SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2432-20

STATE OF NEW JERSEY,

Plaintiff-Appellant/
Cross-Respondent,

v.

JOHN W. FLINN,

Defendant-Respondent/
Cross-Appellant.

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Submitted December 14, 2022 – Decided January 5, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-08-1850.

Grace C. MacAulay, Camden County Prosecutor, attorney for appellant/cross-respondent (Jason Magid, Assistant Prosecutor, of counsel and on the brief).

Jacobs & Barbone, PA, attorneys for respondent/cross-appellant (Louis M. Barbone, on the briefs).

PER CURIAM

The State appeals as of right from the sentencing judge's downgrading of an official misconduct conviction, a first- or second-degree crime, to a third-degree crime. See N.J.S.A. 2C:44-1(f)(2). The State also contends the sentencing judge erred in waiving the five-year mandatory minimum term of imprisonment for official misconduct in the first- or second-degree under N.J.S.A. 2C:43-6.5(a).

Defendant John W. Flinn cross-appeals from his conviction for official misconduct and the sentence imposed.[1]

We affirm defendant's conviction but remand for the sentencing judge to state the bases for sentencing defendant for official misconduct in the third-degree rather than the second-degree.

We recite the facts from the testimony during the pretrial motion hearings and trial.

On March 8, 2018, the Gloucester County Police Department (Department) received a call about a disturbance at a group home for at-risk teenage girls. The residents at the group home included individuals with mental health issues. The caller stated some of the residents were fighting and possibly had weapons.

[1] The sentencing judge issued a stay of the sentence pending the State's appeal.

Officer Paul Bertini responded to the group home and activated his body camera upon arrival. Bertini heard yelling coming from a small room inside the group home. When he opened the door to the room, Bertini saw D.C. (Dot),[2] a thirteen-year-old resident of the group home, "tussling and kind of wrestling with two staff members." Dot was arguing with another resident, and staff members separated the girls. Dot continued fighting with the staff members who were attempting to restrain her.

According to Officer Bertini, he instructed Dot to calm down but she failed to do so. When Dot attempted to leave the room, Bertini grabbed her by the torso and brought her to the ground. He did so "because she wasn't being compliant" and "it was unknown if there were any weapons or where they were, for the safety of everybody, to get her detained."

While Dot was on her stomach, Bertini, intending to handcuff her, placed Dot's right hand behind her back. He again instructed Dot to remain calm.

Defendant arrived at the group home just as Dot attempted to leave the room where the dispute arose. Defendant, who also activated his body camera,

[2] We use a pseudonym to protect the identity of the juvenile. See R. 1:38-3(d)(5).

helped Bertini handcuff Dot. The video footage from body cameras worn by both officers was played for the jury and admitted as evidence at trial.

Because the video footage from the officers' body cameras was relevant to the charges against defendant, we describe the images in detail. While she remained on her stomach, defendant was to the left side of Dot and Bertini was to her right side. Bertini knelt on the ground, straddled Dot's right leg, and restrained her right arm and right leg. According to Bertini, Dot complied with his instruction to remain quiet and calm and did not fight the officers while they handcuffed her. However, on cross-examination, Bertini testified that Dot slightly moved her right arm and both feet during the handcuffing process.

While attempting to handcuff Dot, defendant twice struck Dot with an open hand to the right side of her face and she began to cry. Defendant then pushed Dot's head toward the ground and yelled, "Don't play this fucking game. Stop resisting." Dot responded, "I'm not." In addition to the images and audio from the officers' body cameras, Dot testified she never resisted during the handcuffing process.

It was unclear to Bertini why defendant struck Dot. Bertini testified that he did not feel threatened by Dot and would not have used that level of force.

Sergeant Edward O'Lano was the Department's supervising officer at the scene and Bertini's direct supervisor. Bertini reported his use of force against Dot to O'Lano. Defendant also told O'Lano that he needed to complete a use of force report. O'Lano instructed defendant to contact his supervisor and watch commander, Lieutenant Jason Fretz.[3]

Fretz subsequently spoke with defendant to understand "the level of force that was used and why." Fretz also reviewed the officers' body camera footage.

When asked by Fretz to explain the level of force used, defendant stated his main concern was to take Dot into custody quickly so that Bertini could handle another situation at the group home. Defendant also told Fretz that he becomes "emotional" and "angry" in situations where he feels the need to use force. Defendant also expressed his "concern[] for his safety as an officer, not getting injured, . . . safety for others involved not getting injured, and then obviously the person he's using force on not getting injured."

After viewing the body camera footage, Fretz testified that he had "reservations" regarding defendant's need to strike Dot under the circumstances. Although Fretz agreed handcuffing Dot was a lawful police objective, he

[3] Defendant was assigned to Fretz's unit four days prior to the incident with Dot.

understood defendant slapped Dot to gain her compliance. According to Fretz, "the slaps were not necessary to gain compliance."

Fretz testified he would not have handled the situation the same way and believed the situation could have been better handled. In explaining why he held that opinion, Fretz stated there were two young officers, each weighing 200 or more pounds, on top of a smaller juvenile. Fretz believed the officers were confronted with a crisis situation rather than a criminal situation and, under those circumstances, "a little more de-escalation" would have been appropriate.

Several officers from the Department testified that defendant, who previously worked with the Delaware State Department of Corrections and the Camden Metro Police, underwent training regarding the use of force, including handcuffing techniques, de-escalating situations, and dealing with individuals in crisis.

