SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1542-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NAHOMI COLLAZO,

Defendant-Appellant.

Submitted November 1, 2022 – Decided November 18, 2022

Before Judges Sumners, Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 16-09-0787.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (William P. Cooper-Daub, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Nahomi Collazo appeals from certain motion rulings, her conviction of drug-related offenses, her sentence, and a forfeiture order. We affirm in all respects except for reversing the forfeiture order entered during the sentencing hearing.

Collazo and her husband, co-defendant Anthony Figueroa, were charged alongside several defendants after an extensive law enforcement investigation into drug activity in Cumberland County. Collazo and Figueroa were severed from the other defendants upon the State's motion. Collazo argues that the court erred by granting severance, asserting that her intended trial strategy suffered as a result. Alternatively, she argues that she should have been tried alone rather than with Figueroa. Collazo also argues that the court should have ordered a mistrial after the State served subpoenas on two of her children mid-trial, or after it was discovered that a juror was acquainted with the mother of one of the assistant prosecutors. Collazo further asserts cumulative error.

As to sentencing, Collazo argues that because the mitigating factors substantially outweighed the aggravating factors, she should have been sentenced a degree lower. Collazo also argues that the order forfeiting the monies seized from her apartment during the execution of a search warrant violated her statutory and due process rights.

I.

From the fall of 2015 into 2016, the Organized Crime Bureau of the Cumberland County Prosecutor's Office and local police departments investigated an alleged network of individuals distributing heroin, cocaine, and marijuana in the county. As part of this investigation, police obtained warrants to monitor several telephones, including two cellular phones linked to Carlos Thomas, who was later indicted with defendants.

On twenty-two calls recorded pursuant to the wiretap warrants, officers heard Thomas discussing drug transactions with a man referred to as "Tone"; these calls were played for the jury. One of the two phones Tone used to talk with Thomas had a number ending in 7325. This phone's origin was traced to a Cricket Wireless store in Vineland; Cricket Wireless's records stated that it was purchased by "Noami Calaza." The other phone could not be linked to any specific individual.

Vineland Police Detective Jose Torres, who was assigned to listen to the recorded calls, recognized Tone's voice as Figueroa's voice. Torres knew Figueroa from having heard him speak twice before: once for several hours in

2012 and once for twenty minutes a year or two later.[1] Further details concerning the identification of Figueroa as a speaker on the calls is discussed below. Collazo did not participate in any wiretapped calls and was never mentioned in the conversations.

Detectives linked Figueroa to an apartment on East Wood Street in Vineland, which was being rented by his then girlfriend, Collazo.[2] The apartment had previously been leased to Thomas, who recommended Collazo to the landlord as a tenant. She lived in the apartment with her five children. Figueroa was not listed as a tenant on the lease.

On January 12, 2016, after intercepting three calls in which Thomas and Tone talked about meeting for a drug transaction, officers watched Thomas drive to Collazo's apartment. After arriving, Thomas called Figueroa and told him he was outside. Thomas went inside the building, emerging twelve minutes later. On January 25, 2016, following two more calls where Thomas and Figueroa planned a drug transaction, officers again followed Thomas to the apartment.

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[1] These prior interactions occurred during other investigations. The State and Collazo were barred from eliciting detailed testimony about Figueroa's history with police.

[2] The two married at some point after their arrest.

Thomas went inside, then came out eleven minutes later carrying a yellow shopping bag.

Investigators executed a search warrant for Collazo's apartment at 6:33 a.m. on February 5, 2016. Collazo, Figueroa, and the children were inside. A drug-detection dog alerted to a closet, inside which officers found a backpack containing bags of marijuana, wax folds of heroin, cocaine, a Ruger handgun, and bullets. In various locations throughout the apartment, particularly the kitchen, officers found more marijuana and cocaine, a grinder, a scale, small plastic baggies, and other paraphernalia. In total, 3.34 ounces of marijuana, 1.3 ounces of heroin, and 1.37 ounces of cocaine were recovered. Police also found $13,145.86 in cash, including $10,893 in Collazo's purse, which she claimed was rent money, and $1,965 in Figueroa's pocket.

