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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0482-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN C. BAILEY, JR.,

Defendant-Appellant.

Submitted May 28, 2024 – Decided June 11, 2024

Before Judges Mayer and Whipple.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 21-09-1209.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Daniel S. Rockoff, Assistant Deputy Public Defender, of counsel and on the brief).

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

PER CURIAM

Defendant, John C. Bailey, Jr., appeals from an August 26, 2022 judgment of conviction for first-degree carjacking, N.J.S.A. 2C:15-2. We affirm.

Defendant raises the following issues on appeal:

POINT I: THE [TWENTY]-YEAR NERA SENTENCE CANNOT STAND BECAUSE THE TRIAL COURT FAILED TO ORDER A PSYCHIATRIC EVALUATION OF THE DEFENDANT, WHO SUFFERS FROM SEVERE MENTAL ILLNESS AND WHO HAS NEVER PREVIOUSLY BEEN SENTENCED TO PRISON. THE LAW DIVISION'S FAILURE TO COLLECT NECESSARY INFORMATION IN THE PRESENTENCE REPORT ON THE DEFENDANT'S MENTAL HEALTH VIOLATED THE GUARANTEE IN THE COURT RULES AND CRIMINAL CODE OF AN INDIVIDUALIZED PRESENTENCE INVESTIGATION INTO ALL MATERIAL HAVING ANY BEARING ON THE RELEVANT AGGRAVATING AND MITIGATING FACTORS.

1. A Psychological Evaluation Should Have Been Conducted Prior to Sentencing.
2. After a Psychological Examination Is Conducted, the Sentencing Court Must Re-Evaluate Whether the Sentencing Factors Warrant a Reduced Sentence, Including Mitigating Factors [Four] and [Eight], and Aggravating Factor [Three].

POINT II: THIS COURT MUST ALSO REMAND FOR RESENTENCING BECAUSE THE TRIAL COURT IMPROPERLY (I) WEIGHED FAMILY

COURT ORDERS IN SUPPORT OF AGGRAVATING FACTOR [SIX], WHICH CONCERNS CRIMINAL CONVICTIONS; (II) DISCOUNTED MITIGATING FACTOR [FOUR] BECAUSE THE ELEMENTS OF THE CRIME WERE SATISFIED; AND (III) FAILED TO WEIGH MITIGATING FACTOR [NINE] EVEN THOUGH ITS OWN FACT-FINDING CONVEYED MITIGATING FACTOR [NINE] WAS PRESENT.

1. The Defendant Must Be Resentenced Because the Trial Court Misconstrued and Misapplied Aggravating Factor [Six], Which Concerns Criminal Convictions and Not Family Court Orders.
2. The Defendant Must Be Resentenced Because the Trial Court Improperly Discounted Mitigating Factor [Four] by Reasoning That the Elements of the Crime Were Satisfied and a Crime Was Therefore Committed.
3. The Defendant Must Be Resentenced Because the Trial Court Failed To Articulate Why Mitigating Factor [Nine] Should Not Apply, Despite the Trial Court's Own Very Favorable Findings of Fact on the Defendant's Attitude.

Early in the morning of December 5, 2018, Lakewood Police responded to a report of a carjacking and aggravated assault and found a female victim with blood on her jacket and a cut on her knee, holding a rag to a cut on her neck.

She told the officers a man with a covered face and regular build approached her while she sat in her car and asked her for a ride and directions to Route 9. After she refused him a ride, he appeared to walk away but quickly returned and smashed the driver's side window with his fist until it broke. The man then entered the vehicle, sat on the victim, and began to choke her. He told her to drive and be quiet or else he would kill her; his body was preventing her from operating the vehicle, so the man drove off with her in the vehicle.

After travelling a short way, the victim broke free and jumped out of the vehicle, ran to a nearby residence, and contacted the police. Emergency Medical Services transported her to a hospital, where officers noted she also had a bite mark on her left shin. Her fingernails and the bite mark were swabbed for DNA samples. The victim's injuries required a stitch on her neck and a staple on her forehead.