Additionally, Detectives Ernest Basile and Joseph DiAndricola from the Department's training unit testified regarding the Department's use of force policy. According to the detectives, the Department's policy mirrored the New Jersey Attorney General's policy on the use of force and specified the types of force to be used in various circumstances. Basile testified that the policy permitted officers to slap individuals or push their head if the officer "reasonably

believe[d] it [was] immediately necessary at the time . . . to overcome resistance . . . or . . . to effect other lawful objectives such as [to] make an arrest." Basile explained an officer must stop using force once a suspect submits to an arrest.

At trial, the parties presented conflicting expert opinions regarding defendant's use of force against Dot. The State presented testimony from Mickie McComb, a retired New Jersey State Trooper who worked in the State Police training bureau and, at the time of trial, worked as a consultant regarding police litigation matters. McComb testified that the guidelines promulgated by the New Jersey Attorney General on the use of force were applicable to all police departments in the State and confirmed the Department's use of force policy mirrored those guidelines.

While McComb explained the policy permitted different types of force, he stated the force used must be objectively reasonable based upon the totality of the circumstances confronting the officer. Under the Department's policy, an officer was required to have a "reasonable belief" to justify the use of force. McComb defined a "reasonable belief" as "a belief that the police officer needs to use force, and it's an assessment based on a reasonable, well-trained, and prudent police officer with similar time and experience, based . . . on the incident and the totality of the circumstances."

McComb explained that police officers are permitted to use force to overcome a person resisting authority, to protect a person or property, or to effectuate a law enforcement objective. However, objectively assessing the totality of the circumstances in Dot's situation, McComb opined that defendant used excessive force when he slapped Dot and shoved her head. McComb testified Dot did not present a threat of violence and her slight movements during the handcuffing process were reflexive and not indicative of her resisting arrest. Moreover, based on the body camera footage, McComb found no evidence Dot attempted to escape or threatened to harm either police officer. Thus, McComb stated defendant's actions violated the Department's use of force policy.

McComb further explained there were other options available to defendant without hitting Dot or pushing her head. Although he admitted that the force procedures used by defendant were sometimes permissible to overcome resistance, McComb reiterated that the use of force was not objectively reasonable under these circumstances.

Defendant presented expert testimony from Thomas Jerdan, who worked for the United States Department of Homeland Security and previously worked as a police officer with the Atlantic City Police Department. He also trained officers who attended the Atlantic County Police Academy as well as other law

enforcement and military personnel. However, Jerdan was unfamiliar with the Attorney General's law enforcement training regarding de-escalation techniques.

Jerdan opined defendant did not use excessive force against Dot, and did not violate any laws or policies governing the use of force by police officers, including the Attorney General's guidelines. Jerdan testified Dot failed to comply with the officers' attempts to handcuff her. He explained that defendant's slapping her and pushing her head constituted "distraction" or "stunning" techniques and were appropriate to obtain Dot's compliance.

As a result of defendant's conduct, he was charged with simple assault, N.J.S.A. 2C:12-1(a), official misconduct, N.J.S.A. 2C:30-2(a), and endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2).

In August 2018, defendant was indicted on the following charges: second-degree official misconduct, N.J.S.A. 2C:30-2(a), for slapping Dot "twice in the face . . . after [she] had complied with police commands" (count one); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2) (count two); and second-degree official misconduct, N.J.S.A. 2C:30-2(a), for pushing Dot's head "towards the floor, after she had been handcuffed" (count three).

Defendant moved to dismiss the indictment "based upon prosecutorial misconduct and the failure to properly charge the grand jury on the law." The judge heard oral argument and denied the motion in a November 16, 2018 oral decision.

The trial began in March 2020 and the jury heard testimony over the course of five days. At the conclusion of the State's case, defendant moved for a judgment of acquittal, which the judge denied.

After hearing the testimony, counsel's closing arguments, and the judge's instructions on the law, the jury found defendant guilty on the official misconduct charges. The jury was unable to reach a verdict on the child endangerment charge.

After the verdict, defendant again moved for a judgment of acquittal. In a decision placed on the record on August 12, 2020, the judge granted defendant's motion in part, entering a judgment of acquittal limited to count three—the official misconduct charge based on defendant pushing Dot's head after she was handcuffed. The judge reasoned the evidence adduced at trial demonstrated Dot had not been fully handcuffed when defendant pushed her head. However, the judge denied the motion as to the misconduct charge in

count one premised upon defendant slapping Dot in the face after she complied with police commands.

Thereafter, defendant moved for the following relief: vacating the jury's guilty finding on count one, dismissing the indictment, or compelling a new trial. On October 20, 2020, the judge denied defendant's applications for the reasons stated on the record.

At the sentencing hearing on April 26, 2021, applying N.J.S.A. 2C:43-6.5(c)(2), the judge found the State's request for imposition of a five-five-year mandatory minimum term and period of parole ineligibility would constitute a serious injustice and extraordinary circumstances existed that overrode the need to deter others from similar conduct. Based on the finding of extraordinary circumstances, the judge waived the period of parole ineligibility under N.J.S.A. 2C:43-6.5(a) and (b)(17). The judge further concluded a sentencing downgrade was warranted under N.J.S.A. 2C:44-1(f)(2), finding the mitigating factors substantially outweighed the aggravating factors. The judge held the interests of justice demanded that defendant be sentenced to a term appropriate for a third-degree crime, rather than the second-degree crime for which he was convicted. As a result, the judge sentenced defendant to a four-year term of imprisonment without any period of parole ineligibility.

On May 4, 2021, the judge entered the judgment of conviction. The State appealed the sentence. Defendant cross-appealed from the conviction and the sentence imposed.

On the cross-appeal, defendant raises the following arguments:

POINT I

> THERE NEVER WAS ANY EVIDENCE TO ESTABLISH THE PRIMA FACIE ELEMENTS OF OFFICIAL MISCONDUCT AS CHARGED IN COUNT [3] OF THE INDICTMENT, AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DISMISS IT TWO YEARS BEFORE THE JURY TRIAL.

POINT II

> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL ON COUNT 1 - THE PERPETUAL ARGUMENTS OF THE STATE AND INSTRUCTIONS BY THE COURT THAT THERE WAS A VALID AND INDEPENDENT ACT OF OFFICIAL MISCONDUCT, PROPERLY CHARGED IN COUNT [3], IRRETRIEVABLY TAINTED THE TRIAL RECORD AND DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

POINT III

> THE COURT SHOULD DISMISS THIS INDICTMENT ON THE DOCTRINE OF FUNDAMENTAL FAIRNESS.

POINT IV

> THE TRIAL COURT PROPERLY WAIVED THE MINIMUM MANDATORY SENTENCE PURSUANT TO N.J.S.A. 2C:43-6.5(c)(2) BASED UPON ITS METICULOUS ANALYSIS AND FINDINGS THAT A SERIOUS INJUSTICE WOULD OTHERWISE OBTAIN; THE COURT DID HOWEVER ABUSE ITS DISCRETION THEREAFTER IN ORDERING IMPRISONMENT.

POINT V

> THE ONLY ERROR OF THE TRIAL JUDGE WAS HIS FAILURE TO IMPOSE A SENTENCE OF PROBATION, GIVEN HIS FINDING THAT IMPRISONMENT WOULD CONSTITUTE A SERIOUS INJUSTICE OVERRIDING THE NEED FOR DETERENCE PURSUANT TO BOTH N.J.S.A. 2C:43-6.5(c)(2) AND [N.J.S.A.] 2C:44-1(d).

Defendant raises several arguments regarding the evidence in support of his conviction and the judge's failure to dismiss certain charges before and after the trial. First, defendant contends "[t]here was never any evidence to establish the prima facie elements of official misconduct as charged in Count [Three] of the indictment" and therefore the judge abused his discretion in failing to dismiss count three prior to trial.

Second, defendant asserts entitlement to a new trial on count one because he was erroneously compelled to defend against two misconduct charges (counts one and three). According to defendant, the jury's guilty verdict on count one was tainted by the guilty verdict on count three which was dismissed by the judge in a post-trial motion for a judgment of acquittal.

Third, defendant argues count one should be dismissed under the doctrine of fundamental fairness. Defendant claims he "did nothing wrong" and would have been acquitted of all charges had the State not "misrepresented the true facts to the grand jury, [and] secured an indictment without any evidence in support of Count [Three]."

We disagree with defendant's arguments and affirm the judge's denial of defendant's pre- and post-trial motions.

I.

We first address defendant's pretrial motion to dismiss the indictment based on the evidence presented to the grand jury. On August 8, 2018, the State presented the following to the grand jury: (1) testimony from Joseph Gurcik, a detective with the Camden County Prosecutor's Office, which included the detective's narration of the events depicted in the videos from the officers' body cameras; (2) the footage from the officers' body cameras; (3) defendant's written

report of the incident with Dot; and (4) a statement of the applicable law and the proposed charges.

At the end of the presentation, a grand juror questioned what he saw in the footage. The prosecutor replayed the body camera videos and explained that the juror's understanding of the video images, rather than Gurcik's narration, controlled. The prosecutor gave the following instruction to the grand jurors:

> Well, your understanding of the video – I want you guys – that's why I brought the video in, because what he understands it to be – obviously it's what you understand it to be . . . so I want you to take a look at it and you decide whether you think it's – it satisfies what we're presenting here. Okay?

Based on the information presented by the State, the grand jury indicted defendant on three counts. Count three, second-degree official misconduct, N.J.S.A. 2C:30-2(a), alleged defendant committed "an act relating to his office, but constituting an unauthorized exercise of his official functions, and knowing that such act was unauthorized or committed in an unauthorized manner." As worded, count three stated defendant "push[ed] Dot's head . . . down towards the floor, after she had been handcuffed." (emphasis added).

In moving to dismiss the indictment prior to the trial, defendant argued the following: (1) prosecutorial misconduct in presenting testimony that misrepresented whether defendant's slaps and push came before or after Dot had

been handcuffed, and in responding to a juror's question relating to Dot's resisting arrest; and (2) the prosecutor's failure to properly charge the grand jury on the law regarding the use of force.

The judge denied defendant's motion. Regarding the prosecutor's alleged misrepresentation of the facts, the judge stated:

> [A]s reflected in the transcript, the . . . videos were shown to the grand jurors on multiple occasions.
>
> I'm not aware of any law that says that the State is not permitted to present testimony from a witness who has viewed videos and who states what the witness believes the videos show.
>
> The fact that the defendant believes that the videos show something different does not mean that the State usurped the fact-finding function of the grand jury by presenting the testimony of the witness that it presented and the videos themselves and reminded the grand jurors that it is the grand juror's perception of what is shown in those videos that ultimately controls.
>
> At the end, I think . . . we would be dealing with speculation as to where that juror was going when that juror says, on the top of page 43 of the transcript, "Well if you agree with what I'm saying as far as –"
>
> The interruption . . . is for the prosecutor to again explain "that's why I brought the videos, it's obviously what you understand it to be, so if you want to take a look at it and you decide whether you think it satisfies what we're presenting here, okay." Juror says "okay." So I'm going to play it both again, they play it again, . . . the grand jury ultimately votes to return the indictment . . . sought by the State.
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> So I do not believe the defense has made a showing that the presentation of the factual basis for the

> State's position at the grand jury proceeding . . . usurped the fact-finding function of that grand jury.

A "grand jury must be presented with sufficient evidence to justify the issuance of an indictment. The absence of any evidence to support the charges would render the indictment 'palpably defective' and subject to dismissal." State v. Morrison, 188 N.J. 2, 12 (2006) (quoting State v. Hogan, 144 N.J. 216, 228−29 (1996)). However, "[a]t the grand jury stage, the State is not required to present enough evidence to sustain a conviction." State v. Feliciano, 224 N.J. 351, 380 (2016) (citing State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 18 (1984)). The prosecutor need only present "some evidence establishing each element of the crime to make out a prima facie case." Morrison, 188 N.J. at 12. "The quantum of this evidence . . . need not be great." State v. Schenkolewski, 301 N.J. Super. 115, 137 (App. Div. 1997) (citing State v. Bennett, 194 NJ Super. 231, 234 (App. Div. 1984)).

"[I]n reviewing the grand jury record on a motion to dismiss an indictment, the trial court should use a standard similar to that applicable in a motion for a judgment of acquittal at trial" under Rule 3:18-1. Morrison, 188 N.J. at 13. "The court should evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the

State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." Ibid.

Ultimately, "the decision whether to dismiss an indictment lies within the discretion of the trial court, and that exercise of discretionary authority ordinarily will not be disturbed on appeal unless it has been clearly abused." Hogan, 144 N.J. at 229 (1996) (citations omitted). Dismissal of an indictment is warranted only if the prosecutor's misconduct is extreme and clearly infringes on the grand jury's decision-making function. State v. Bell, 241 N.J. 552, 561 (2020). We review the denial of a motion to dismiss an indictment for abuse of discretion. Ibid. Generally, we defer to the trial court's factual findings on motions, including those based upon videotaped evidence. State v. S.S., 229 N.J. 360, 379–80 (2017).

Here, the record before the grand jury was sufficient to indict defendant of official misconduct under count three. The grand jurors had sufficient evidence to conclude that defendant pushed Dot's head after she had been handcuffed. The grand jurors saw the officers' body camera videos. The grand jurors also considered Officer Bertini's statement to his supervisor regarding defendant's use of force against Dot. Additionally, the prosecutor informed the grand jurors that their own understanding of the videos controlled.

Under these circumstances, we are satisfied that the prosecutor acted within her broad discretion in presenting the case to the grand jury. State v. Smith, 269 N.J. Super. 86, 92 (App. Div. 1993). There is no evidence that "the grand jury's fair and impartial decision-making process [was] affected by the prosecutor's conduct during the proceedings," such that reversal is warranted. Ibid.

II.

We next consider defendant's claim that he is entitled to a new trial on count one because he was erroneously compelled to defend against two misconduct charges (counts one and three). Defendant argues the jury's guilty verdict on count one was tainted by the guilty verdict on count three which was dismissed on a post-trial motion for a judgment of acquittal.

At trial, defendant and the State disputed the timing of defendant pushing Dot's head. The officers' body camera footage was played and replayed for the jury multiple times. Defense counsel also obtained favorable trial testimony from Bertini, stating that when defendant pushed Dot's head, only one hand was handcuffed. Defendant's witness, Jerdan, also testified that defendant pushed on Dot's head while attempting to secure Dot's other hand in the handcuffs. Even

McComb, the State's expert, conceded the handcuffing process was incomplete when defendant pushed Dot's head.

Based on the testimony, defense counsel argued the trial proofs were insufficient to sustain a guilty verdict on count three as worded in the indictment because defendant pushed Dot's head before, not after, she was fully handcuffed. The judge agreed, and found the trial evidence was insufficient to sustain a guilty verdict beyond a reasonable doubt on the official misconduct charge as worded in count three was missing a word.

In granting the judgment of acquittal on count three, the judge stated:

> [T]he [c]ourt agrees with the defense that the trial did not produce evidence that the defendant pushed [Dot's] head after she, "had been handcuffed."
>
> . . . .
>
> Here, the defendant was not charged with official misconduct by pushing [Dot's] head during the process of handcuffing her. He was charged with official misconduct by pushing her head after she had been handcuffed. Thus, while the evidence presented to the jury could support a finding that the head-push occurred during the process of handcuffing, that is not the offense . . . with which the defendant was charged.

However, the judge rejected defendant's argument that submission of count three to the jury prejudiced defendant regarding the jury's deliberations on count one. The judge noted his instructions to the jury emphasizing that the

jury should consider each count of the indictment separately, and the jury was presumed to have followed his instruction. He explained that the jury's guilty verdict on the charge in count three, later determined to be legally deficient, failed to constitute a basis for a new trial on the official misconduct charge in count one because the jury separately considered defendant's guilt on that count.

Rule 3:20-1 provides as follows:

> The trial judge on defendant's motion may grant the defendant a new trial if required in the interest of justice. . . . The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.

A motion for a new trial "is decided in the court's discretion in light of the credible evidence and with deference to the trial judge's feel for the case and observation of witnesses." State v. Terrell, 452 N.J. Super. 226, 268–69 (App. Div. 2016), aff'd, 231 N.J. 171 (2017). We will not reverse a trial court's denial of a new trial motion unless there has been a clear abuse of discretion. State v. Van Ness, 450 N.J. Super. 470, 495–96 (App. Div. 2017).

Defendant claims a new trial is required in the interest of justice because he was prejudiced by the judge's failure to dismiss count three of the indictment as part of his pretrial dismissal motion. Because we affirm the judge's denial of

defendant's pretrial motion to dismiss the indictment, we reject defendant's claim that the judge erred in denying his motion for a new trial.

Even if we were to conclude that the judge erred in denying the pretrial motion to dismiss the indictment, which we do not, trying both of the official misconduct charges did not prevent defendant from arguing to the jury that his pushing Dot's head constituted a proper de-escalation of the situation rather than an improper use of force. Defendant was free to present that argument to the jury as part of a justification defense.

Moreover, the jury's verdict on count one of the indictment was supported by the evidence and the jury's consideration of both official misconduct charges did not result in prejudice because the jury was instructed to consider each misconduct charge separately. See State v. Muhammad, 182 N.J. 551, 578 (2005). We presume the jury followed the judge's instructions. State v. Gonzalez, 249 N.J. 612, 635 (2022).

III.

We next review defendant's "fundamental fairness" argument. The judge "seriously doubt[ed] that the remedy of a dismissal with prejudice on fundamental fairness grounds [was] available when a defendant cannot establish

a basis for a remedy requiring a lesser showing, i.e.[,] a new trial under the interest of justice standard under Rule 3:20-1."

The doctrine of fundamental fairness protects citizens against unjust and arbitrary governmental actions. State v. Ryan, 249 N.J. 581, 601 (2022). Fundamental fairness is an essential part of the constitutional right to due process and is often inferred from other constitutional guarantees. State v. Melvin, 248 N.J. 321, 347 (2021).

The doctrine "can be applied 'at various stages of the criminal justice process even when such procedures were not constitutionally compelled.'" State v. Saavedra, 222 N.J. 39, 67 (2015) (quoting Doe v. Poritz, 142 N.J. 1, 108 (1995)). The primary considerations for invoking the doctrine are fairness and the fulfillment of reasonable expectations in light of constitutional and common law objectives. Id. at 67–68.

However, the doctrine is to be applied sparingly and only when necessary to prevent a defendant from suffering oppression, harassment, or egregious deprivation. Ryan, 249 N.J. at 601. The "one common denominator" in cases applying the doctrine is "a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked." Doe, 142 N.J. at 109.

Here, defendant's fundamental fairness argument in support of dismissal of count one of the indictment is premised upon the following contentions: (1) the judge erred in denying his motion to dismiss count three of the indictment before trial and (2) he suffered prejudice as a result of defending against two charges of official misconduct. As set forth previously, we reject defendant's arguments the judge erred in denying his pretrial motion to dismiss the indictment and that he suffered prejudice as a result of defending against two charges of official misconduct. Thus, defendant failed to identify any unfairness during the criminal proceedings and his fundamental fairness argument is without merit.

IV.

We next consider defendant's arguments regarding the sentence imposed. Defendant argues that the judge abused his discretion by imposing a prison term rather than a probationary sentence. Because the judge found the mitigating factors clearly and convincingly outweighed the aggravating factors so as to constitute a serious injustice, defendant asserts a five-year probationary sentenced rather than imprisonment was warranted. We disagree.

At the sentencing hearing on April 26, 2021, the State requested a seven-year sentence, arguing for a finding of aggravating factors one, two, three, and

four. Defense counsel sought a probationary sentence and a waiver of the five-year mandatory period of parole ineligibility. Defense counsel further argued for a finding of mitigating factors one through eleven.

The judge found only two aggravating factors. He applied aggravating factor four, N.J.S.A. 2C:44-1(a)(4), that a lesser sentence would depreciate the seriousness of defendant's offense because it involved a breach of the public trust–that is, defendant took advantage of a position of trust or confidence to commit the offense. However, the judge gave little weight to aggravating factor four because breaching the public trust was part of the crime of official misconduct. The judge also applied aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need for deterrence, but only as to general deterrence. The judge relied on State v. Briggs, 349 N.J. Super. 496, 505 (App. Div. 2002) in finding that specific deterrence was not a concern given his finding on mitigating factor nine that the character and attitude of defendant indicated he was not likely to commit another offense. Thus, the judge gave little weight to aggravating factor nine.

The judge held seven mitigating factors applied to defendant's case. He found mitigating factor one, N.J.S.A. 2C:44-1(b)(1), applied because defendant's conduct neither caused nor threatened serious harm to Dot. The

judge also applied mitigating factor four, N.J.S.A. 2C:44-1(b)(4), because there were substantial grounds tending to excuse or justify defendant's conduct despite defendant's failure to establish a defense regarding his conduct. Next, the judge applied mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), because defendant had no prior history of delinquency or criminal activity. Further, the judge applied mitigating factor eight, N.J.S.A. 2C:44-1(b)(8), because defendant's conduct was the result of circumstances unlikely to recur given defendant was barred from future public employment based on the misconduct conviction. Additionally, the judge applied mitigating factor nine, N.J.S.A. 2C:44-1(b)(9), because defendant was unlikely to commit another offense based on defendant's expression of remorse, a statement from defendant's therapist indicating defendant's progress in learning from his experiences and improving himself, defendant's work as a volunteer firefighter, and supporting letters from defendant's family, friends, colleagues, and members of the community. The judge also applied mitigating factor ten, N.J.S.A. 2C:44-1(b)(10), because defendant was likely to respond affirmatively to probationary treatment. Finally, the judge found mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11), applied because imprisonment would entail excessive hardship to defendant and his dependents, but gave this factor only slight weight.

In imposing a sentence, the trial court must identify and weigh the relevant aggravating and mitigating factors, and determine the appropriate sentence within the range specified by the Legislature for the crime committed by the defendant. State v. Case, 220 N.J. 49, 63-65 (2014). We apply an abuse of discretion standard when reviewing sentencing decisions. State v. R.Y., 242 N.J. 48, 73 (2020). Applying this deferential standard of review, we do not substitute our judgment for that of the sentencing court. Case, 220 N.J. at 65. Where the trial court imposes a sentence within the statutory guidelines, and the court's findings on the aggravating and mitigating factors are supported by competent, credible evidence in the record, and properly balanced, we will affirm the sentence unless it shocks the conscience. See N.J.S.A. 2C:44-7; see also State v. Rivera, 249 N.J. 285, 297–98 (2021).

Having reviewed the judge's reasons in support of his findings as to the aggravating and mitigating factors, we discern no abuse of discretion in the judge's decision. The record reflects that the judge painstakingly engaged in the required inquiry in stating his findings as to the aggravating and mitigating factors. The judge also detailed why he rejected the State's requests regarding application of additional aggravating factors. We are satisfied the judge's

findings on the aggravating and mitigating factors were properly based on the evidence in the record and did not constitute an abuse of discretion.

Additionally, we reject defendant's argument that the judge abused his discretion by declining to waive the presumption of imprisonment under N.J.S.A. 2C:44-1(d) and impose a probationary term.

N.J.S.A. 2C:44-1(d) provides that the presumption of imprisonment for a first- or second-degree offense may be overcome as follows:

> The court shall deal with a person who has been convicted of a crime of the first or second degree . . . by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that [the defendant's] imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

A defendant attempting to overcome the presumption of imprisonment bears a "heavy burden." State v. Evers, 175 N.J. 355, 392 (2003). The standard for establishing a serious injustice "is extremely narrow." State v. Cooke, 345 N.J. Super. 480, 487 (App. Div. 2001). "A probationary sentence for a first or second degree offense is rarely warranted and only in 'truly extraordinary and unanticipated circumstances.'" Ibid. (quoting State v. Roth, 95 N.J. 334, 358 (1984)).

Moreover, a trial court's decision to downgrade an offense for purposes of sentencing under N.J.S.A. 2C:44-1(f)(2) does not dispel the presumption of imprisonment under N.J.S.A. 2C:44-1(d). Evers, 175 N.J. at 388 (citing State v. Jabbour, 118 N.J. 1, 7 (1990)). The standards are different, and they "address two qualitatively different situations." State v. Megargel, 143 N.J. 484, 499 (1996) (noting that N.J.S.A. 2C:44-1(d) addresses imprisonment versus non-imprisonment, which is "a more serious condition" than whether a defendant should be sentenced as if convicted of a crime one degree lower).

"[T]he reasons offered to dispel the presumption of imprisonment must be even more compelling than those that might warrant downgrading an offense." Evers, 175 N.J. at 389. In the event of a sentencing downgrade, "the trial court must nevertheless impose a term of imprisonment within the downgraded sentencing range because the presumption of imprisonment is determined 'not by the sentence imposed[,] but by the offense for which a defendant is convicted." Id. at 388 (alterations in original) (quoting State v. O'Connor, 105 N.J. 399, 404–05 (1987)).

Thus, "[t]he presumption of imprisonment in N.J.S.A. 2C:44-1(d) . . . is exceptionally strict." State v. Harris, 466 N.J. Super. 502, 532-33 (App. Div. 2021). The presumption may be overcome only in those truly extraordinary and

idiosyncratic cases where the human suffering resulting from imprisoning a particular defendant to deter others from committing the same offense would be too great. Evers, 175 N.J. at 388. See also State v. Jarbath, 114 N.J. 394, 398, 405−09, 413 (1989) (finding the presumption of imprisonment was overcome where defendant was a psychotic, mentally disabled woman who accidentally killed her baby and, while in prison, suffered abuse almost daily and attempted to commit suicide).

As our Supreme Court held in Evers:

> In deciding whether the "character and condition" of a defendant meets the "serious injustice" standard, a trial court should determine whether there is clear and convincing evidence that there are relevant mitigating factors present to an extraordinary degree and, if so, whether cumulatively, they so greatly exceed any aggravating factors that imprisonment would constitute a serious injustice overriding the need for deterrence. We do not suggest that every mitigating factor will bear the same relevance and weight in assessing the character and condition of the defendant; it is the quality of the factor or factors and their uniqueness in the particular setting that matters.
>
> [175 N.J. at 393−94.]

Addressing the role of deterrence, the trial court must start from the presumption of imprisonment for first- and second-degree offenses, while

recognizing that crimes may be "more or less egregious depending on the particular facts." Id. at 394. As the Court stated in Evers:

> It is the quality of the extraordinary mitigating factors taken together that must be weighed in deciding whether the "serious injustice" standard has been met. The trial court also must look at the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the equation. Generally, for first- and second-degree crimes there will be an overwhelming presumption that deterrence will be of value.
>
> [Id. at 395.]

Here, the judge properly found there was no evidence to overcome the presumption of imprisonment for official misconduct. Defendant failed to demonstrate that this matter was so extraordinary or idiosyncratic that the human cost of imprisonment to deter others from committing the same offense would be too great. On this record, we are satisfied the judge properly rejected defendant's request for a probationary sentence and waiver of the presumption of imprisonment pursuant to N.J.S.A. 2C:44-1(d).

V.

Because we reject defendant's challenge to his conviction and the sentence imposed, we turn to the State's appeal. On appeal the State argues:

> THE TRIAL COURT ABUSED ITS DISCRETION NOT ONLY WHEN IT DETERMINED WAIVER OF

> THE STATUTORILY MANDATED PERIOD OF PAROLE INELIGIBILITY WAS WARRANTED GIVEN THE COURT FAILED TO ESTABLISH THE IMPOSITION OF SAME WOULD IMPOSE A "SERIOUS INJUSTICE" ON DEFENDANT BUT ALSO, WHEN THE COURT COMPOUNDED ITS ERROR BY RELYING ON IT TO THEN SENTENCE DEFENDANT A DEGREE LOWER.

We agree with the State in part, and remand to the sentencing court to reconsider the decision to downgrade the offense. However, we reject the State's argument that the judge abused his discretion in waiving the period of parole ineligibility.

The judge adjourned the original sentencing hearing at defendant's request. Defendant requested that his sentencing be adjourned based on the pendency of a bill in the Legislature, S3456, proposing elimination of the parole ineligibility period for individuals convicted of official misconduct. Governor Philip Murphy conditionally vetoed that bill on April 19, 2021. An identical bill, S3658, was introduced in the Legislature the same day as the Governor's veto of S3456. The Governor conditionally vetoed the identical bill on June 28, 2021.

On the day of the sentencing hearing, April 26, 2021, the judge acknowledged N.J.S.A. 2C:43-6.5 had not been amended and that the mandatory minimum prison sentence for official misconduct "remain[ed] in effect, and it continue[d] to govern the sentencing of those convicted of official misconduct."

While the judge rejected defendant's argument that the imposition of a prison term would constitute a serious injustice, in applying N.J.S.A. 2C:43-6.5(c)(2), the judge clearly and convincingly found that extraordinary circumstances existed such that imposition of a five-year mandatory minimum term and period of parole ineligibility would constitute a serious injustice, which overrode the need to deter others. Thus, the judge waived any period of parole ineligibility otherwise required under N.J.S.A. 2C:43-6.5(a) and (b)(17).

In doing so, the judge stated:

> The offense at issue in this case, official misconduct, covers a very broad range of criminal conduct, including in the area of excessive use of force by police. At one end of the spectrum, the most egregious end, there is conduct like that at issue in [State v. O'Donnell, 117 N.J. 210 (1989)], deliberate, targeted, prolonged physical abuse of a . . . suspect partly based on a personal vendetta, abuse that the defendant expressed pride in having administered.
>
> This [c]ourt finds that the facts in this case are at the opposite end of that spectrum. The presence of the defendant and his partner at the group home where [Dot] resided was justified without question. The ultimate purpose of the encounter by the defendant and his partner with [Dot] was to detain her, to [defuse] the situation, and remove her from the home so she could get additional professional help.
>
> The State conceded and the jury was advised that the purpose to detain [Dot] was entirely lawful and justified. [Dot] being face down having been taken down by the defendant's partner, that conduct was not alleged to be [un]lawful and was not alleged to have

been unjustified. What was not justified was the split-second decision by the defendant to go over the line and employ excessive physical force against [Dot] by slapping her with an open hand twice on the side of the head.

As noted earlier, the defendant's criminal conduct was disturbing to see and hear . . . on the body-worn camera evidence. But that conduct took place over the course of seconds, not minutes, and was not part of any other unlawful exercise of police authority. Thus, with regard to the deterrence issue, the "nature of and the relevant circumstances pertaining to the offense" strongly favor the defense's position.

As noted earlier, there are separate deterrence issues here under the two relevant statutes. One is deterrence as reflected in the decades-long presumption of imprisonment that applies to all first- and second-degree cases. The other is the deterrence as reflected in the 2007 enactment of a mandatory five-year period of parole ineligibility that applies to official misconduct cases.

With regard to the character and condition of the defendant, the [c]ourt finds by clear and convincing evidence that the mitigating factors predominate in this case to an extraordinary degree. There are far more mitigating factors here than aggravating factors, and many of the mitigating factors are entitled to great or significant weight, and . . . that is not true with any aggravating factor.

On the ultimate issue, the [c]ourt finds that it would not be a serious injustice to impose a prison sentence in this case, but the [c]ourt also finds clearly and convincingly that extraordinary circumstances exist such that the imposition of a five-year period parole ineligibility would be a serious injustice which overrides the need to deter others justifying a waiver of any period of parole ineligibility.

The judge also determined that a sentencing downgrade was appropriate under N.J.S.A. 2C:44-1(f)(2). In reaching that decision, the judge stated:

> As to the issue of a sentencing downgrade, the standard is less demanding than for overcoming the presumption of imprisonment, but the standard is still elevated when the offense is covered, as this is, by an enhanced-penalty statute, and that's [Megargel] 143 N.J. at 502.
>
> The standard is where the [c]ourt is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and the "interests of justice demand" the downgrade.
>
> For all the reasons just described that warrant a waiver of the period of parole ineligibility, the [c]ourt also finds that the interests of justice demand a sentencing downgrade to the third-degree level.

Official misconduct as charged in this case is a second-degree crime under N.J.S.A. 2C:30-2. A conviction for official misconduct permits imposition of a sentence within the five-to-ten-year range, N.J.S.A. 2C:43-6(a)(2), a presumption of imprisonment, N.J.S.A. 2C:44-1(d), and a five-year mandatory minimum, N.J.S.A. 2C:43-6.5(a) and (b)(17).

A. Mandatory Minimum

We first address the State's argument regarding the judge's waiver of the five-year mandatory minimum parole period.

The five-year mandatory minimum term may be waived pursuant to N.J.S.A. 2C:43-6.5(c)(2). The statute provides as follows:

> If the court finds by clear and convincing evidence that extraordinary circumstances exist such that imposition of a mandatory minimum term would be a serious injustice which overrides the need to deter such conduct in others, the court may waive or reduce the mandatory minimum term of imprisonment required by subsection a. of this section. In making any such finding, the court must state with specificity its reasons for waiving or reducing the mandatory minimum sentence that would otherwise apply.

"The 'serious injustice' threshold [of N.J.S.A. 2C:43-6.5(c)(2)] is higher than the showing necessary to downgrade an offense" under N.J.S.A. 2C:44-1(f)(2). State v. Trinidad, 241 N.J. 425, 456 (2020) (quoting Megargel, 143 N.J. at 501). A decision to waive or reduce the mandatory minimum sentence "affects the actual period of imprisonment a defendant must serve before being eligible for parole." State v. Rice, 425 N.J. Super. 375, 388 (App. Div. 2012).

