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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2327-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RALPH BAKER,

Defendant-Appellant.

Submitted May 3, 2022 – Decided March 17, 2023

Before Judges DeAlmeida and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 02-10-1239.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

The opinion of the court was delivered by
DeALMEIDA, J.A.D.

This matter returns to us from a remand. Defendant Ralph Baker appeals from a January 8, 2020 judgment of conviction of several charges arising from an armed robbery of a restaurant. He challenges the trial court's denial of his motion for a new trial and the life sentence he received. We affirm.

I.

On July 10, 2002, defendant entered a Burger King in Middlesex County, carrying a black bag, wearing latex gloves, and armed with a handgun. He did not have his face covered. Defendant grabbed a fifteen-year-old restaurant visitor by her shirt, twisted it, and pushed her against the counter. He told the fourteen-year-old cashier to "give me the fucking money." The restaurant manager, Michelle Krigger, saw that defendant was threatening the two children with a weapon. She approached defendant and told him she was the only one who had access to the register and to point the gun at her instead of the children. Defendant alternated pointing the gun at the cashier and the visitor. He pointed the gun at the visitor while Krigger gave him the bills from the register. Defendant put the cash into the black bag and demanded the visitor give him the money in her purse. Once she complied, defendant fled toward a black car.

Six days later, in Union County, police officer Michael Wittevrongel saw defendant running from the office of a gas station wearing a black ski mask, carrying a black bag, and heading towards a black car. The officer saw defendant go behind a shed and emerge without the mask and bag. Wittevrongel arrested defendant. He found \$204 in defendant's pocket. Behind the shed, the officer found a black bag containing a black handgun, a loose bullet, thirteen packs of cigarettes, loose cash, and fifty \$1 bills in a wrapped bundle. Near the bag the officer found a ski mask. A search of the car revealed defendant's wallet, driver's license, and latex gloves.

For the restaurant robbery, a grand jury indicted defendant, charging him with (1) first-degree armed robbery of the cashier, N.J.S.A. 2C:15-1 (count one); (2) first-degree armed robbery of the visitor, N.J.S.A. 2C:15-1 (count two); (3) second-degree possession of a weapon for an unlawful purpose (the cashier), N.J.S.A. 2C:39-4(a) (count three); (4) second-degree possession of a weapon for an unlawful purpose (the visitor), N.J.S.A. 2C:39-4(a) (count four); (5) fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count five); and (6) fourth-degree aggravated assault (pointing the gun at the cashier and/or visitor), N.J.S.A. 2C:12-1(b)(4) (count six).

The ski mask found in Union County was admitted as evidence in the trial of the Middlesex County charges. The State called Wittevrongel, who testified that he saw defendant wearing "a woolen head covering" and carrying a bag heading toward a black car that contained his documents and latex gloves. The officer explained that he found the bag, which contained a handgun, and the "woolen head covering" a few feet from the bag. He identified defendant, the "woolen head covering," the handgun, the bag, and photographs of the car and the latex gloves.

Krigger, the cashier, and the visitor testified that the bag, handgun, and photo of the latex gloves found in Union County resembled the bag, handgun, and gloves used in the robbery. A forensic ballistics expert testified that the handgun was operable.

Krigger, who had identified defendant in an out-of-court photo array shortly after the robbery, also identified him as the perpetrator at trial. The visitor identified defendant at trial as the man who robbed her.

The assistant prosecutor discussed the items found by Wittevrongel in both her opening statement and closing argument. She argued that defendant robbed the Burger King "with the same bag, the same gun. And, in the same

type car, are found the gloves. The only thing that's different, or additional on July 16th of 2002, he's wearing a woolen head covering."

The jury convicted defendant of all counts. At sentencing, the court merged count three into count one, and merged count four into count two. For count two, the court sentenced defendant as a persistent offender, N.J.S.A. 2C:44-3(a), to an extended term of life imprisonment, with concurrent sentences of twenty years in prison with ten years of parole ineligibility on count one, and eighteen months in prison with nine months of parole ineligibility on counts five and six.