A Cumberland County grand jury issued Indictment No. 16-09-0787 charged sixteen individuals, including Collazo and Figueroa, with various drug-related offenses. Collazo and Figueroa were charged with second-degree possession with intent to distribute more than a half ounce of cocaine or heroin; third-degree possession with intent to distribute more than an ounce of marijuana; third-degree possession of cocaine or heroin; fourth-degree possession of more than fifty grams of marijuana; and second-degree possession

of a gun while committing possession with intent to distribute a controlled dangerous substance (CDS). Figueroa was additionally charged with second-degree conspiracy to distribute CDS; two counts of third-degree conspiracy to distribute CDS; fourth-degree conspiracy to possess CDS; and second degree certain persons not to possess weapons.

The court conducted a multi-day Driver[3] hearing. The court determined the wiretapped phone calls submitted by the State were admissible.

The State initially moved to sever Collazo for trial. It later filed a revised motion to sever Collazo and Figueroa to be tried together. The court granted the motion. The court also granted the State's motion to authenticate, and voice identify, wiretapped calls between Figueroa and a former co-defendant.

Collazo and Figueroa were tried together before a jury over seven days. the court denied Collazo's motion for a mistrial based on an alleged jury taint issue and a claim that the State had improperly served subpoenas on her two oldest children. At the close of the State's case, the court denied defendants' motions for acquittal. The jury convicted Collazo and Figueroa of all the charges against them.

[3] State v. Driver, 38 N.J. 255 (1962).

On October 22, 2019, the court denied Collazo's motion for a new trial. It then sentenced her to an aggregate ten-year term subject to forty-two months of parole ineligibility.

This appeal followed. Collazo raises the following points for our consideration:

> POINT ONE
>
> THE SEVERANCE OF TRIALS OVER DEFENDANT'S OBJECTION PREJUDICIALLY UNDERMINED DEFENDANT'S DEFENSE STRATEGY.
>
> > (1) The Trial Court Erred When it Granted the State's Severance Motion.
> >
> > (2) The Trial Court Erred When it Failed to Sua Sponte Declare a Mistrial When it Became Apparent That Defendants Had Antagonistic Defenses.
>
> POINT TWO
>
> AS THE STATE'S SUBPOENA OF DEFENDANT'S CHILDREN MIDTRIAL WAS A BLATANT ATTEMPT TO INTIMIDATE DEFENDANT, THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL.
>
> POINT III
>
> THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL ON THE GROUND OF JUROR TAINT.

POINT IV

THE TRIAL COURT'S CUMULATIVE ERRORS DENIED DEFENDANT A FAIR TRIAL.

POINT V

AS DEFENDANT HAD SHOWN THAT THE MONEY FOUND IN HER APARTMENT WAS GIVEN TO HER BY HER FATHER-IN-LAW FROM HIS PENSION ACCOUNT, THE FORFEITURE ORDER AS TO THE MONEY SEIZED SHOULD BE REVERSED AND FURTHER THE FORFEITURE PROCEDURE USED BY THE COURT VIOLATED DEFENDANT'S STATUTORY AND DUE PROCESS RIGHTS.

POINT SIX

AS THE MITIGATING FACTORS SUBSTANTIALLY OUTWEIGHED THE AGGRAVATING FACTORS IN THIS CASE, THE TRIAL COURT SHOULD HAVE IMPOSED A SENTENCE A DEGREE LOWER.

II.

Collazo argues the trial court erred by severing her from the rest of the indicted defendants other than Figueroa. She asserts that her planned trial strategy was to minimize her level of culpability in comparison to these others and that she was unable to use this tactic to the fullest because she was tried only with Figueroa. Collazo maintains that severance did not serve judicial

economy as it resulted in multiple trials. She contends that severance gave the State a "major strategic advantage" and denied her a fair trial.

Collazo argues for the first time on appeal that the court should have sua sponte severed her from Figueroa, asserting that the two had "antagonistic defenses." She points to instances where Figueroa's counsel prevented her from eliciting testimony about Figueroa's history with the police, arguing that she would have been permitted to do so if Figueroa was not her co-defendant. She argues that her and Figueroa's defenses were mutually exclusive, and "when [this] became apparent" the court should have ordered new, separate trials.