The serious injustice inquiry "focuses on whether the mitigating factors are 'extraordinary,' such that 'they so greatly exceed any aggravating factors that imprisonment would constitute a serious injustice overriding the need for deterrence.'" Trinidad, 241 N.J. at 456 (quoting Evers, 175 N.J. at 393–94). The sentencing court must "consider 'the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the equation.'" Ibid. (quoting Evers, 175 N.J. at 395). Moreover, the sentencing

court must recognize "a presumption of valuable deterrence in a custodial term for first- and second-degree offenders." Ibid.

In finding that extraordinary circumstances warranted a waiver of the five-year mandatory minimum sentence in this case, the judge found the mitigating factors predominated "to an extraordinary degree," and many of the mitigating factors were entitled to significant weight, while the same was not true of the aggravating factors. The judge also considered the gravity of the offense and concluded that defendant's conduct was less serious than conduct in other excessive use of force cases.

The statute expressly allows for a waiver of the mandatory minimum sentence in situations where the ends of justice would not be served. Here, after applying the proper legal analysis, the judge explained his reasons for waiving the mandatory minimum sentence. We discern no abuse of discretion in the judge's decision to waive the five-year mandatory minimum sentence under N.J.S.A. 2C:43-6.5(c)(2).

B. Sentencing Downgrade

Sentencing downgrades are permitted under N.J.S.A. 2C:44-1(f)(2). The statute provides:

> In cases of convictions for crimes of the first or second degree where the court is clearly convinced that the

> mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands, the court may sentence the defendant to a term appropriate to a crime of one degree lower than that of the crime for which the defendant was convicted.

The threshold for downgrading an offense is less than the threshold required for waiving or reducing a mandatory minimum sentence. Rice, 425 N.J. Super. at 389. The statute sets forth a two-part test for a sentence to be downgraded. Under the first step, "[t]he sentencing judge must be (1) clearly convinced that the mitigating factors substantially outweigh the aggravating factors and (2) the interest of justice must demand the downgrade." Megargel, 143 N.J. at 495; State v. Canfield, 470 N.J. Super. 234, 348 (App. Div.), certif. granted, 251 N.J. 38 (2022).

Under the second step, while the statute fails to define the term "the interest of justice," our Supreme Court found the term is "a high bar, requiring 'compelling' reasons for a downgrade." Trinidad, 241 N.J. at 454 (citing Megargel, 143 N.J. at 500−02). In Trinidad, the Court explained:

> Generally, the reasons that compel a downgrade must be in addition to, and separate from, the mitigating factors. As the focus of the inquiry is on the offense rather than the offender, "the most single important factor" is the severity of the crime. Determining a crime's severity involves consideration of the "factual circumstances," including whether the defendant's crime was "similar to a lower degree offense, thus

> suggesting that a downgraded sentence may be appropriate." The defendant's role in the crime is also relevant. ("Was the defendant the mastermind, a loyal follower, an accomplice whose shared intent is problematic, or an individual who is mentally incapable of forming the necessary criminal intent?"). We further consider the sentence from the perspective of deterrence. And, finally, we hesitate to downgrade where the Legislature has provided an enhanced penalty for a particular offense.
>
> [Trinidad, 241 N.J. at 454 (citations omitted).]

In determining whether to downgrade an offense, the focus must be on the offense and not the offender. Rice, 425 N.J. Super. at 389–90. The applicable statute, N.J.S.A. 2C:44-1(f)(2), "is an offense-oriented provision. Characteristics or behavior of the offender are applicable only as they relate to the offense itself and give fuller context to the offense circumstances." State v. Lake, 408 N.J. Super. 313, 328 (App. Div. 2009).

In deciding whether a sentencing downgrade is warranted, a sentencing judge should "state why sentencing the defendant to the lowest range of sentencing for the particular offense for which he was convicted, is not a more appropriate sentence than a downgraded sentence under section 44-1f(2)." Rice, 425 N.J. Super. at 390 (quoting Megargel, 143 N.J. at 502).

Here, the sentencing judge omitted a separate analysis concerning the appropriateness of a sentencing downgrade. The judge relied on the same

reasons that he expressed in support of waiving the five-year mandatory minimum sentence, stating, "for all the reasons just described that warrant a waiver of the period of parole ineligibility, the [c]ourt also finds that the interests of justice demand a sentencing downgrade to the third-degree level." The judge failed to expressly state the reasons why a sentencing downgrade was appropriate apart from the reasons advanced for waiver of the mandatory minimum sentence. Under the case law, the judge was required to separately state his reasons for the downgrade and consider the matter under an offense-oriented legal standard as opposed to the offender-oriented standard applicable to waiver of the mandatory minimum sentence.

The judge also omitted any explanation why a five-year sentence for a second-degree offense would not be more appropriate than sentencing defendant to a four-year sentence for a downgraded third-degree offense, particularly in light of the enhanced penalties accorded to official misconduct offenses. The absence of such an explanation by the sentencing judge warrants a remand to the trial court.

Thus, we remand to the trial court to reconsider whether a sentencing downgrade is appropriate in this case. The judge should explain the reasons for granting or denying the downgrade, applying the factors under N.J.S.A. 2C:44-

1(f)(2). Additionally, if granting a downgrade, the judge should state why it would not be more appropriate to issue a five-year sentence for a second-degree offense than a lesser sentence for a downgraded third-degree offense.

Affirmed as to the conviction. The sentence is vacated in part and remanded for the judge to explain the reasons for granting or denying the downgrade in accordance with N.J.S.A. 2C:44-1(f)(2). In all other respects, the sentence is affirmed and the judge's stay of the sentence is vacated. We do not retain jurisdiction.