Defendant appealed his convictions and sentence. While the appeal was pending, new evidence came to light with respect to the ski mask. Defendant had been charged with armed robbery and aggravated assault in Somerset County. In that matter, the trial court decided that the ski mask, bag, and gun seized in Union County would be admissible, and granted defendant's motion to have the mask tested for DNA. A forensic scientist tested DNA samples taken from inside and outside the mask. She issued reports stating both samples were mixtures of DNA from more than two people. The major contributor of the samples was identified as a man arrested in 2003 for a masked armed robbery in Hudson County. In addition, the expert excluded defendant as a possible

contributor to the specimen on the inside of the mask, but could not exclude him as a minor contributor to the DNA on the outside of the mask, stating that 1 in 544 African Americans, 1 in 4,520 Caucasians, and 1 in 5,490 Hispanics cannot be excluded as having contributed to the sample.

We granted defendant's motion to remand the appeal to permit him to file a motion for a new trial based on the newly discovered evidence. The trial court denied defendant's motion without holding an evidentiary hearing. Although the court found the DNA evidence was material, it concluded the evidence would not alter the verdict because the mask was not used during the Burger King robbery, two eyewitnesses identified defendant at trial as the perpetrator of the robbery, the manager also identified defendant pre-trial, and the cashier identified the handgun at trial.

Defendant filed a pro se notice of appeal, which we dismissed as untimely. The Supreme Court denied certification. State v. Baker, 196 N.J. 592 (2008). We subsequently granted defendant's motion to reinstate his direct appeal, as well as his appeal of the trial court's denial of his motion for a new trial.

We affirmed defendant's convictions. State v. Baker, No. A-3867-05 (App. Div. June 28, 2017). With regard to his sentence, defendant did not dispute that his prior convictions qualified him for an extended term as a

persistent offender pursuant to N.J.S.A. 2C:44-3(a).¹ Nor did he argue that the trial court abused its discretion in deciding to impose an extended term. He argued, however, that the trial court double-counted his prior convictions both to qualify him for an extended term and to sentence him to the maximum extended-term sentence.²

We did not address these arguments because the State conceded defendant was entitled to resentencing on count two pursuant to State v. Pierce, 188 N.J. 155 (2006), which was decided while his appeal was pending. In Pierce, the Court held that "once the court finds that th[e] statutory eligibility requirements are met" for an extended term, "the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of

¹ A "persistent offender" must "ha[ve] been previously convicted on at least two separate occasions of two crimes, committed at different times," and "the date of the defendant's last release from confinement" must have been "within 10 years of the date of the crime for which the defendant is being sentenced." N.J.S.A. 2C:44-3(a). Defendant was convicted of multiple armed robberies in Essex and Union Counties in 1982, sentenced to prison with seventeen years of parole ineligibility, and initially paroled in 2000.

² The convictions used to qualify defendant for an extended term may not be considered in determining the aggravating factors or the length of his extended-range sentence, but the court may consider "other aspects of the defendant's record," including other crimes, his "juvenile record, parole or probation records, and overall response to prior attempts at rehabilitation" State v. Dunbar, 108 N.J. 80, 92 (1987); see State v. Vasquez, 374 N.J. Super. 252, 267-68 (App. Div. 2005).

the extended-term range." Id. at 169. The holding in Pierce sets the range for a first-degree extended term from "ten years to life imprisonment." Id. at 179 (Albin, J., dissenting); see N.J.S.A. 2C:43-6(a)(1), -7(a)(2). However, the assistant prosecutor advised the trial court that "the range is 20 to life" for count two. Accordingly, we vacated defendant's life sentence on count two and remanded "for re-sentencing, but only in respect of reconsideration of the appropriate sentence for defendant within the expanded range The court must reconsider the applicable aggravating and mitigating factors and impose a sentence within the broadened range of sentences available consistent with" the holding in Pierce. See Pierce, 188 N.J. at 171. We also directed the trial court to reconsider aggravating factors three, six, and nine without "double-counting" the offenses relied on to qualify defendant for the extended term. See Vasquez, 374 N.J. Super. at 267.

With respect to the denial of defendant's motion for a new trial, we noted that the trial court concluded that the DNA evidence was newly discovered and material. However, without having held an evidentiary hearing at which experts could opine on the value of the DNA evidence, the court found that the new evidence would not alter the outcome of the trial. In light of the "close[] question" of whether the new evidence would alter the outcome of the trial, we

vacated the order denying defendant's motion and remanded for an evidentiary hearing "to allow the court to have a full factual record to determine whether the actual DNA evidence could have the probable effect of raising a reasonable doubt of defendant's guilt of the" Burger King robbery.

On remand, the trial court held an evidentiary hearing on defendant's motion for a new trial. An expert testified consistent with the DNA results detailed above. She conceded that a ski mask could be worn inside-out and had no knowledge of whether the areas of the mask she considered to be "inside" and "outside" actually reflected how the mask was worn during the robbery.

