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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2237-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OSVALDO RAMIREZ,

Defendant-Appellant.

Submitted October 4, 2022 – Decided December 7, 2022

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 17-12-0842.

Joseph E. Krakora, Public Defender, attorney for
appellant (Stefan Van Jura, Assistant Deputy Public
Defender, of counsel and on the brief).

William A. Daniel, Union County Prosecutor, attorney
for respondent (Michele C. Buckley, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Tried to a jury, defendant Osvaldo Ramirez was convicted of robbing a stranger during the predawn hours of August 14, 2017 in Elizabeth. Among other evidence presented at trial, the State introduced defendant's videorecorded statement to police, and surveillance footage depicting defendant in the vicinity of the robbery. The jury found defendant guilty of second-degree robbery, N.J.S.A. 2C:15-1(a)(2), a lesser-included offense of first-degree robbery, N.J.S.A. 2C:15-1(a)(1), charged in a one-count Union County indictment. Defendant was sentenced to a nine-year prison term; he must serve eighty-five percent of that term under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant now appeals, challenging the admission into evidence of his custodial statement to law enforcement, contending he did not waive his right to remain silent. In the alternative, defendant argues his "relatively minor criminal history" did not warrant a nine-year NERA sentence in view of his youth and drug addiction. He also contends the court impermissibly considered acquitted conduct, contrary to the Court's decision in State v. Melvin, 248 N.J. 321 (2021), which was decided while defendant's appeal was pending. He raises the following points for our consideration:

POINT I

THE FAILURE TO SCRUPULOUSLY HONOR DEFENDANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT DEMANDS SUPPRESSION OF HIS STATEMENT AND REVERSAL OF THE CONVICTIONS. U.S. Const. amend V and XIV.

POINT II

THE NINE-YEAR NERA SENTENCE IS MANIFESTLY EXCESSIVE AND MUST BE REDUCED.

We reject these contentions and affirm.

We summarize the facts leading to defendant's arrest from the trial record. Around 5:00 a.m. on August 14, 2017, defendant approached Luis Morales,¹ who was standing at an intersection in Elizabeth waiting for an Uber ride to work. Defendant asked Morales for money; Morales claimed he had none; defendant exclaimed, "Give me the money, or do you want to get shot." Morales gave defendant \$100, stating: "Here. Take that. I don't have any more. I have a family to maintain and to support." Defendant responded that he "also had a family," and – according to Morales – displayed a gun in the waistband of his

¹ The record contains various versions of the victim's name. We use the name he stated under oath when he testified at trial.

pants. Morales gave defendant the remainder of his cash – \$640, which was earmarked for the Morales family's rental payment.

Later that day, Elizabeth police obtained surveillance video from a nearby restaurant. The video did not capture the robbery, but Morales recognized the individual walking in the area as the person who robbed him. About three weeks later, on September 8, 2017, Morales identified defendant from a photo array at police headquarters.

Following his arrest on September 20, 2017, defendant gave a statement to Elizabeth Police Detectives Joseph Carratala and James Szpond. During the one-hour questioning, defendant acknowledged he was the person depicted in the surveillance video and spoke with Morales during their encounter, but denied he robbed Morales or displayed a gun. The jury answered, "No," to Question 1(a) on the jury sheet: "In the course of committing the [r]obbery did [defendant] threaten the immediate use of a weapon?"

I.

A.

Prior to trial, defendant moved to suppress his statements, primarily contending he had invoked his right to remain silent. At the August 3, 2018 suppression hearing, the State presented the testimony of Carratala, and

introduced into evidence the Miranda² form signed by defendant and the videorecording of his statement. Defendant neither testified nor presented any evidence at the hearing.

Carratala testified, and the videorecorded statement confirmed, defendant read each Miranda warning aloud. While doing so, defendant did not ask the detectives any questions, and did not "invoke any of those rights." Turning to the waiver of rights portion of the form, defendant hesitated when he read the term, "coercion," but did not ask the detectives to define the term. Defendant does not challenge the administration of his Miranda warnings. Rather, at issue is the following exchange:³

DEFENDANT: "I have read this statement of my rights and I understand my rights are. I am willing to make a statement and answer questions. No promise that [sic] threats have been made to me and no pressure or" – what?

[CARRATALA]: Coercion.

DEFENDANT: "Coercion of any kind has been used against me." I'm signing it?

² Miranda v. Arizona, 384 U.S. 436 (1966).

³ We cite the transcript of the hearing. Because this transcript does not identify the detectives, we glean their names from the trial transcript during which the videorecorded statement was played for the jury.

[CARRATALA]: If you want to speak with us. Do you want to speak to us?

DEFENDANT: No. I mean –

[CARRATALA]: Well, that's – do you want to speak with us?

DEFENDANT: Well, about the whole matter?

[CARRATALA]: Yeah.

DEFENDANT: Yeah. I want to know what's going on, like I want to know what I did and –

[CARRATALA]: All right, because we're going to question you on some certain items and I gotta make sure that you're willing to speak with us.

[SZPOND]: And we'll answer questions you have too, but, in order for us to go have this dialect [sic], you have to say: I understand my rights and I'm willing to speak to you.

DEFENDANT: All right, yeah, I'm willing to speak to you.

[SZPOND]: And you can understand your rights.

[SZPOND]: Do you understand –

DEFENDANT: Yeah, yeah –

[CARRATALA]: – (indiscernible)

DEFENDANT: – (indiscernible) yes.

[CARRATALA]: So, you want to speak with us?

DEFENDANT: Yes (indiscernible).

[CARRATALA]: All right, sign right there.

[(Emphasis added).]

Following oral argument, the trial court reserved decision. On August 9, 2019, the court issued a written decision denying the motion. The court squarely addressed the governing law in view of the testimony adduced at the suppression hearing and defendant's contention that he had invoked his right to remain silent.

Citing our Supreme Court's decision in State v. Diaz-Bridges, 208 N.J. 544, 564 (2012), the court considered defendant's words and demeanor during the interrogation under the totality of the circumstances. Quoting our decision in State v. Burno-Taylor, 400 N.J. Super. 581, 587 (App. Div. 2008), the court recognized: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Accordingly, the court noted "even an ambiguous indication of a desire to remain silent is sufficient to require that questioning cease." Id. at 590. Nonetheless, the court further recognized whether a defendant has waived his Miranda rights requires "consideration of all of the relevant surrounding facts and circumstances." See State v. Kremens, 52 N.J. 303, 311 (1968); see also State v. Maltese, 222 N.J. 525, 545 (2015) ("Whether a suspect has invoked his

right to remain silent requires analysis of the totality of the circumstances, including consideration of the suspect's words and conduct.").

Turning to the present matter, the trial court made detailed findings of fact and conclusions of law. Referencing the videorecording, the court observed: "Defendant presented as relatively relaxed and comfortable, at ease, and readily responsive and conversant with the [d]etectives. He went through [his Miranda rights] with the [d]etectives without any problem, and where he hesitated at the pronunciation of a word or two, Detective Car[ratala] assisted with pronunciation."

The trial court found

beyond a reasonable doubt that [d]efendant did not say "no" when asked whether he would like to waive his right to remain silent. As evidenced by [the video], [d]efendant vacated and erased the "no" portion of his statement when he says, "I mean." This is not "No," and this is not ambiguous. Rather, the result of "No . . . I mean" was that Det[ective] Carra[tala]'s question remained pending and unanswered. Det[ective] Carratala testified that he understood [d]efendant's response to mean that there was something else he wanted to tell the [d]etectives.

[(Footnotes omitted).]

According to the court, the detectives "provided explanation and assurance as to the process so as to enable [d]efendant to be fully informed and

understanding of his rights such that [d]efendant could provide an informed response." That process included "explaining and assuring [d]efendant once again as to his specific rights, including that the [d]etectives would only talk to him if in addition to understanding that he has those rights, he [wa]s still willing to speak to the[m]." The detectives then engaged in "appropriate questioning to ensure and obtain [d]efendant's willing, knowing[,] and informed consent." The court concluded "the record demonstrated that [d]efendant knowingly, voluntarily, and intelligently waived his privilege" against self-incrimination.

B.

Our review of a trial court's decision on a suppression motion is circumscribed. We defer to the court's factual and credibility findings provided they are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). Our deference includes the trial court's findings based on video recording or documentary evidence. See State v. S.S., 229 N.J. 360, 374-81 (2017) (clarifying the deferential and limited scope of appellate review of factual findings based on video evidence); see also State v. Tillery, 238 N.J. 293, 314 (2019); State v. McNeil-Thomas, 238 N.J. 256, 271-72 (2019). Deference is afforded because the court's findings "are often influenced by matters such as observations of the character and demeanor of witnesses and

common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). "We ordinarily will not disturb the trial court's factual findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v. Gamble, 218 N.J. 412, 425 (2014)). Legal conclusions are reviewed de novo. Dunbar, 229 N.J. at 538.

The right against self-incrimination is "[o]ne of the most fundamental rights protected by both the Federal Constitution and state law." State v. O'Neill, 193 N.J. 148, 167 (2007). Among those rights is the right to remain silent. Miranda, 384 U.S. at 444. Under federal law, police must halt a custodial interrogation when the suspect "unambiguously asserts his right to remain silent." S.S., 229 N.J. at 382 (citing Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010)). By contrast, New Jersey's privilege against self-incrimination requires that a defendant's invocation of the right to remain silent "'however ambiguous . . . must be diligently honored.'" Ibid. (quoting State v. Bey, 112 N.J. 123, 142 (1988)). Accordingly, "[w]ords used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were spoken.'" Ibid. (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div. 2005)).

Consistent with this principle, a defendant need not use any "talismanic words" or phrases to invoke the right to remain silent. Id. at 383. In fact, "[a]ny words or conduct that reasonably appear to be inconsistent with [the suspect's] willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination." Bey, 112 N.J. at 136. When a "statement is susceptible to two different meanings, the interrogating officer must cease the interrogation and 'inquire of the suspect as to the correct interpretation.'" S.S., 229 N.J. at 383 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)). As the Court held in Johnson, police may clarify whether a suspect intended to invoke the right to remain silent if they are "reasonably unsure" the suspect's response was equivocal. 120 N.J. at 283.

"If the police are uncertain whether a suspect has invoked his right to remain silent, two alternatives are presented: (1) terminate the interrogation or (2) ask only those questions necessary to clarify whether the defendant intended to invoke his right to silence." S.S., 229 N.J. at 383. A defendant who has "'nothing else to say'" or "'does not want to talk about the crime'" has asserted the right to remain silent, requiring the police immediately to stop questioning. Johnson, 120 N.J. at 281 (first quoting Christopher v. Florida, 824 F.2d 836

(11th Cir. 1987; and then quoting State v. Bishop, 49 Or. App 1023, 1025 (1980)).

However, police are not required to accept "any words or conduct, no matter how ambiguous, as a conclusive indication that a suspect desires to terminate questioning." Bey, 112 N.J. at 136-37. "When the defendant's statement or conduct do not indicate that he is invoking his right to silence, that statement or conduct does not constitute an invocation of the right." Id. at 137.

As the trial court correctly recognized, New Jersey courts use a "totality of the circumstances approach that focuses on the reasonable interpretation of defendant's words and behaviors" to determine whether a defendant invoked the right to remain silent. Diaz-Bridges, 208 N.J. at 564 (2012). New Jersey's heightened standard of proof requires that "the State must 'prove beyond a reasonable doubt that the [defendant]'s waiver was knowing, intelligent, and voluntary in light of all the circumstances.'" Tillery, 238 N.J. at 316 (quoting State v. Presha, 163 N.J. 304, 313 (2000)).

In the present matter, defendant contends the trial court correctly determined "there was nothing ambiguous" about his initial response, "No," but incorrectly found the remainder of his response, "I mean," vacated and erased defendant's intention to remain silent. Relying on Johnson, 120 N.J. at 283, he

contends there was nothing equivocal about his response that would otherwise permit police to inquire further.

We discern no basis to reject the trial court's finding that defendant did not invoke his right to remain silent and, as such, we hold the court properly denied his suppression motion. However, we part ways with the court's finding that defendant's initial response, "No. I mean" was unambiguous. See Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (allowing appellate courts to affirm for reasons other than those reached by the trial court because "appeals are taken from orders and judgments and not from opinions"). In our view, defendant's response was susceptible to more than one meaning, compelling the detectives to make a limited inquiry "to clarify whether defendant intended to invoke his right to remain silent." S.S., 229 N.J. at 383. The detectives did just that.

Following defendant's response, "No. I mean," Carratala inquired: "Well, . . . do you want to speak with us?" Defendant responded: "Well, about the whole matter?" The ensuing exchange clarified that the detectives wished to question defendant but were required to ensure he was "willing to speak with [them]." Contrary to defendant's contention, that inquiry was not "intended to suggest [he] had answered the question incorrectly." Instead, the detectives properly clarified whether defendant intended to invoke his right to remain

silent. Under the totality of the circumstances presented in this case, see Maltese, 222 N.J. at 545, we discern no basis to reject the trial court's decision.

II.

We review a sentence under an abuse of discretion standard. See State v. Trinidad, 241 N.J. 425, 453 (2020). We "consider whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether 'the factfinder [has] appl[ied] correct legal principles in exercising its discretion.'" State v. Blackmon, 202 N.J. 283, 297 (2010) (alterations in original) (quoting State v. Roth, 95 N.J. 334, 363 (1984)). Nor do we substitute our judgment for that of the sentencing court. State v. Fuentes, 217 N.J. 57, 70 (2014). A sentence will be affirmed unless it violated the sentencing guidelines, relied on aggravating or mitigating factors that "were not based on competent and credible evidence in the record," or applied the guidelines in such a manner as to "'make[] the sentence clearly unreasonable so as to shock the judicial conscience.'" Fuentes, 217 N.J. at 70 (quoting Roth, 95 N.J. at 364-65).

When sentencing a defendant, a court must identify and balance the aggravating and mitigating factors pursuant to N.J.S.A. 2C:44-1(a) and (b) and explain the factual basis underpinning its findings. Fuentes, 217 N.J. at 72-73.

"After balancing the factors, the trial court may impose a term within the permissible range for the offense." State v. Bieniek, 200 N.J. 601, 608 (2010).

On September 11, 2017 – about a month after commission of the present offense – defendant pled guilty to two unrelated charges of third-degree unlawful possession of a BB gun, N.J.S.A. 2C:39-5(b), committed on February 3, 2017 and September 5, 2017. Sentencing was held in abeyance pending the outcome of the present robbery trial. At the November 8, 2019 sentencing hearing, prior to sentencing on the robbery charge, the trial court sentenced defendant to concurrent time-served sentences on the weapons offenses.

Turning to the robbery charge, the trial court denied defendant's application to be sentenced within the third-degree range under N.J.S.A. 2C:44-1(f)(2). The court found aggravating factors three (the risk that defendant will re-offend); six (defendant's prior record and the seriousness of the offense); and nine (general and specific deterrence), see N.J.S.A. 2C:44-1(a)(3), (6) and (9), outweighed the non-existent mitigating factors. The court also thoroughly considered but declined to find the mitigating factors sought by defendant. See N.J.S.A. 2C:44-1(b)(2) to (4); (6) to (10); and (12). Defendant does not challenge the court's rejection of those factors.

Citing the chronology of defendant's convictions, the court rejected defendant's contention that the present offense constituted defendant's first adult conviction.⁴ Instead, the court was persuaded the chronology of defendant's three criminal convictions, committed during a short time frame, supported its finding of aggravating factor three. Referencing the victim's "terror" during the commission of the crime, the court also found the record supported aggravating factor six.

At the sentencing hearing, defense counsel conceded the application of aggravating factor nine, acknowledging "there's . . . always a need to deter anybody from violating the law." Defendant now cites the first two sentences of the trial court's findings on aggravating factor nine, contending they ran afoul of Melvin: "You can't do these things. You can't carry weapons. You can't carry things that look like weapons that you are carrying because you want people to think it's a weapon." The State counters that the court was referencing defendant's prior weapons offenses, and not conduct the jury rejected.

In Melvin, and its companion case, State v. Paden-Battle, 248 N.J. 321 (2021), the same judge made factual findings that contradicted those made by

⁴ Although not referenced by the trial court, defendant had two juvenile adjudications.

the juries in acquitting the defendants. Id. at 341-45. The Court held the due process principles inherent in Article I, paragraph 1 of the New Jersey Constitution and the doctrine of fundamental fairness protected the defendant in each case from the sentencing court's improper use of facts related to acquitted conduct to enhance a sentence. Id. at 347-52.

Defendant's argument in the present case is unavailing. The court focused only on defendant's prior weapons convictions and did not, as in Melvin, make any findings that defendant, "in fact" used a weapon during commission of the robbery for which he was acquitted. See id. at 328. Rather, as defendant acknowledges, the court expressly stated it was "not going to undermine the jury's verdict." The court then discussed, at length, the impact of defendant's conduct on the victim, who was robbed of his rent money and afraid to call the police. Accordingly, the court found the "seriously strong . . . need for deterrence." We discern no violation of Melvin here.

Finally, for the first time on appeal, defendant argues the trial court failed to consider his youth. When his merits brief was filed, however, as defendant recognized, the issue of retroactive application of mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), was pending before the Court. The Court subsequently decided State v. Lane, 251 N.J. 84, 87-88 (2022), which held mitigating factor

fourteen only applies prospectively. We therefore discern no basis to remand the matter for resentencing.

Affirmed.

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



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