A witness reported observing a white male in grey sweatpants and a grey or white shirt inside the car, on top of the victim. Police located the vehicle and observed blood on the outside of the vehicle and a bloody rubber glove inside it. Police recovered fingerprints from a window and samples of the blood on the exterior of the vehicle.

Approximately eighteen months later, Lakewood police officers were notified the DNA samples matched defendant's DNA from the Combined DNA Index System (CODIS). Officers collected a buccal swab from defendant and additional testing confirmed his DNA matched the sample from the bite mark on the victim's leg and the blood on the exterior of the vehicle. Defendant was arrested on January 26, 2021.

An Ocean County Grand Jury returned an indictment charging defendant with: first-degree carjacking, N.J.S.A. 2C:15-2; second-degree kidnapping, N.J.S.A. 2C:13-1(b); second-degree robbery, N.J.S.A. 2C:15-1(a); second-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7); and third-degree terroristic threat, N.J.S.A. 2C:12-3(a).

In June 2022, defendant pled guilty to first-degree carjacking. In exchange for his guilty plea, the State agreed to dismiss the remaining counts of the indictment and recommend a sentence of twenty-five-years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On August 26, 2022, defendant was sentenced and, in accordance with the plea agreement, argued for a lesser sentence. The trial court sentenced defendant to twenty-years, subject to NERA; ordered defendant to have no contact with the victim; and required defendant to pay certain fees and assessments.

This appeal followed, and the matter was placed on the sentencing oral argument calendar; after argument on June 12, 2023, we transferred the matter to the plenary calendar.

"Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). Our deference to the "discretionary decision of a sentencing judge is similar, in purpose and origin, to that accorded decisions of a trier of fact. It is based primarily on the sentencing judge's presumed superior ability to make a first-hand evaluation of the background and character of the defendant and the offense." State v. Leggeadrini, 75 N.J. 150, 162 (1977). The sentence, therefore, must be affirmed unless:

- (1) the sentencing guidelines were violated;
- (2) the aggravating and mitigating factors found were not "based upon competent credible evidence in the record"; or
- (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Rivera, 249 N.J. 285, 297-98 (2021) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

See also State v. Dalziel, 182 N.J. 494, 501 (2005). Questions of law, such as whether any of these three elements is satisfied, are reviewed de novo. See State v. Robinson, 217 N.J. 594, 603-04 (2014). The same standard for appellate review applies whether the sentence results from a trial or a plea. State v. Sainz, 107 N.J. 283, 292 (1987).

We will generally refuse to consider an issue not raised and addressed at the trial court level, unless it is jurisdictional or "substantially implicate[s] public interest." State v. Walker, 385 N.J. Super 388, 410 (App. Div. 2006) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). We may consider an issue not raised to the trial court "if it meets the plain error standard or is otherwise of special significance to the litigant, to the public, or to achieving substantial justice, and the record is sufficiently complete to permit its adjudication." Ibid. See also R. 2:10-2. The plain error standard looks to whether, "in light of the overall strength of the State's case," State v. Sanchez-Medina, 231 N.J. 452, 468 (2018), the "unchallenged error . . . was 'clearly capable of producing an unjust result,'" State v. Clark, 251 N.J. 266, 286-87 (2022) (quoting R. 2:10-2). See also State v. Singh, 245 N.J. 1, 13 (2021); State v. R.K., 220 N.J. 444, 456 (2015).

Defendant argues the sentencing court should have ordered a psychological evaluation before pronouncing sentence and, by failing to do so, the court improperly sentenced him without considering "all presentence material having any bearing whatever on the sentence," as is required by Rule 3:21-2(a). Further, defendant challenges the sentencing court's application of the aggravating and mitigating factors.

Applying the plain error standard, we conclude defendant was not deprived of a fair sentence when the sentencing court pronounced sentence without ordering a psychiatric evaluation. Before sentencing a defendant, the court is required to consider a presentence report (PSR) that "shall contain all presentence material having any bearing whatever on the sentence." R. 3:21-2(a); see also N.J.S.A. 2C:44-6(a) and (b). Here, the court was provided with, and referenced, a comprehensive PSR that included defendant's recent medical history. Defendant's presentencing brief also contained over fifty pages of recent psychiatric treatment notes to support his argument for mitigating factor four. Based on this information, the sentencing court had sufficient materials to fully assess the aggravating and mitigating factors at the time of sentencing.