On September 10, 2019, the trial court issued a written opinion denying defendant's motion. Applying the three-prong test established in State v. Carter, 85 N.J. 300 (1981), the court found that the DNA evidence was not material to the question of defendant's guilt, "but merely contradictory." This is so, the court concluded, because the person who robbed the Burger King was not wearing a mask. In addition, the court found the evidence, if known to the jury, is unlikely to change the verdict because two eyewitnesses identified defendant as the robber at trial. The court found that those witnesses were reliable and provided a physical description of the perpetrator that matched defendant. The

court noted that the person whose DNA was identified on the mask had physical features that did not match those of defendant.³

At defendant's resentencing on count two, the court noted that defendant was to be sentenced as a persistent offender and that the applicable range was between ten years and life.⁴ The court noted that it must consider defendant as he stands before the court on the date of resentencing. See State v. Randolph, 210 N.J. 330 (2012). Thus, the court considered that defendant: (1) had been incarcerated since 2002 with respect to the Burger King robbery;⁵ (2) completed prison courses in substance abuse, anger management, reentry preparation, and religious studies; (3) has medical issues, including cancer that was in remission; and (4) had a difficult childhood as described in a letter submitted to the court from his relative. In addition, the court considered defendant's extensive

³ We have not been provided with an order memorializing the trial court's decision on defendant's motion.

⁴ The trial court rejected defendant's attempt to argue that he did not qualify for sentencing as a persistent offender, given that he conceded that point on his first appeal.

⁵ At the 2019 resentencing hearing, defendant's counsel argued that defendant had already served twenty-five years for the robbery and the resentencing court found that defendant had been serving his term for twenty-five years. However, the robbery happened in 2002. Assuming defendant was detained after his 2002 arrest and until his 2005 conviction, at the time of the resentencing hearing the maximum time that he could have served for the robbery was seventeen years.

criminal history, with his first contact with the justice system as a juvenile in 1969. After nine arrests as a juvenile, defendant was adjudicated delinquent in 1970. Following a term of probation, defendant was arrested numerous additional times as a juvenile and charged with possession of stolen property, aggravated assault, and battery. Because the outcomes of some of those arrests were not available, the court did not consider them, except to note that defendant's initial term of probation did not deter him from further criminal activity.

As an adult, defendant was arrested for larceny and sentenced to five years in prison. He later violated parole three times. Defendant was thereafter arrested four times in Illinois for robbery, theft, and possession of a stolen motor vehicle. He served terms in prison in Illinois, was released on parole, and returned to prison for violating parole. He committed the Burger King robbery after release from a forty-two-year sentence in Illinois for essentially the same type of criminal behavior that resulted in the present convictions. The court found that

[i]t is clear and it is convincingly clear that this defendant has made a poor adjustment previously to probationary judgments and probationary terms. And despite substantial periods of incarceration for much of his juvenile and adult life, he continued to reoffend.

The court found the following aggravating factors applied:

(1) one, N.J.S.A. 2C:44-1(a)(1) ("[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner"), based on defendant having grabbed the young visitor and pushed her against the counter, which the court found to be clearly beyond what was necessary to accomplish the robbery;

(2) two, N.J.S.A. 2C:44-1(a)(2) ("[t]he gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance"), in light of the fourteen-year-old victim who the court found "had no ability to defend against this defendant;"

(3) three, N.J.S.A. 2C:44-1(a)(3) ("[t]he risk that defendant will commit another offense"), given defendant's failure to be rehabilitated by his lengthy prior incarcerations and numerous periods on probation or parole; and

(4) nine, N.J.S.A. 2C:44-1(a)(9) ("[t]he need for deterring the defendant and others from violating the law").⁶

The court rejected defendant's request to apply mitigating factor nine, N.J.S.A. 2C:44-1(b)(9) ("[t]he character and attitude of the defendant indicate that the defendant is unlikely to commit another offense"). While the court noted that it was "encouraged" by defendant "being productive in" prison, it found that prison is the only setting in which defendant is able to be productive and incarceration had not deterred him from criminal activity upon release. The court also found prison officials had been able to treat defendant's medical conditions and that his cancer was in remission. Weighing these factors, the court sentenced defendant to life on count two. A January 8, 2020 judgment of conviction reflects the court's decision.

This appeal followed. Defendant raises the following arguments.

POINT I

THE FAILURE TO ENGAGE IN A THOROUGH FACT-SENSITIVE ANALYSIS OF THE ASSISTANT PROSECUTOR'S DEPENDENCE ON THE SKI

⁶ The judgment of conviction indicates the court also found aggravating factor six, N.J.S.A. 2C:44-1(a)(6) ("[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted"). The court, however, does not mention this aggravating factor when making its findings at the resentencing hearing.

MASK TO CONVICT DEFENDANT PREJUDICED
DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT II

THE FAILURE TO CONSIDER DEFENDANT'S
REHABILITATION EFFORTS WHILE
INCARCERATED DURING A REMAND FOR
RESENTENCING WHICH OCCURRED OVER
FOURTEEN YEARS AFTER THE INITIAL
SENTENCE WAS IMPOSED AMOUNTS TO AN
ABUSE OF DISCRETION.

POINT III

THE TRIAL JUDGE ERRED WHERE HE
CONCLUDED THAT THE ASSISTANT
PROSECUTOR DID NOT NEED TO RECUSE
HERSELF.

POINT IV

THE TRIAL JUDGE ABUSED HIS DISCRETION BY
BARRING THREE DEFENSE WITNESSES FROM
TESTIFYING.

In a supplemental pro se brief, defendant also raised the following points:
the original trial court (1) should have conducted discovery on racial profiling;
(2) improperly denied his request for funds from the public defender for an
identification expert; (3) violated his constitutional rights by denying him and
his witnesses an opportunity to testify; and (4) erred by not concluding that

because an N.J.R.E. 404(b) hearing was never conducted the evidence from the Union County case should not have been admitted.

II.

A.

"The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge." Twp. of Manalapan v. Gentile, 242 N.J. 295, 304-05 (2020) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)). The trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. "Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial." State v. Ways, 180 N.J. 171, 187-88 (2004). The evidence must "shake the very foundation of the State's case" and its admission "almost certainly alter the earlier jury verdict." Id. at 189.

We have carefully reviewed the record and agree with the trial court's conclusion that the DNA evidence is unlikely to change the jury's verdict. At trial, the State proffered the mask as evidence connecting defendant to the bag

and gun Wittevrongel found in Union County. The connection was made because Wittevrongel testified that he saw defendant wearing a mask and carrying a bag before he went behind a shed, where the officer discovered a bag and a mask in close proximity. The mask had the tendency to corroborate the officer's testimony that shortly after the Burger King robbery defendant was in possession of a bag, which witnesses identified as looking similar to the bag he used in the robbery, and which contained a gun identified as similar to the gun used in that robbery.

At a new trial, defendant would be aware that the mask contained DNA of someone who had recently committed an armed robbery and that his connection to the mask was tenuous – he, like 1 in every 544 African-American men, could not be excluded as a contributor to DNA on the outside of the mask. At a new trial, he could argue: (1) that the mask, bag, and gun belonged to the armed robber who left his DNA on the mask and should not be admitted; and, if admitted, (2) that the armed robber who left his DNA on the mask was the perpetrator of the Burger King robbery.

With respect to the first argument, although the mask was used to link defendant to the bag and gun, it is not the sole evidence of the link. Wittevrongel testified that he saw defendant carrying the bag, which was found near defendant

and his vehicle after he was apprehended, and which contained the gun. It is unlikely that the absence of evidence directly identifying defendant as a contributor to the DNA on the outside of the mask would result in suppression of the mask, bag and the gun. Defendant was not definitively excluded from having contributed DNA to the outside of the mask, which defendant could have worn inside-out to commit the robbery, and the officer's observation of defendant carrying the bag was not dependent on him also seeing defendant wearing the mask.

With respect to the second argument, defendant's tenuous connection to the mask likely would be strongly outweighed in the minds of the jurors by the eyewitness testimony presented at trial. Both Krigger and the visitor identified defendant at trial as the perpetrator of the robbery. Krigger also identified defendant in an out-of-court photo array shortly after the robbery. The victims also testified that the bag and the gun were similar to those used in the robbery. In addition, both Krigger and the visitor described the assailant as a stocky, African-American man that was around 5'9" or 5'10" tall. Defendant fits that description. The major contributor to the DNA on the mask, however, is 6'4" and weighs 175 pounds, physically dissimilar to defendant. Plus, the perpetrator of the robbery did not wear a mask. It is highly unlikely that defendant would

have succeeded in convincing the jury that the major contributor of the DNA on the mask was the person who robbed the Burger King. We are satisfied that the DNA evidence would not change the jury's verdict.

B.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). An appellate court "must not substitute its judgment for that of the sentencing court[,]" State v. Fuentes, 217 N.J. 57, 70 (2014), and is bound to affirm the sentence absent a "clear abuse of discretion." State v. Roth, 95 N.J. 334, 363 (1984).

Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not "based upon competent credible evidence in the record;" or (3) "the application of the guidelines to the facts" of the case "shock[s] the judicial conscience."

[State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting Roth, 95 N.J. at 364-65).]

Our Code of Criminal Justice "provides for ordinary sentences, N.J.S.A. 2C:43-6[(a)], as well as extended-term sentences that carry greater punishment for the same crime." Pierce, 188 N.J. at 161. At sentencing, there must be no double-counting of aggravating factors. Fuentes, 217 N.J. at 76; State v. Yarbough, 100 N.J. 627, 643-44 (1985). Thus, it is impermissible for the court

to consider the convictions that made the defendant eligible for an extended term as aggravating factors when deciding the sentence to be imposed. Dunbar, 108 N.J. at 91-92.

We reject defendant's argument that the trial court engaged in double-counting when it considered his criminal history both in determining he was eligible for an extended term and when finding aggravating factor three. The court's well-supported findings with respect to aggravating factor three concerned defendant's failure to be rehabilitated during his many terms of incarceration and periods of probation, going back to his criminal activity as a juvenile. This fact was demonstrated by his commission of the Burger King robbery shortly after being released from incarceration. The convictions that made defendant eligible for an extended sentence were not a component of the trial court's findings supporting aggravating factor three.

Nor are we persuaded by defendant's argument that the court did not consider his rehabilitation efforts. At resentencing, courts should "view defendant as he stands before the court on that day unless the remand order specifies a different and more limited resentencing proceeding," which includes post-conviction rehabilitative efforts. Randolph, 210 N.J. at 354. Our review of the record revealed that the trial court considered all of the evidence of

rehabilitation submitted by defendant. While the court was "encouraged" by defendant's efforts at rehabilitation while incarcerated, the record supports its determination that defendant had not established he would likely refrain from criminal activity if released from prison with the "time served" sentence he requested. We see no basis on which to reverse the trial court's determination that mitigating factor nine did not apply.

We have considered defendant's remaining arguments with respect to his sentence and are not persuaded that the trial court erred. The record supports a life term on count two, given defendant's extensive criminal history and inability to comport with the law during the limited periods of his life that he was not incarcerated, as well as the violent and terrorizing nature of his crime against two teenagers.

C.

We turn to defendant's arguments relating to his 2005 jury trial. In his counseled brief, defendant argues the trial court erred when it: (1) denied his motion to disqualify the assistant prosecutor; and (2) denied his proffer of three witnesses. In his pro se brief, defendant argues he is entitled to discovery regarding racial profiling. This argument appears to relate to defendant's claim that Wittevrongel unlawfully searched his vehicle. In addition, he argues he is

entitled to discovery with respect to "the Special Master Report on Misidentification" and the appointment at State expense of an identification expert, which appears to relate to the cashier's identification of him. He also argues that he is entitled to discovery to prove he was incarcerated in another State when the Burger King robbery took place, which appears to relate to an alibi defense. Finally, defendant argues that the trial court erred by not holding a hearing pursuant to N.J.R.E. 404 (b) regarding evidence of defendant's other bad acts.

Each of these arguments concern issues outside the scope of our limited remand. They are, therefore, not properly before this court. In addition, to the extent defendant did not raise these issues in his direct appeal they were effectively waived, and cannot be raised in an appeal from the judgment entered on remand. Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("It is, of course, clear that an issue not briefed is deemed waived."); Telebright Corp., Inc. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any arguments supporting the contention in its brief).

In his pro se brief, defendant argues that he is entitled to discovery concerning the practice of altering DNA factual findings and tainting STR DNA

factual findings. It is difficult to determine with precision the import of these arguments, although they appear to relate to a claim that the DNA expert's testimony at the remand hearing was false to the extent that she opined that defendant could not be excluded as a contributor to the DNA found on the outside of the ski mask. We have reviewed these arguments, as well as defendant's argument concerning State secrets and his claim of innocence, and conclude they lack sufficient merit to warrant discussion in a written opinion.

R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION