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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1952-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK AUSTIN,

Defendant-Appellant.

Argued October 3, 2022 – Decided November 3, 2022

Before Judges Currier, Enright, and Bishop-Thompson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 21-10-1328.

Robert J. De Groot argued the cause for appellant (Oleg Nekritin, on the brief).

Samuel Marzarella, Chief Appellate Attorney, argued the cause for respondent (Bradley D. Billhimer, Ocean County Prosecutor, attorney; Samuel Marzarella, of counsel and on the brief).

PER CURIAM

On leave granted, defendant appeals from the court's December 27, 2021 order denying his motion to compel the forensic psychiatric examination of a co-defendant, Jack,¹ who has agreed to testify against defendant. We affirm.

Defendant was charged in a superseding indictment with (1) first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2); (2) fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and (3) third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). Defendant's father was the murder victim.

The victim was killed on September 7, 2019. A post-mortem examination concluded that the cause of death was "[b]lunt [t]rauma" to the head and face. The manner of death was homicide.

Defendant, who lived with his father, spoke to police the day after the murder. A forensic analysis of defendant's phone revealed encrypted messages between defendant and Jack.²

¹ We use a pseudonym for co-defendant in light of the sensitive issues involved in the appeal. R. 1:38-3.

² It was later discovered that Jack and defendant were bunkmates while incarcerated at the Garden State Youth Facility.

On September 13, 2019, Jack gave a recorded statement during which he admitted to killing the victim with a baseball bat. He said he was at the victim's home on September 7 to purchase marijuana from defendant when defendant put a gun to Jack's head and instructed Jack to hurt the victim. Jack told detectives that defendant wanted to kill his father because he owed defendant approximately \$8,000. Defendant then gave Jack a bat and gloves and told Jack to kill the victim or defendant would kill Jack's family.

Jack said after he hit the victim with the bat, defendant came into the room. Defendant then drove Jack back to his house in Salem. During the drive, defendant instructed Jack to take off his clothes. Defendant poured bleach on the clothes and told Jack to throw them in the dumpster next to his house.

Jack was charged with the victim's murder, conspiracy to commit murder, and other gun-related charges. In pleading guilty to aggravated manslaughter, Jack agreed to provide "truthful testimony" regarding the events leading up to the murder of the victim.

Shortly after the plea hearing, defendant moved to compel the production of Jack's medical and mental health records from his school years as well as during his incarceration at the juvenile detention center and county jail.

Defendant also sought reports of psychological testing performed on Jack when he was in elementary school.

The court granted the motion and, after an in camera review, released the records with redactions under a protective order. Although the court found the middle school records were "not relevant and remote in time," the records were inadvertently provided and read by defense counsel. In an amended protective order, the court directed counsel to destroy the erroneously produced middle school records.

For context, we briefly summarize the pertinent contents of the records. Jack was subject to an Individualized Education Program (IEP) in high school in 2007. The document classified him in the "[e]motionally [d]isturbed" category. The IEP noted his disabilities resulted from his "inability to build or maintain satisfactory interpersonal relationships." Jack's general cognitive ability was in the average range.

The Department of Corrections produced records from an intake screen done at the Central Reception and Assignment Facility in June 2012. Jack was twenty years old at the time. The psychologist determined that Jack was not a special needs inmate and did not have a current psychiatric diagnosis nor any history of psychiatric problems. The doctor found there were no mental health

issues that would impact Jack's current level of functioning. Under the mental health screening portion of the form, Jack reported he was not taking any medications. However, the intake nurse wrote that Jack stated he was hospitalized four years earlier for bipolar disorder. But Jack also denied any mental health difficulties or suicidality.

A mental health evaluation was also performed in May 2016 prior to Jack's parole from the Garden State Youth Correctional Facility. Jack self-reported that he was previously in counseling and took psychotropic medication for depression and bipolar disorder from ages eight to thirteen. Jack also reported that he was in an outpatient mental health program from age ten to thirteen. The psychologist performing the evaluation concluded that Jack did not show any signs of a "major mood, anxiety, or thought disorder."