Defense counsel proceeded with sentencing and argued for mitigating factor four without once referencing the fact the court had not ordered a

psychiatric evaluation. The sentencing court found mitigating factor four based on the presentence materials presented, but afforded it light weight, as opposed to the significant weight requested by defendant.

Here, we consider whether there is reasonable doubt that the absence of a court-ordered psychiatric evaluation led the sentencing court to an unjust result. Based on the psychological treatment notes in the record, there is no reasonable doubt.

Defendant contends the PSR indicated his "mental health challenges were causally linked to the offense," such indications should have resulted in the court's ordering a full evaluation, and the absence of such a report prevented the sentencing court from conducting a "meaningful assessment of the specific mitigating and aggravating factors at sentencing."

The decision whether to order a mental health evaluation is entirely within the sentencing court's discretion. Rule 3:21-2 is permissive, in that it states, "the court may order . . . [a] mental examination of the defendant." R. 3:21-2(b) (emphasis added). Similarly, the corresponding statute explicitly commits the decision of whether to order such examination to the sentencing court's discretion. N.J.S.A. 2C:44-6(b) ("The court, in its discretion and considering all the appropriate circumstances, may waive the medical history and

psychological examination in any case in which a term of imprisonment including a period of parole ineligibility is imposed."). In his sentencing brief, defense counsel provided psychiatric records documenting defendant's mental health diagnosis, but defendant never requested a court-ordered evaluation.

On this record, we discern no plain error. Even without a court-ordered evaluation, the sentencing court found mitigating factor four based on the presentence materials before it. It is highly unlikely, therefore, that the absence of the evaluation led the sentencing court to an unjust result.

Defendant further argues the sentencing court erred by giving mitigating factor four light weight, as opposed to significant weight, and that this error is grounded in the absence of a court-ordered mental health evaluation to assess his "current mental health, . . . which mental illnesses caused [defendant] to black out during the offense, and . . . whether treatment could be reasonably expected to reduce future risk." Defendant also asserts mitigating factor eight and aggravating factor three should be re-balanced after a court-ordered mental health evaluation.

The sentencing court afforded mitigating factor four little weight. The court did not find mitigating factor eight but did find aggravating factor three and afforded it moderate weight. Defendant provided no evidence what a court-

ordered mental health evaluation would have shown, so the effect of an evaluation on sentencing is purely speculative. Based on our review, it was not plain error for the court to sentence defendant without ordering a psychological evaluation.

Defendant next asserts the sentencing court's consideration of final restraining orders issued by a family court was a misapplication of aggravating factor six, which concerns the nature and extent of defendant's prior criminal record. Aggravating factor six permits a sentencing court to consider, as one of several factors, the "extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted." N.J.S.A. 2C:44-1(a)(6).

We agree it was error for the sentencing court to mention defendant's family court matters while analyzing aggravating factor six because these were not criminal matters or part of his criminal record. Such error was harmless, however, because the sentencing court found the factor based on defendant's prior conviction for aggravated assault and violations of supervision. The sentencing court also appropriately afforded little weight to aggravating factor six after acknowledging the brevity of defendant's violent criminal history, noting defendant's prior aggravated assault and the carjacking for which he was

being sentenced occurred within a year of each other. Because there is sufficient relevant evidence in the record to support the sentencing court's according little weight to aggravating factor six, the sentencing court's decision did not exceed the court's discretion and did not constitute plain error.

Defendant argues the trial court improperly discounted mitigating factor four based on the purportedly circular reasoning that the elements of the crime were satisfied, and a crime was, therefore, committed. He also contends the sentencing court erroneously conflated the absence of a defense against the crime with the absence of mitigation at sentencing.