A trial court's decision on a severance motion is reviewed for abuse of discretion and is "entitled to great deference on appeal." State v. Brown, 118 N.J. 595, 603 (1990). Since Collazo argues she should have been severed from Figueroa for the first time on appeal, the court's failure to do so sua sponte is reviewed for plain error. Reversal on that ground is therefore unwarranted unless the error was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

Under Rule 3:7-7, two or more defendants may be charged and tried jointly if they are alleged to have participated in the same act or series of actions constituting the offense. In those circumstances, and particularly where much

of the same evidence is needed to prosecute each defendant, a joint trial is preferable because it serves judicial economy, avoids inconsistent verdicts, and allows for a more accurate assessment of relative culpability. State v. Weaver, 219 N.J. 131, 148 (2014); Brown, 118 N.J. at 605. However, if it appears any defendant or the State will be prejudiced by a joint trial, the court may sever pursuant to Rule 3:15-2(b). Weaver, 219 N.J. at 148-49. The trial court should balance any potential prejudice against the State's interest in judicial efficiency. Brown, 118 N.J. at 605.

Here, as of May 2018, several of the original sixteen individuals named in the indictment were to be tried together. The State first moved to sever Collazo and try her alone. Collazo filed a brief contesting the motion, in which she stated that she did not want to be severed at all but that if she had to be, her "preference" was to go to trial with Figueroa because she wanted to "face this potential life-changing event" with him and because her attendance at both his trial and her own would present "difficult child care issues for her three daughters." The State subsequently moved for Collazo and Figueroa to be severed and tried together.

By the time of the motion hearing on January 30, 2019, seven defendants remained in the case. The State informed the court that it had filed its revised

motion in part based on Collazo's stated preference to be tried alongside Figueroa.[4] The prosecutor also argued that trying the two together would make sense because "they resided together [and] they were arrested together." He asserted that a seven-defendant "mega trial" would take eight weeks, and that granting severance would not take longer and be "more efficient" in terms of addressing the varying charges against the different defendants. The prosecutor noted that scheduling court dates for seven defendants and their respective attorneys had been difficult during the pretrial phase, and asserted this illustrated the difficulties of proceeding expeditiously and efficiently in an orderly way in a single trial.

Collazo's counsel argued that his client had prepared for a "mega trial with multiple defendants and all sorts of other evidence that didn't bear on [her]." He stated that he had intended to point out to the jury that Collazo was not documented in any of the wiretapped calls, social media posts and messages, or other surveillance reports that would be presented by the State at a long trial, in hopes that the jury would "recognize" that Collazo's "relative culpability" was minimal compared to the other defendants. Counsel also argued that there was

[4] The State also argued successfully that another defendant, Rasheem Roberts, should be severed and tried alone.

"no economy" in holding multiple trials. In response, the prosecutor stated that whether all seven defendants were tried together or only Collazo and Figueroa, the evidence the State would present against Collazo would be the same. Figueroa did not oppose the severance motion.

The court noted that moving the case forward had been "difficult" due to the need to schedule any proceedings around the schedules of all the attorneys involved. The court thought that a joint trial would take more than eight weeks. The court found that while multiple trials would require multiple jury selections and other procedures, the matter was "simply too ungainly if left in its current configuration" and "the only way [the] trial [was] going to get done in any reasonable period of time [was through] severance." It also found that the severance of Collazo and Figueroa from the other defendants "seem[ed] to align with the different areas of proofs." The court concluded that judicial economy would be better served by severance, and granted the State's motion.

We discern no abuse of discretion. Generally, joint trials of defendants are preferable because they "foster an efficient judicial system," "spare witnesses and victims the inconvenience and trauma of testifying about the same events two or more times," and avoid the possibility of inconsistent verdicts. State v. Sanchez, 143 N.J. 273, 282 (1996). However, most of this case law

addresses instances where a defendant has moved for severance and argued that he or she will not receive a fair trial if tried alongside others, rather than cases where, as here, the State sought severance.

Here, the court found that trying all seven remaining defendants together would be difficult and inefficient based on the difficulty in scheduling pretrial proceedings. There is nothing in the record to suggest that any witnesses would be traumatized or unduly inconvenienced by having to testify at multiple trials. Also, because the evidence against Collazo and Figueroa was largely separate from the evidence against the other defendants save for the wiretapped calls that also included Thomas, there was a relatively low risk of inconsistent verdicts. As a result, the usual implications disfavoring severance were not present.

"The fact that one defendant seeks to escape conviction by placing guilt on his or her co-defendant has not been considered sufficient grounds for severance." Brown, 118 N.J. at 606. A defendant "does not have a right to severance simply because [he or she] believes that a separate trial 'would offer [him or her] a better chance of acquittal.'" State v. Johnson, 274 N.J. Super. 137, 151 (App. Div. 1994) (quoting State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975)). A defendant's speculation regarding the likelihood of acquittal in a combined trial is not a factor when deciding a severance motion.

Collazo's only argument that severance should not have been granted was that her intended trial strategy might have worked better if there had been more co-defendants with whom she could contrast herself. We find no precedent supporting this argument. The evidence against Collazo would have been the same whether she was tried alongside one or six other individuals. Defense counsel had more than sufficient time to adjust his tactics; severance was granted on January 30, 2019, and trial did not commence until May 14, 2019. Moreover, counsel was also still able to, and did, attempt to distance Collazo from the greater drug conspiracy by pointing out that she was not identified in any wiretapped calls or other communications collected during the investigation.

Because severance did not prejudice Collazo's due process rights or render her trial unfair, and because dividing the defendants allowed the matter to proceed more efficiently, we conclude the trial court did not abuse its discretion in granting the State's motion.

We are also unpersuaded by Collazo's assertion that the trial court erred by not sua sponte ordering that Collazo and Figueroa be tried separately. Severance should be granted where co-defendants' defenses are mutually exclusive. Weaver, 219 N.J. at 149. Mutual exclusivity exists where the jury is forced "to choose between the defendants' conflicting accounts and to find only

one defendant guilty." Brown, 118 N.J. at 606. If the jury can accept the core of one defendant's defense only if it rejects the core of the other's, severance is necessary. Ibid. If, by contrast, the jury can return a verdict against one or both defendants by believing neither, both, or some part of each defense, the defenses are not mutually exclusive even if they are "clearly in conflict and antagonistic." Ibid.

The latter scenario is what occurred here. The jury found both Collazo and Figueroa guilty of the possession charges against them. This outcome was consistent with the evidence; a reasonable jury could have found that the drugs, money, and gun discovered in Collazo's apartment belonged to both defendants jointly. There was nothing "mutually exclusive" about the core of Collazo and Figueroa's defenses, as they did not give irreconcilably different accounts of how these items came to be in the home. While Collazo now argues on appeal that the court should have severed her from Figueroa when she sought to admit evidence of Figueroa's history with the police, merely "antagonistic" strategies do not warrant severance. Brown, 118 N.J. at 606.

Collazo did not move for severance at any point during trial, and it should be noted that in opposition to the State's initial motion to sever her alone, she stated that if she had to be severed, she would prefer to be tried alongside her

husband. See State v. Corsaro, 107 N.J. 339, 345-46 (1987) (trial errors induced, encouraged, or acquiesced to by defense counsel are not a basis for reversal). The court's alleged failure to sua sponte sever Collazo and Figueroa was not plain error.

III.

Collazo argues the trial court should have declared a mistrial for two reasons. First, she complains that subpoenas had been served on two of her children. She asserts this "extraordinary conduct" was an intimidation tactic by the State meant to threaten that if she testified, it would call her children against her. She claims the court should have declared a mistrial because she was prevented from participating fully in her trial as a result.

Second, Collazo argues the court should have granted her motion for a mistrial after it was learned that a juror was acquainted with the assistant prosecutor's mother. She also contends the court erred by failing to excuse another juror to whom the first juror briefly spoke about her realization that she knew the mother, and by failing to voir dire the rest of the jurors to ascertain whether they had also learned of this relationship. Collazo argues a new trial was required due to the possibility of "juror bias and taint."

"The decision to grant or deny a mistrial is entrusted to the sound discretion of the trial court." State v. Harvey, 151 N.J. 117, 205 (1997). The denial of a mistrial motion should not be disturbed "absent an abuse of discretion that results in a manifest injustice." Ibid. A mistrial is "an extraordinary remedy to be exercised only when necessary 'to prevent an obvious failure of justice.'" State v. Yough, 208 N.J. 385, 397 (2011) (quoting Harvey, 151 N.J. at 205). If there is "an appropriate alternative course of action," a mistrial should be denied. State v. Allah, 170 N.J. 269, 281 (2002).

A.

At the start of trial one day, Collazo's counsel argued that Collazo's two eldest children, who were present during the execution of the search warrant at the apartment, were being served with a subpoena. Counsel contended that the State should have served the subpoenas earlier but had waited until this moment to "make sure [Collazo's] upset and inattentive and unable to participate" in the trial.

The court denied a mistrial, noting "[s]ubpoenas are issued all the time at trials." Our court rules do not require that subpoenas be issued to a potential witness in a criminal case prior to trial. Defense counsel produced no evidence that the State intended to intimidate his client into remaining silent. Ultimately,

the son and daughter were not called to testify. The trial court correctly found that service of the subpoenas was not improper, much less grounds to grant a mistrial.

B.

"A defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007). "The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants "the right to . . . trial by an impartial jury." State v. Brown, 442 N.J. Super. 153, 179 (App. Div. 2015) (quoting U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10). "That constitutional privilege includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters." State v. R.D., 169 N.J. 551, 557 (2001). "[T]he trial court is in the best position to determine whether the jury has been tainted." Id. at 559. As a result, we review the trial court's jury-related decisions for abuse of discretion. Brown, 442 N.J. Super. at 182. This standard "respects the trial court's unique perspective," while showing traditional deference to the court in "exercising control over matters pertaining to the jury." Ibid.

In determining whether a jury has been tainted, the trial court must consider "the gravity of the alleged extraneous information in relation to the case, the demeanor and credibility of the juror or jurors who were exposed . . . and the overall impact of the matter on the fairness of the proceedings." R.D., 169 N.J. at 559. The test for determining whether any alleged outside influence merits a mistrial is whether it "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Panko v. Flintkote, Co., 7 N.J. 55, 61 (1951). The inquiry is not whether the extraneous influence affected the result, but whether it had the capacity to do so. Ibid. If the record does not establish whether an irregularity was prejudicial, it is presumed to be so unless it is affirmatively shown to have no tendency to influence the verdict. State v. Grant, 254 N.J. Super. 571, 584 (App. Div. 1992). The burden is upon the State to establish that the outside influence was "harmless." State v. Scherzer, 301 N.J. Super. 363, 487 (App. Div. 1997).

If during a trial there are allegations that a juror may have been exposed to outside influences, "the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." R.D., 169 N.J. at 557-58. The judge is obliged to interrogate the juror believed to be

influenced, to determine if there is a taint. Id. at 558. When questioning a juror allegedly possessing extraneous information, the court should inquire about the nature of the information and whether the juror has, intentionally or not, imparted it to other jurors. Id. at 560. Depending on the juror's answers, the court must then decide whether to "voir dire individually other jurors to ensure the impartiality of the jury." Ibid. This decision is discretionary and there is "no per se rule" requiring individual voir dire of additional jurors in all instances of potential jury taint. Id. at 561.

Ultimately, the court must decide, in its discretion, "whether the trial may proceed after excusing the tainted juror or jurors, or whether a mistrial is necessary." Id. at 558. A new trial is not warranted in every instance where a juror may have been exposed to outside information. Id. at 559. In fact, "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Smith v. Phillips, 455 U.S. 209, 217 (1982).

On the third day of trial, the parties informed the court that Juror Five had reported running into someone she knew at the courthouse the previous day. Collazo's counsel also said he had observed Juror Five making eye contact with assistant prosecutor, Shari Ann Sasu, and having "cheerful little exchanges" with her. The court asked Sasu if she knew Juror Five, and Sasu said she did not.

The court decided that Juror Five would be questioned at sidebar before trial began for the day.

Juror Five stated that after proceedings ended the day before, a woman she "used to work with" at a hospital approached her to say she thought she recognized her. Juror Five did not know the woman's name, and said that they did not work together, were not in the same department at the hospital, and never met socially; they were "acquaintances" who worked in the same building from 2012 to 2014. Juror Five said the two talked about their children, and that the woman told her she was attending the trial to watch her daughter, Sasu. The woman then said she "didn't want anybody to get in trouble" and left.

The court asked Juror Five whether her prior relationship with Sasu's mother would impact her ability to remain neutral in the trial, and Juror Five said it would not. Juror Five stated she did not consider the mother her friend but simply "a familiar, pretty face from the hospital," and that she could continue to be fair and impartial.

Figueroa's counsel asked Juror Five if she had any conversations with any other jurors about her encounter with Sasu's mother. She said she told one "young lady" that she "just ran into somebody that [she] worked with in the hospital" who had "just made [her] aware that Sasu was her daughter." Juror

Five reported saying to this other juror that she "hope[d] nobody gets in trouble for it." She described the other juror, and the parties discerned that it was Juror Eleven. The court told Juror Five to go back to the deliberation room and not discuss the encounter and discussion with the court with the other jurors.

The court had Juror Eleven brought into the courtroom. The judge asked her whether she had "a conversation with any of the other jurors about somebody they may have run into or something like that." Juror Eleven replied that on her way-out last night, another juror told her "she was talking to somebody's mom." When the judge asked who the daughter was, Juror Eleven said, "It was somebody in [the courtroom]. I don't know. I wasn't really paying much attention." Further questioning revealed that Juror Eleven did not know the daughter was Sasu. The court asked Juror Eleven if the conversation with Juror Five would affect her ability to be fair and impartial in the case. Juror Eleven said it would not, because all Juror Five had said was that she "had talked about somebody [she] knew in the past or something but . . . didn't realize she was part of the jury or part of the court." Juror Eleven also said the conversation "didn't amount to anything" because she was "trying to get out the door." The court told Juror Eleven to return to the jury room and not to speak to anyone about the matter.

Defense counsel requested that Juror Five be removed from the jury. Collazo's counsel argued that Juror Eleven was "tainted by that same exchange." The State argued that neither juror needed to be removed because the conversation between Juror Five and Sasu's mother was "very benign" and "ended immediately." None of the parties requested that the court question any other jurors.

The court found that neither Juror Five nor Juror Eleven was "deceptive, either intentionally or inadvertently." It found that Juror Eleven was "completely credible" when she said she had not paid attention to what Juror Five was talking about and did not know who Juror Five was referring to.

The court decided that because Juror Five now knew of the relationship between her acquaintance and Sasu, it would excuse her "out of the abundance of caution." However, it would not excuse Juror Eleven.

The next day, Collazo's counsel renewed the motion for a mistrial based upon a tainted jury, claiming that Sasu's mother had been sitting where the jury could see her all through that day of trial. The State responded that Sasu's mother did not arrive at court until after lunch and that any taint based on Juror Five's relationship with her had been removed with that juror's dismissal. The court denied the mistrial motion, stating Juror Five had been excused and

reiterating that Juror Eleven was credible in stating she "wasn't even following" what Juror Five was telling her.

We discern no abuse of discretion. Juror Five was removed, and there is no evidence that Juror Eleven was tainted by Juror Five's comments. Questioning the other jurors was not required. R.D., 169 N.J. at 560-61.

IV.

Collazo contends that cumulative error denied her a fair trial, thereby requiring reversal of her conviction. We disagree.

The cumulative error doctrine provides that where a court's errors "are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair," a new trial by jury must be granted. State v. Orecchio, 16 N.J. 125, 129 (1954). Although each established error may not warrant reversal individually, a court may find that the errors together deprived the defendant of due process. Id. at 134. Nevertheless, even where a defendant alleges multiple errors, "the theory of cumulative error will still not apply where no error was prejudicial, and the trial was fair." Weaver, 219 N.J. at 155.

Considering our rulings, we find no error. We therefore reject defendant's invocation of the cumulative error doctrine. State v. Rambo, 401 N.J. Super. 506, 527 (App. Div. 2008).

V.

Collazo argues her sentence is excessive. She argues the court erred by finding that the aggravating and mitigating factors were in equipoise. Collazo contends the court should have found mitigating factors eleven ("imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents"), N.J.S.A. 2C:44-1(b)(11), and twelve ("willingness of the defendant to cooperate with law enforcement"), N.J.S.A. 2C:44-1(b)(12), and concluded that the mitigating factors "clearly and substantially outweighed" the aggravating factors. She also argues for the first time on appeal that the "unique circumstances of this case" should have led the trial court to sentence her to a term appropriate for crimes one degree lower than those she was convicted of, pursuant to N.J.S.A. 2C:44-1(f)(2).

"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). A trial court enjoys "considerable discretion in sentencing." State v. Blann, 429 N.J. Super. 220, 226 (App. Div. 2013), rev'd on other grounds, 217 N.J. 517 (2014). An appellate court first must review whether the sentencing court followed the applicable sentencing guidelines set forth in the

Code of Criminal Justice. State v. Natale, 184 N.J. 458, 489 (2005); State v. Case, 220 N.J. 49, 63 (2014).

Next, the reviewing court must ensure that any aggravating or mitigating factors found by the trial judge under N.J.S.A. 2C:44-1 are based upon sufficient credible evidence in the record. State v. Miller, 205 N.J. 109, 127 (2011). If the factors found by the trial court are so grounded, the sentence must be affirmed even if the reviewing court would have reached another result. State v. O'Donnell, 117 N.J. 210, 215 (1989).

Whether a sentence will "gravitate toward the upper or lower end of the [statutory] range depends on a balancing of the relevant factors." Case, 220 N.J. at 64. A court "must qualitatively assess" the factors it finds and assign each an "appropriate weight." Id. at 65. The sentencing judge must explain its findings about each factor presented by the parties and how the factors were balanced to arrive at the sentence. Id. at 66.

The court found aggravating factor five ("[t]here is a substantial likelihood that the defendant is involved in organized criminal activity"), N.J.S.A. 2C:44-1(a)(5). It based this finding on the facts that the drugs being found in the apartment where Collazo lived, "in and amongst" her personal items, and that most of the money "ostensibly being garnered from" the drug

enterprise in the apartment was found in her purse. The court gave aggravating factor five "slight weight." The court also found aggravating factor nine ("[t]he need for deterring the defendant and others from violating the law"), N.J.S.A. 2C:44-1(a)(9), stating that because there was "a lot of money being made" from the drug operation, there was a need for "a substantial amount of specific deterrence." It gave this factor "substantial weight."

The court found mitigating factor seven ("defendant has no history of prior delinquency or criminal activity"), N.J.S.A. 2C:44-1(b)(7), and gave it "moderate weight," stating that Collazo had little to no prior criminal history beyond some truancy violations and had previously attempted to live a law-abiding life despite "very difficult circumstances" she had endured. It also found mitigating factor eight ("defendant's conduct was the result of circumstances unlikely to recur"), N.J.S.A. 2C:44-1(b)(8), but gave this "slight weight" because she was "more than just an ancillary participant" in the drug activity charged. The court rejected the other mitigating factors Collazo requested and found the aggravating and mitigating factors were in equipoise.

The record supports the court's finding that Collazo did not cooperate with law enforcement, as required for a finding of mitigating factor twelve. As to excessive hardship under mitigating factor eleven, the court noted that Collazo

was raising five children but found that while this was a "difficult situation" it was "not different than any other parent who faces incarceration." This finding was likewise supported by the record. Under these circumstances, rejection of mitigating factor eleven was appropriate. Similarly, the finding that the aggravating factors and mitigating factors were in equipoise is supported by the record.

The ordinary sentencing range for a second-degree offense is five to ten years. N.J.S.A. 2C:43-6(a)(2). Collazo was sentenced at the bottom of that range. She received a five-year term for the second-degree possession with intent to distribute more than a half ounce of cocaine or heroin, and a five-year term, subject to a forty-two-month period of parole ineligibility for second-degree possessing a firearm while committing a violation of N.J.S.A. 2C:35-5, with the sentences to run consecutively as required by the Graves Act, N.J.S.A. 2C:39-4.1(d). The other counts against her were merged with count fourteen.

We discern no basis to set aside Collazo's sentence. It was not manifestly excessive or unduly punitive. We reject Collazo's argument that she should have been sentenced her one degree lower under N.J.S.A. 2C:44-1(f)(2). Collazo did not qualify for lenity under N.J.S.A. 2C:44-1(f)(2). The mitigating factors did not "substantially outweigh the aggravating factors" and Collazo did not

demonstrate that "the interests of justice demand[ed]" a sentencing downgrade. N.J.S.A. 2C:44-1(f)(2).

VI.

Additionally, Collazo argues that the trial court erred by ordering the forfeiture of the $10,893 found in her purse during the search that led to her arrest. At sentencing her counsel asserted that she would have testified about the origin of the $10,893, but that she decided not to out of fear that the State might use her to "try to get at Figueroa." Counsel maintained that Collazo would have testified that Figueroa's father gave her the money after "cash[ing] out his pension."

Following the pronouncement of Collazo's custodial sentence, the prosecutor sought an order forfeiting confiscated funds seized from Collazo's pocketbook. The court stated it "did not find any credibility" in the argument that the money was "anything other than" the proceeds of the "criminal distribution." Defense counsel protested that he had provided evidence that Collazo's father-in-law had made a contemporaneous withdrawal of funds from his pension account, but the court stated that there was "no testimony introduced" to support Collazo's assertion and that there was "sufficient credible

evidence" in the record that the money was obtained illegally. The court entered the forfeiture order.

On appeal, Collazo argues that the forfeiture order violated her due process rights. She contends the proper procedure was for the State to file a forfeiture complaint in the Civil Part, which would entitle her to a hearing at which the State would have the burden to demonstrate that the money was the product of criminal activity.

We reverse the forfeiture order. The seized cash was not prima facie contraband. Pursuant to N.J.S.A. 2C:64-3(a), whenever property other than prima facie contraband is subject to forfeiture, "the forfeiture may be enforced by a civil action, instituted within 90 days of the seizure and commenced by the State and against the property sought to be forfeited." This includes the "proceeds of illegal activities." N.J.S.A. 2C:64-1(a)(4). Notice of the forfeiture action must be given "to any person known to have a property interest" in the articles seized. N.J.S.A. 2C:64-3(c). A person wishing to claim ownership of the seized property must file an answer in the civil action and assert the claimant's interest in the property. N.J.S.A. 2C:64-3(d).

Forfeiture proceedings are considered "quasi-criminal in nature." State v. Melendez, 240 N.J. 268, 278 (2020). As such, they "implicate a person's due

process rights under the Fourteenth Amendment" and are "strictly construed against the State." Ibid. If an answer is filed in a forfeiture action, the Superior Court must "set the matter down for a summary hearing as soon as practicable." N.J.S.A. 2C:64-3(f). If the owner of the property does not file and serve a timely answer, "the property seized shall be disposed of pursuant to N.J.S.A. 2C:64-6." N.J.S.A. 2C:64-3(e). A three-year statute of limitations applies to claims that the owner "did not consent to, and had no knowledge of its unlawful use." N.J.S.A. 2C:64-8.

The record shows that the State filed a civil in rem forfeiture action against several amounts of money seized in connection with the greater CDS investigation, including the $13,145.86 seized from Collazo's apartment. Notably, the caption of the amended complaint refers to the funds being "seized from the possession or constructive possession of Anthony Figueroa." Paragraph twelve of the amended complaint states:

> On February 5, 2016, law enforcement officers executed a judicially authorized search warrant at 716 East Wood Street in the City of Vineland, Cumberland County, New Jersey. Anthony Figueroa was located within the residence. A search of the residence revealed a quantity of controlled dangerous substances and a firearm. Also located within the residence was United States Currency totaling $13,145.86. As a result of the investigation Anthony Figueroa was charged with Conspiracy to commit narcotics trafficking

> offenses, pursuant to N.J.S.A. 2C:5-2; Possession of Controlled Dangerous Substances with the Intent to Distribute, pursuant to N.J.S.A. 2C:35-5; and other felony offenses in violation of the New Jersey Criminal Code.

Noticeably absent from the amended complaint is any mention of Collazo, much less her interest in the funds seized from her pocketbook.

There is no indication in the record that the forfeiture complaint was served on Collazo. A contesting answer was not filed by Figueroa in the forfeiture action. On September 30, 2016, judgment by default was entered forfeiting the $13,145.86 to the State. There is no indication in the record that the civil forfeiture judgment was reopened, vacated, or reversed.

Due process fundamentally requires that a deprivation of property through state action be preceded by notice and an opportunity to be heard. State v. Two Thousand Two Hundred Ninety-Three Dollars in U.S. Currency, 436 N.J. Super. 497, 504 (App. Div. 2014). The State provided neither. Instead, it merely verbally requested entry of an order forfeiting Collazo's interest in the monies seized from her pocketbook. For several reasons, entry of the forfeiture order was error.

First, a civil forfeiture judgment cannot be enforced by a criminal judgment of conviction. See State v. Masce, 452 N.J. Super. 347, 352, 356 (App.

Div. 2017) (noting "[t]he distinction between restitution and civil penalties," and the "qualifying language" in N.J.S.A. 2C:43-2(d) "that the authority to impose a civil penalty must be conferred by law"). In Masce, we concluded that "the Legislature did not intend to include civil consent judgments as penalties. Id. at 358. Here, Collazo did not even consent to the entry of the order and the funds in question did not involve restitution to a victim. The trial court should not have entered the forfeiture order in the criminal case.

Second, Collazo was not afforded due process. There is no indication that the State filed a written application or otherwise provided notice that it intended to make the forfeiture application at sentencing. When defense counsel attempted to argue against entry of a forfeiture order, he was repeatedly cut off by the judge.

Third, the State did not seek to forfeit Collazo's interest in the underlying civil forfeiture action even though it knew at the time of the execution of the search warrant that $10,893 was seized from Collazo's pocketbook.

Collazo was not afforded notice or a full and fair opportunity to contest the forfeiture of the monies seized from her pocketbook in the criminal case. While we do not decide the issue, the record also suggests she may not have

been afforded notice of the civil forfeiture action. We reverse the forfeiture order entered in this case.

Affirmed in part and reversed in part.

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

CLERK OF THE APPELLATE DIVISION