On a February 2020 Ocean County Jail Health Assessment intake form, Jack answered "no" to the questions asking whether he had a "current disease or condition requiring mental treatment" and whether he was ever committed to a psychiatric hospital. He also denied any history of mental illness and substance abuse, inpatient or outpatient psychiatric care, and the use of current or past psychotropic medication.

On a different, undated Ocean County jail form,³ Jack reported that he was previously treated for bipolar and schizophrenia disorders, and that he had taken lithium four months earlier and Seroquel at some point. The report also noted Jack advised the questioner that he previously attempted suicide when he "drove through a pole [in] 2018."

Defendant also obtained recordings of Jack's phone calls from the jail to his wife. In several calls, Jack reiterated the story he told the detectives—that defendant put a gun to his head and threatened to kill his family if Jack did not kill the victim.

During a September 16, 2019 phone call, Jack stated he thought the correctional facility put him back on [his] medicine and that he "need[ed] it because they [sic] fucking voices is [sic] killing me right now. . . . That's why I was smoking like that." The next day, Jack stated "the bipolar is kicking in[,] [t]he voices." Jack told his mother he was in the "mental health department" waiting for his "medicine, lithium, and my Seroquel."

Defendant moved to compel Jack to undergo a forensic psychiatric evaluation and sought the release of Jack's 2004 middle school records.

³ This is a patient questionnaire, likely completed by a correctional officer.

Defendant submitted a report from Daniel Greenfield, M.D., a forensic psychiatrist, in support of his motion.

Defendant contended he was entitled to the evaluation to determine whether Jack was competent to testify; to seek an expert opinion regarding Jack's mental health to ascertain whether he could be truthful; and whether Jack suffered from schizophrenia or bipolar disorder.

On December 27, 2021, Judge Guy P. Ryan issued a comprehensive and well-reasoned written opinion and order denying defendant's motion to compel Jack to undergo a forensic evaluation and to release Jack's 2004 psychiatric evaluation and 2004 social work assessment.⁴

Judge Ryan analyzed N.J.R.E. 601 and pertinent caselaw in considering defendant's contention that he needed the psychiatric evaluation to determine whether Jack was competent to testify. The judge noted that State v. R.W. established a "substantial need" test. 104 N.J. 14, 21 (1986). The party seeking the psychiatric evaluation had to show there was some "deviation from acceptable norms, such as an identifiable or clinical psychiatric or similar disorder, beyond the realm of those human conditions that ordinary experience

⁴ Defendant sought leave to appeal only from the portion of the order denying his request for Jack to submit to a forensic psychiatric examination.

would confirm as normal." Id. at 22. To establish the need, the moving party must "present evidence reasonably indicating something peculiar, unique or abnormal about the . . . witness that would influence the witness's competence or the court's ability to assess that competence, or raise unusual difficulties in assessing the witness's credibility." Id. at 22-23.

Judge Ryan then reviewed the documents presented by defendant in support of his application. In considering the school records, the judge found the IEP did not "call into question [Jack's] competency." He stated, "It was conducted more than [ten] years ago while [Jack] was still in high school and carries little, if any, weigh[t] in determining [Jack']s competency to testify at trial in 2022." And in fact, the IEP contradicted defendant's assertion of incompetency as it denoted multiple positive aspects in Jack's personality, academic abilities, and relationships with others.

Similarly, the judge found the various correctional facility documents were not persuasive evidence to support defendant's motion. The forms contained conflicting information, and there was no evidence Jack was ever hospitalized for any mental illness.

Lastly, Judge Ryan reviewed the jailhouse phone calls in which Jack gave different versions of the events surrounding the victim's murder. He stated that

"[Jack's] frequent changes in recollection are matters typically challenged under the crucible of cross-examination."

In concluding defendant was not entitled to a psychiatric examination to determine Jack's competency, the court found "defendant has not presented evidence that goes beyond 'mere allegations of a disorder or unusual condition bearing on competence.'" (quoting R.W., 104 N.J. at 25). The judge stated that conflicting versions of events did not "rise to the level necessary to compel [Jack] to undergo a psychiatric examination."