Mitigating factor four permits a sentencing court to consider, as one of several factors, whether "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense." N.J.S.A. 2C:44-1(b)(4). In this case, the sentencing court stated:

Mitigating factor four deals with whether or not there are grounds tending to excuse or justify . . . [d]efendant's conduct, though, . . . failing to establish a defense. There really is no excuse. However, there—again, there's case law I'm bound by which indicates that I'm supposed to consider all of the mental health issues.

So[,] it's not as if there was some potential defense to this. There's not a defense to this. But am I required to consider the nature and extent of all these psychological issues? The answer is yes. And there's, there's

independent proof of that. It's been submitted. I've—
amount of medical records. . . .

. . . .

. . . I believe I'm required to at least acknowledge [defense counsel] has established some grounds to recognize mitigating factor four. I do so, but I give it light weight. And [defense counsel] is, is—his argument is misplaced that the [c]ourt should give it heavy weight. Despite his professionalism and the diligent manner in which he's presented it, four is, is present, but it's present in, in a fashion that . . . [d]efendant knew what he was doing[,] and his psychological conditions may have been some background for that, but he committed the crime. He did so knowingly. So[,] four's entitled to light weight.

The sentencing court's less than forceful reasons for affording little weight to mitigating factor four was not harmful as the judge provided sufficient reasons in support of his determination while reviewing that factor. The analysis of mitigating factor four followed the sentencing court's consideration of mitigating factor two: that defendant did not contemplate his conduct would cause or threaten serious harm. In analyzing mitigating factor two, the sentencing court stated, "once one walks up to the car and asks for directions and asks for a ride, gets the directions and not the ride, . . . [d]efendant then made apparently a split-second decision of monumental error and, and criminal in nature." The judge remarked, "[there is] no claim that defendant's substance

abuse rendered him unable to act purposely or knowingly." Further, during the plea colloquy, defendant "admitted that he engaged in these acts knowingly."

In the context of this analysis, the court acknowledged defendant's history of mental health issues—and substance abuse—but declined to afford this factor even moderate weight because, despite his mental health struggles, he knowingly committed the crime of which he had been convicted. Because defendant acknowledged he knowingly inflicted bodily injury upon the victim and used force upon her to commandeer control of the vehicle, his mental health issues did not render him unaware of his actions. Although defendant later alleged he "blacked out" during the attack, he produced no support for that contention. An admission of knowledge balanced against an allegation of having "blacked out" supports a finding that mitigating factor four should be accorded little weight in the sentencing rubric.

Finally, defendant argues the sentencing court erred in failing to find and weigh mitigating factor nine, despite making independent findings that supported that factor. Mitigating factor nine permits a sentencing court to consider, as one of several factors, whether the "character and attitude of the defendant indicate that the defendant is unlikely to commit another offense." N.J.S.A. 2C:44-1(b)(9). Here, the sentencing court did not address mitigating

factor nine—as defense counsel did not ask the court to apply that factor—but acknowledged defendant was genuinely remorseful and had obviated the need for the victim to endure a trial.

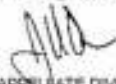
A sentencing court "is required to consider all of the aggravating and mitigating factors and to find those supported by the evidence" and must do so even if counsel does not "squarely present" an argument for each factor. Dalziel, 182 N.J. at 505. Although defendant expressed his regret for committing the crimes, the evidence in the record did not support the finding that "the defendant is unlikely to commit another offense" required to apply mitigating factor nine. See N.J.S.A. 2C:44-1(b)(9).

Defendant's remorse was explicitly acknowledged by the sentencing court. Other evidence in the record, however, suggests defendant's long-term substance abuse issues and untreated mental health struggles overrode any intention defendant may have had not to commit the instant offense. These issues, if left unaddressed, are likely to continue to lead to future offenses by defendant. We conclude there is sufficient relevant evidence in the record to support the sentencing court's rejection of mitigating factor nine. Further, the sentencing court considered defendant's obvious remorse as a "non-statutory factor," in balancing the aggravating and mitigating factors prior to his

sentencing. These decisions did not exceed the court's discretion and certainly were not plain error.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION