to ensure the appropriateness of a tier classification." C.A., 146 N.J. at 94 (citation omitted). The reviewing judge is tasked with conducting an evidentiary and investigatory hearing, that is civil and not criminal in nature, in which it carefully balances registrant's due process and fundamental fairness rights and the community's right of protection against registrant's risk of re-offense. Ibid. Judicial determinations regarding tier classification and community notification are made "on a case-by-case basis within the discretion of the court[]" and "based on all of the evidence available[,]" not simply by following the "numerical calculation provided by the [RRAS]." In re Registrant G.B., 147 N.J. at 78-79 (quoting C.A., 146 N.J. at 109).

In striking the balance between the registrant's and the community's rights, C.A. noted the Rules of Evidence do not apply and trial courts may rely on documentary evidence. 146 N.J. at 94. Importantly, while hearsay is admissible, the "relaxed standards for admissibility are not to be equated with automatic admissibility[. . . .] Our Rules of Evidence insist that only statements subject to cross-examination, or other statements where 'circumstantial guarantees of trustworthiness' exist, should be admitted as

evidence." Id. at 95 (citing 2 McCormick on Evidence § 253 at 130 (4th ed. 1992)).[9]

Guided by these principles, we review the trial court's decision in this matter. The court noted it had an opportunity to review all the briefs and supporting documentation, including trial transcripts[10] provided by the State. The court stated:

> [the victim's] statements are sufficiently trustworthy to meet the State's burden by clear and convincing evidence in the present case. First[,] the [c]ourt notes that [the victim's] version of events was consistent throughout the police reports, her statement, and the trial testimony. She described in the initial reports to responding officers on July 10, 2008[,] that [C.J.] "stuck his penis inside of me. He hurt me." . . . The next day . . . the victim . . . told a . . . detective that [C.J.] "[s]tuck his penis inside of me for, like, four or five minutes." . . . She further explained that he stuck his finger inside of her vagina and used his mouth on her vaginal area.

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[9] The Court further noted neither the State nor the defense may compel the victim's testimony without leave of court. Id. at 97. "The State often avoids a trial, particularly in a sex offense case, so that the victim will not be forced to testify. We are therefore reluctant to compel a victim to testify unless it is absolutely necessary." Id. at 97-98. "We expect that only in the rarest of cases will a court compel the testimony of a victim." Id. at 98. There was no testimony at the hearing in this matter. We leave to the trial court's sound discretion whether testimony is necessary on remand bearing in mind the Court's guidance regarding victim testimony.

[10] It is not clear from the record what specific transcripts were reviewed by the trial court and what transcripts C.J. wanted the court to review.

> At trial some three years later while under oath the victim was similarly as consistent. . . .
>
> . . . [T]he hearsay here is perhaps the most reliable of hearsay. It is testimony under oath and subject to the rigors of cross examination. While the jury did not convict on the charges of sexual assault . . . there is a significant difference in the burden of proof at a criminal trial than at the hearing before the [c]ourt here. . . .
>
> . . . [W]hile the State may not have been able to meet its burden of proving sexual assault beyond a reasonable doubt at trial, that does not automatically preclude it from meeting its burden . . . by clear and convincing evidence for purposes of this hearing . . . .

In responding to the parties' arguments concerning whether the jury failed to convict on sexual assault because the State failed to prove penetration or force, the court recognized it could not speculate as to how the jury decided certain elements of the charges. Nevertheless, the court did address the issue noting force was not an element for certain of the charged offenses and commented on aspects of the victim's testimony regarding the use of force. The court ultimately concluded:

> [b]ased on the [c]ourt's review of the file, which includes police reports, trial transcripts, victim statements, and psychological evaluation, this [c]ourt is satisfied the scores the registrant received to each of the [thirteen] categories has been met by clear and convincing evidence. . . . Therefore, the [c]ourt will sign an order designating the registrant as a Tier II . . . .

Although the jury determined the State failed to prove the sexual assault claims beyond a reasonable doubt, as previously discussed, the trial court correctly found this did not preclude it from evaluating the same evidence under the less demanding clear and convincing standard. Our concern, however, is the trial court did not address C.J.'s request to review other portions of the transcripts. In fairness to the trial court, C.J. did not specifically identify the portions of the record he contended rebutted the acquitted conduct evidence, with the exception of one witness. Rather, defense counsel indicated, "[t]he victim's statements at trial was only one piece of a very large and lengthy trial. If the . . . court [was] to consider the victim's testimony, . . . arguably the testimony by Dr. Debellis should also be considered." C.J. further noted there were multiple other witnesses whose testimony the court should review and not limit its review to the victim's testimony. In short, while C.J. conceded the victim consistently alleged penetration, he argued the judge should have conducted a more robust review of the record. For these reasons, we vacate the trial court's order.

We emphasize we are not suggesting the court must review the entire trial transcript at every Megan's Law hearing. Rather, the parties should specifically identify the portions of the record that should be reviewed. The court, in turn, should review the portions of the record requested by both

parties or explain why it is not necessary. Moreover, defense counsel has an obligation in advance of the hearing to precisely identify the specific witnesses' testimony the court should review prior to making its determination. The trial court should not be expected to review the entire transcript and guess what may be relevant for the purposes of a Megan's Law hearing. The court must rely on the attorneys to develop a proper record. Here, it appears the State provided portions of the record supporting its contention there was proof that C.J. penetrated the victim. The defense has a corresponding obligation to identify the portions of the record (in addition to Dr. Debellis's testimony) the court should review so that a proper tier classification can be made. On remand, C.J. shall specifically identify the other portions of the transcript or other documents he wants the court to review in advance of the hearing.

The parties dispute how the jury reached its conclusion in acquitting C.J. of sexual assault and whether the acquittal was related to a failure to prove force or penetration. While the court ultimately, and correctly, noted it could not speculate regarding what the jury may have concluded in making its decision, the court did engage in some conjecture as to how the jury may have arrived at its verdict before rendering its decision. On remand, the court should not speculate as to how the jury may have reached its decision. State v. Grunow, 102 N.J. 133, 148 (1986) (courts will ordinarily not speculate on

foundations of jury verdict). Rather, the trial court's role is to evaluate the evidence and independently determine if there is clear and convincing evidence to support the tier classification requested by the State.

V.

To summarize, we hold the trial court properly considered C.J.'s acquitted conduct because of the non-punitive, civil nature of a Megan's Law proceeding, the public safety purpose underpinning the statute, and the less demanding clear and convincing standard utilized to make a tier designation. We remand for the trial court to consider the portions of the record requested by the defense and require the defense to specifically identify portions of the trial transcript or other documents for the court's review. We further leave it to the court's discretion whether a testimonial hearing is necessary.

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