Judge Ryan also noted he had presided over Jack's plea hearing in February 2020. At that time, after making detailed findings regarding the plea, the judge found Jack was "clearly alert and oriented." He stated further, "[Jack] is not under the influence of any substances. There[] [is] absolutely nothing to indicate to the [c]ourt that he[] [is] impaired or unable to understand what[] [is] going on here today." In addition, Jack's defense attorney never raised any issue of competency during any of the proceedings.

The judge next considered defendant's contention that a psychiatric exam was necessary to reconcile the discrepancies noted in Jack's self-reported medical history in the various documents. The court again found there was no showing of a substantial need. The only evidence of any mental disorder was

made by Jack as a self-reported comment. And those comments were "refuted by [Jack]'s own denial of any mental health diagnoses or conditions" in other correctional facility intake screening records.

Defendant further asserted the examination was necessary to ascertain whether Jack suffered from schizophrenia or bipolar disorder. The judge noted that the documents presented by defendant did not contain any medical diagnosis of a medical or mental health disorder nor a prescription for psychotropic medication. Therefore, defendant was engaging in a "fishing expedition," in attempting to obtain a psychiatric diagnosis from his own expert in the absence of such a diagnosis from any other medical professional.

Because defendant did not present persuasive evidence of incompetence or a justification for the forensic examination, the court denied defendant's application. The court also denied the release of the 2004 records to defendant's proposed psychiatric expert.

On appeal, defendant presents the following point for our consideration:

POINT I

[DEFENDANT'S] SIXTH AMENDMENT RIGHTS TO EFFECTIVE REPRESENTATION AND CONFRONTATION WILL BE VIOLATED IF [JACK] IS NOT COMPELLED TO TAKE A FORENSIC EXAMINATION TO FIND IF HIS PSYCHIATRIC DISORDERS AFFECT HIS ABILITY TO BE TRUTHFUL

A. SIXTH AMENDMENT PROTECTIONS PERMIT A DEFENDANT TO EXAMINE HOW A WITNESS'S PSYCHOLOGICAL DISORDERS [A]FFECT THEIR ABILITY TO BE TRUTHFUL AND WHETHER THEY CAUSE CONFABULATION.

B. [JACK'S] CENTRAL ROLE IN THE PROSECUTION OF [DEFENDANT], HIS HISTORY OF INCONSISTENT STATEMENTS AND MENTAL ILLNESS, REQUIRES THIS COURT TO REVERSE THE TRIAL COURT'S DECISION AND COMPEL HIM TO BE EXAMINED BY FORENSIC PSYCHIATRIST, DR. GREENFIELD.

C. THE COURT SHOULD GRANT [DEFENDANT'S] MOTION FOR LEAVE TO APPEAL THE INTERLOCUTORY ORDER BECAUSE THIS MATTER INVOLVES ISSUES OF CONSTITUTIONAL MAGNITUDE.

Under Rule 601, every person is competent to be a witness unless

(a) the court finds that the proposed witness is incapable of expression so as to be understood by the court and any jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) as otherwise provided by these rules or by law.

Our Court has stated that "[i]nherent in the trial court's discretion to qualify a witness as competent is the power to have the individual submit to psychiatric or psychological evaluation for the purpose of aiding the court's determination." R.W., 104 N.J. at 21. The decision whether to permit an examination is within a trial judge's "sound discretion." See State v. G.C., 188

N.J. 118, 133 (2006) (quoting State v. Savage, 120 N.J. 594, 632 (1990)). The practice of granting a psychiatric examination of a witness is not to be taken lightly and must only be executed upon a "substantial showing of need and justification." State v. Butler, 27 N.J. 560, 605 (1958). Once the trial court decides to grant or deny a psychiatric examination, "[m]uch reliance must be placed upon the judgment of the trial court." Ibid.

Mindful of these principles in our review of the record, we conclude that Judge Ryan's factual findings are fully supported by the record and, in light of those facts, his legal conclusions are unassailable. We therefore affirm substantially for the reasons that Judge Ryan expressed in his cogent opinion. We add only the following comments.

Before this court, defendant contends his Sixth Amendment right to counsel will be violated because, lacking a forensic examination, counsel cannot effectively cross-examine Jack regarding his mental disorders and credibility. We disagree.

Under the Sixth Amendment,⁵ a defendant has the right to confront the witnesses against them. As such, the Sixth Amendment will bar "testimonial

⁵ Our Supreme Court has recognized the Sixth Amendment in the New Jersey Constitution provides equivalent protection to that accorded under the Sixth

statements of a witness who did not appear at trial unless [the declarant is] unavailable to testify, and the defendant had . . . a prior opportunity for cross examination." Sims, 250 N.J. at 223 (alteration in original) (citing Crawford v. Washington, 541 U.S. 36, 53-54 (2004)). The central purpose of the Sixth Amendment Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990) (recognizing the adversarial nature of the Confrontation Clause). And the four major elements of the Confrontation Clause—physical presence, oath, cross-examination, and observation of the witness's demeanor by the trier of fact—properly ensures that witness testimony against the defendant is reliable and subject to rigorous adversarial testing. Id. at 845-46.

The Confrontation Clause does not guarantee that every witness will refrain from giving testimony marred by forgetfulness, confusion, or evasion. Sims, 250 N.J. at 224 (citations omitted). But a defendant must be given the full and fair opportunity to cross-examine the State's witnesses to expose any

Amendment to the United States Constitution. State v. Sims, 250 N.J. 189, 223 (2022).

shortcomings and call to the factfinder's attention the reasons for attributing little weight to the testimony. Ibid.

Defendant seeks to explore through a compelled examination how Jack's alleged psychological disorders affect his overall credibility. But the Sixth Amendment does not grant such a wide-sweeping right. Because Jack will be subject to cross-examination in front of the jury, there is no violation of the Sixth Amendment. The institutional documents and Jack's recorded calls, subject to any admissibility rulings, are all fodder for examining Jack's credibility. As Judge Ryan stated, any "changes in [Jack's] recollection are matters typically challenged under the crucible of cross-examination." This evidence presented here does not differ from any other case where a witness's inconsistent versions of an incident or event and the witness's ultimate credibility are explored and discredited by counsel.

We are satisfied Judge Ryan did not abuse his discretion in finding defendant did not establish a "substantial need" to compel Jack to undergo a psychiatric examination. As the Court stated in R.W., "the exercise of [the power to compel an evaluation] is neither frequent nor common, and never lightly undertaken. It is an unusual situation that impels the grant of a psychiatric examination as a precondition to a determination of competence."

104 N.J. at 21. The Court more recently affirmed the high threshold to be accorded an application for an examination, stating "[P]sychiatric . . . examinations are extraordinary intrusions . . . and therefore the heightened standard of substantial need is appropriate in such cases." In re A.B., 219 N.J. 542, 560-61 (2014).

Defendant has not established any mistaken exercise of discretion to disturb Judge Ryan's finding that the proffered evidence regarding Jack's mental health was not persuasive in demonstrating that Jack had a psychiatric diagnosis, nor did it tend to show Jack was incompetent to testify. Although evidence relating to a witness's psychological disorder may be relevant under certain circumstances, it does not automatically lead to the conclusion that a defendant has made the "substantial showing" required for a trial court to compel a psychiatric examination to determine the witness's competency.

Furthermore, defendant has not provided any evidence of a medical professional diagnosing Jack with a mental health issue or disorder. Defendant cannot obtain an examination of Jack in an attempt to secure such a diagnosis. See R.W., 104 N.J. at 28 (raising an issue of potential incompetence of a witness without evidence "impugning the witness' mental capacity, psychological stability or testimonial credibility" is only a "fishing expedition"); see also In re

A.B., 219 N.J. at 561; compare with State v. Henries, 306 N.J. Super. 512, 530, 536 (App. Div. 1997) (finding mental health records showing "extensive psychiatric disorders" of identifying witness warranted a retrial to include such evidence).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION