SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0538-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NIKITA CARDWELL,

Defendant-Appellant.

Argued January 18, 2017 – Decided February 21, 2017

Before Judges Yannotti, Fasciale and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-02-0043.

Stephen P. Hunter, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Hunter, of counsel and on the brief).

Claudia Joy Demitro, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Demitro, of counsel and on the brief).

PER CURIAM

Defendant Nikita Cardwell was tried before a jury and found guilty of second-degree official misconduct and other offenses, and he was sentenced to seven years of incarceration, with five years of parole ineligibility. Defendant appeals from the judgment of conviction dated July 8, 2014. We affirm.

I.

A Middlesex County grand jury charged defendant with second-degree conspiracy to commit bribery in official matters, official misconduct, and distribution of controlled dangerous substances (CDS), contrary to N.J.S.A. 2C:5-2, 2C:27-2(c), 2C:30-2, 2C:2-6, 2C:35-5(a)(1), 2C:35-5(b)(3), and 2C:35-5(b)(12) (count one); second-degree official misconduct, contrary to N.J.S.A. 2C:30-2 and 2C:2-6 (count two); second-degree bribery in official matters, contrary to N.J.S.A. 2C:27-2(c) and 2C:2-6 (count three); and third-degree money laundering, contrary to N.J.S.A. 2C:21-25(a) (count four). Thereafter, the court denied defendant's motion to suppress statements he made to an investigator after his arrest.

At the trial, the State presented evidence showing that defendant had been employed by the New Jersey Department of Corrections (NJDOC) as a corrections officer at Northern State Prison (NSP) for about twenty-three and one-half years. Samuel Wise is an investigator in the NJDOC's Special Investigations Division (SID), which is responsible for investigating offenses

that occur within the State's correctional system, including offenses involving the possession of narcotics, smuggling contraband into the prisons, an officer's undue familiarity with inmates, and assaults.

In 2011, A.B., an inmate in the F-unit at NSP where defendant worked, contacted Wise and informed him that defendant had smuggled marijuana into the prison for him. Wise enlisted A.B., A.B.'s brother B.D., A.B.'s sister A.D., and others to assist in a confidential investigation.[1] At the time, B.D. also was incarcerated in the F-unit at NSP. A.B. asked defendant if he would smuggle a phone or narcotics into the prison for him.

At some point, A.B. was moved out of the F-unit, but B.D. remained there and continued to negotiate with defendant. Another prisoner, J.J., gave A.D.'s phone number to defendant. The SID's plan was to have A.D. give defendant $1300 to purchase two bricks of heroin and an ounce of marijuana for B.D. From the $1300, defendant would be paid a "fee" of $300.

In June 2011, Wise met with A.D. and gave her a device to record any phone calls she had with defendant regarding the contraband. On June 7, 2011, defendant called A.D. The call was recorded. A.D. told defendant she had $1000 but needed more time

[1] In this opinion, we refer to some individuals by their initials in order to protect their identities.

to give him the additional $300. Defendant told A.D. they would not make the exchange until she had all the money. He also told A.D. to speak with B.D. about how he was "going to get the stuff[.]"

Later, the investigators learned that defendant was going to send a third-party to pick up the money. The investigators then changed the plan. Defendant would be asked to smuggle $400 in cash and a telephone calling card into the prison. Defendant's "fee" would remain at $300. The cash and the telephone calling card would be given to defendant at a meeting which was initially scheduled for June 28, 2011, but later rescheduled for July 6, 2011.

On that date, the investigators met with A.D. outside a restaurant. They gave her $700 in cash and a telephone calling card to give to defendant. They also placed a recording device under a seat in her car. Throughout the day, defendant called A.D. five times. The calls were recorded.

In the second call, defendant told A.D. that a person named "Farad" would meet her and he would be arriving in a green car. Earlier that day, defendant had picked up a friend, S.D., at a train station in Newark, and they drove to Carteret in a green Nissan Sentra. There, defendant directed S.D. to meet "somebody" in a Dunkin' Donuts parking lot. S.D. is known by several nicknames, one of which is "Farad."

A.D. gave S.D. a bag with the money and telephone calling card. At some point, defendant called A.D. and A.D. told him she had given the man a bag containing the money and telephone calling card. Defendant was parked two blocks away, near a convenience store. S.D. walked to that location and gave defendant the bag with the contraband. Defendant then went to a nearby gas station, where he changed a $100 bill for five $20 bills. Immediately thereafter, investigators retrieved the $100 bill from the gas station, and determined that it was one of the bills they had given to A.D.

On July 8, 2011, A.B. called Wise and informed him that defendant had given B.D. the $400 in cash and the telephone calling card by slipping them under the door to B.D.'s cell. Wise then sent an investigator to retrieve the contraband from B.D. Wise confirmed that they were items the investigators had previously given to A.D.

Later that month, Wise had the participants arrange another transaction with defendant. B.D. asked defendant to smuggle heroin and marijuana into the prison for a "fee" of $800. Thereafter, the investigators gave A.D. another recording device. On July 26, 2011, A.D. recorded a call from defendant. In the call, A.D. stated that she had the heroin and marijuana. They agreed to meet on July 28, 2011.

Defendant did not, however, show up for the meeting with A.D. When defendant arrived that day at NSP to begin his shift, he was summoned to the SID's office, where Wise told him he was being placed under arrest. Wise informed defendant of his Miranda rights.[2] As discussed more fully later in this opinion, defendant agreed to answer Wise's questions.

Wise explained the reasons for defendant's arrest, and defendant denied the allegations. He admitted, however, that he knew A.B., B.D., and S.D. Defendant also admitted that, during the previous month, he had driven S.D. to meet someone at a convenience store, but he said S.D. had only given him a small amount of money for the ride to the store.

Defendant denied receiving any other money from S.D. Wise then told defendant that the SID had a video recording of defendant giving a $100 bill to a gas station attendant in exchange for five $20 bills. Defendant then admitted that S.D. had given him the $100 bill, which he exchanged for the $20 bills.

The investigators searched defendant's green Nissan Sentra and found two flip-style cell phones, and a paper on which "J.J." and A.D.'s phone number were written. The investigators obtained

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a warrant and searched the data on the phones. They determined that S.D. was the person who accompanied defendant to Carteret.

Defendant testified that his actions were part of an investigation of A.B. and B.D., and that he was trying to "bust them." He admitted, however, that he was not assigned to the SID, and he did not tell Wise this story when he was questioned. He testified that he never intended to smuggle drugs into NSP.

On count one, the jury found defendant guilty of conspiracy to commit bribery in excess of $200 and official misconduct in excess of $200, but not guilty of conspiracy to distribute CDS. On count two, the jury found defendant guilty of official misconduct that involved the receipt of a benefit of more than $200. On count three, the jury found defendant guilty of bribery by agreeing to accept or accepting a benefit of more than $200 for violating an official duty. The jury found defendant not guilty of money laundering, as charged in count four.

Thereafter, defendant filed a motion for a new trial and for reconsideration of the denial of his motion to suppress his statement. The court denied the motion.

The court merged counts one and three into count two, and sentenced defendant on count two to seven years of incarceration, with a five-year period of parole ineligibility. The court ordered that defendant was forever prohibited from holding public office

or employment pursuant to N.J.S.A. 2C:51-2, and determined that his pension benefits were forfeited pursuant to N.J.S.A. 43:1-3.1. The court also imposed appropriate penalties and assessments. Thereafter, defendant filed a notice of appeal from the judgment of conviction.

On appeal, defendant presents the following arguments:

> POINT I
>
> DEFENDANT'S STATEMENTS TO THE POLICE SHOULD HAVE BEEN SUPPRESSED BECAUSE THERE WAS NO INTELLIGENT WAIVER WHEN HE STATED THAT HE COULD NOT AFFORD AN ATTORNEY AND THE POLICE FAILED TO CLARIFY THAT HE COULD OBTAIN A FREE ATTORNEY. U.S. Const. [a]mend. VI, XIV; N.J. Const. [a]rt. I, ¶¶ 1, 10.
>
> POINT II
>
> THE PROSECUTOR COMMITTED MISCONDUCT IN HER CLOSING BY ESSENTIALLY TELLING THE JURY THAT DEFENDANT'S TESTIMONY ABOUT CONDUCTING AN INVESTIGATION WAS NOT CONSISTENT WITH POLICE PROCEDURES, THOUGH NO SUCH EVIDENCE HAD BEEN PRESENTED AT TRIAL. SINCE THIS MISCONDUCT STRUCK AT THE HEART OF THE PRIMARY DEFENSE HERE, REVERSAL IS REQUIRED. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt. I, ¶ 1.
>
> POINT III
>
> THE OVERALL SENTENCE WAS EXCESSIVE. U.S. Const. [a]mend. VIII, XIV; N.J. Const. [a]rt. I, ¶¶ 1, 12.

II.

We first consider defendant's contention that the trial court erred by denying his motion to suppress the statement he gave to the investigator.

The following facts inform our decision on this contention. After Wise placed defendant under arrest, he read him his Miranda rights from the SID "Miranda Warning" form. Wise had defendant sign his initials next to each numbered statement in order to indicate that he understood each right as it was being read to him. The form included the following statements:

> 1. You have the right to remain silent and refuse to answer any questions.
>
> 2. Anything you say may be used against you in a court of law.
>
> 3. You have the right to consult with an attorney at any time and have him present before and during questioning.
>
> 4. If you cannot afford an attorney one will be provided if you so desire prior to any questioning.
>
> 5. A decision to waive these rights is not final and you may withdraw your waiver whenever you wish either before or during questioning.

The form also stated that, "I acknowledge that I have been advised of the constitutional rights listed above." Defendant signed his name below that statement, and Wise signed as a witness.

Defendant did not have any questions for Wise regarding his Miranda rights.

Thereafter, Wise began to videotape the interview of defendant. Wise had defendant confirm that no threats or promises had been made to him; that defendant did not have any mental or physical disabilities that would prevent him from giving and reviewing a statement; and that prior to the start of the recording, they had not discussed the details concerning defendant's arrest. Defendant then acknowledged that he was previously advised of his Miranda rights.

Wise again informed defendant of his Miranda rights, this time using a different form. Wise asked defendant to read the Miranda rights to ensure that he understood English. After defendant read them, Wise instructed defendant to initial each right that he understood.

Wise told defendant that if he did not understand a right, he would explain it to him. The following discussion ensued:

> [Defendant]: You have the right to remain silent and refuse to answer any questions.
>
> [Wise]: Alright, do you understand that right?
>
> [Defendant]: It appears, I mean I don't know the legality of it, but I mean . . .
>
> [Wise]: That means you don't have to talk to us if you don't want to.

[Defendant]: Ah, I'd like to talk to you I want to know what I'm here for. You know . . .

[Wise]: Okay, alright let's finish this up and we'll get into it then. Initial here.

[Defendant]: Okay (Initials paper).

[Wise]: Next to that one.

[Defendant]: Anything you say may be used against you in a court of law.

[Wise]: Do you understand that right?

[Defendant]: Yeah.

[Wise]: (Nods head yes). Okay.

[Defendant]: (Initials paper). You have the right to consult an attorney at any time, and have him present before and during questioning.

[Wise]: You understand that right?

[Defendant]: Yeah. (Initials paper). If you cannot afford an attorney, one will be provided if you so desire prior to any questioning.

[Wise]: Do you understand that right?

[Defendant]: (Initials paper). Yeah, I can't afford one right now.

[Wise]: Alright.

[Defendant]: Okay. Uh. A decision to waive these rights is not final. You may withdraw your waiver whenever you wish, either before or during questioning. (Initials paper).

[Wise]: Okay. You understand all your rights as you've read them?

[Defendant]: (Nods head yes).

[Wise]: If there's any questions, let us know now and we'll explain them to you.

[Defendant]: Okay, I mean English wise I understand it, but I mean if there's such thing as legally ya know . . .

[Wise]: Well, this . . .

[Defendant]: Is it beyond my English?

[Wise]: Do you have one, do you have one in particular that you don't . . .

[Defendant]: I mean all of them, anything beyond plain English that legally would be different there.

[Wise]: No, this one says you can talk, or you don't have to . . . this says you don't have to talk. This one says if you start talking and you want a lawyer say you want a lawyer, that's all.

[Defendant]: Okay.

[Wise]: And the interview would be terminated that's all.

[Defendant]: Okay.

[Wise]: Alright. Sign here.

[Defendant]: (Signs paper).

[Wise]: Okay now after you were read your rights and understand your rights, are you willing to continue with this interview?

[Defendant]: Yes, yes, yes.

At the suppression hearing, Wise testified that he believed defendant understood all of his rights as they were explained to him. Wise stated that when defendant said he "[could not] afford [a lawyer] right now," he did not believe defendant was invoking his right to counsel. Defendant testified, however, that he was confused throughout his interview with Wise, and he did not fully understand the rights that were being read to him. Defendant stated that he did not understand the "legality" of his rights.

When reviewing the grant or denial of a motion to suppress, we "defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015) (citing State v. Gamble, 218 N.J. 412, 424 (2014)). Deference to the trial court's findings of fact is especially appropriate when the findings "are substantially influenced by [an] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The constitutional protection against self-incrimination applies to the states through the Fourteenth Amendment. Malloy v. Hogan, 378

U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964). Although New Jersey does not have a parallel constitutional provision, "the privilege against self-incrimination derives from the common law and is codified in [the State's] statutes and rules." State v. Cook, 179 N.J. 533, 549 (2004) (citing State v. Reed, 133 N.J. 237, 250 (1993)).

It is well established that "[a] confession obtained during a custodial interrogation may not be admitted in evidence unless law enforcement officers first informed the defendant of his or her constitutional rights." State v. Hreha, 217 N.J. 368, 382 (2014) (citing Miranda, supra, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706). Law enforcement officers must inform any person in custody "(1) of [his or her] right to remain silent; (2) that any statement made may be used against him or her; (3) that the person has a right to an attorney; and (4) that if the person cannot afford an attorney, one will be provided." State v. Knight, 183 N.J. 449, 462 (2005) (citing Miranda, supra, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706-07).

A person may waive these rights, but the waiver must be "voluntary, knowing, and intelligent." Miranda, supra, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707. The State has the burden to establish "beyond a reasonable doubt that [an accused's] waiver of the privilege against self-incrimination and the right

to counsel is knowing and intelligent and voluntary." State v. Cardona, 268 N.J. Super. 38, 44 (App. Div. 1993), certif. denied, 135 N.J. 300 (1994).

"[I]f the accused 'indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.'" State v. Alston, 204 N.J. 614, 619-20 (2011) (quoting Miranda, supra, 384 U.S. at 444-45, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707). Specifically, when a suspect makes a request for counsel, the "interrogation may not continue until either counsel is made available or the suspect initiates further communication sufficient to waive the right to counsel." Id. at 620 (citation omitted).

In determining whether a suspect has asserted his right to counsel, New Jersey has "traditionally utilized . . . a totality of the circumstances approach that focuses on the reasonable interpretation of [an accused's] words and behaviors." State v. Diaz-Bridges, 208 N.J. 544, 564 (2012). "[A] suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger [the] entitlement to counsel." Reed, supra, 133 N.J. at 253 (citations omitted).

Because a person's assertion of the right to counsel is not always clear and unequivocal, law enforcement officers may ask the

accused to clarify his or her statements. Alston, supra, 204 N.J. at 623. "[W]hen faced with an ambiguous assertion of a right, it is only through evaluation of clarifying follow-up inquiries and the responses to those inquiries that a court can ensure that a waiver of [an accused's] right was given intentionally and voluntarily." Ibid.

Thus, when faced with statements that "amount to even an ambiguous request for counsel," the law enforcement officer's questioning must cease, "although clarification is permitted." Id. at 624. When "the statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed." Ibid.

On appeal, defendant contends that, when he stated that he could not afford an attorney "right now," he made a request for counsel, and the questioning should have ceased. He contends that if his statement was ambiguous, the interrogator was required to clarify his statement before continuing the interview. We disagree.

We addressed a similar argument in Cardona, supra, 268 N.J. Super. at 38. In that case, the officer conducting the interrogation asked defendant if he wanted the officer to call the defendant's attorney. Id. at 43. The defendant replied, "[n]o, for what? . . . No, with what money, I have no money." Ibid.

In Cardona, we recognized that a law enforcement officer must cease questioning a suspect in custody when faced with an ambiguous assertion of the right to counsel. Id. at 45. We determined, however, that a pause in questioning in that matter was not required. Ibid. We stated that "it would clearly have been preferable for the initial interrogating officer to have immediately clarified on the record that . . . [the defendant] was . . . entitled to have counsel appointed free-of-charge in this matter." Ibid.

Nevertheless, we held that the lower court had "correctly analyzed the context" in which the statement was made, finding that, under the totality of the circumstances, the defendant's statement did not constitute a request for counsel. Ibid. We noted that the defendant had been advised of his Miranda rights at least five times, and each time the defendant indicated he had a full understanding of those rights. Id. at 45-46. We held that the defendant "spoke freely and by his own choice" when the officer questioned him. Id. at 46.

Here, there is sufficient credible evidence in the record to support the motion judge's finding that defendant made a knowing and intelligent waiver of his right to remain silent and his right to counsel. The judge rejected defendant's claim that he did not understand his Miranda rights. The record shows that defendant had

been a corrections officer for more than twenty-three years, and he had received training on Miranda issues as part of his employment.

The judge noted that Wise had informed defendant of his Miranda rights several times. The judge stated that defendant "had the rights read to him, he read the rights himself, he had the rights paraphrased [for] him, and he repeatedly acknowledged he understood them." The judge also found that the interview was not conducted in an unfair or oppressive manner.

The record supports the motion judge's conclusion that defendant's statement that he could not afford an attorney was not an assertion of a right to counsel, and Wise was not required to cease questioning defendant or clarify the statement. The judge correctly found that, viewing the totality of the circumstances, defendant's statement was not an assertion of the right to counsel. The record supports the judge's finding that defendant knowingly and voluntarily waived his rights to counsel and to remain silent.

In support of his argument, defendant cites Commonwealth v. Waggoner, 540 A.2d 280 (Pa. Super. Ct. 1988), cert. denied, 490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989). In that case, a defendant was arrested for driving under the influence of alcohol and was informed of his Miranda rights. Id. at 281. When the officer repeated the rights, specifically, the right to have

counsel appointed at no cost, the defendant stated, "I can't afford a lawyer." Id. at 287. The officer did not stop to clarify defendant's understanding of his rights, but continued to inform the defendant of his Miranda rights. Id. at 288.

The Pennsylvania court found that in instances where a person facing custodial interrogation makes an ambiguous statement regarding the right to counsel, "the officer should ask questions to clarify what the defendant meant by his statement or why he made it." Id. at 289. The court determined that by failing to seek clarification of the defendant's statement, the officer failed to ensure that the defendant intelligently and knowingly waived his Miranda rights. Ibid.

Defendant's reliance upon Waggoner is misplaced. The defendant in Waggoner was not a person who had been working as a corrections officer for more than twenty-three years, nor was the defendant in Waggoner a person who had received training on Miranda issues. Moreover, in this case, defendant was informed of his Miranda rights several times. He indicated he understood his rights and was willing to answer the investigator's questions.

Although the court in Waggoner was not convinced the record established that the defendant had knowingly and intelligently waived his Miranda rights, the record in this case supports a different conclusion. The motion judge correctly found that

defendant knowingly and intelligently waived his rights to remain silent and to counsel.

We therefore reject defendant's contention that the trial court erred by denying his motion to suppress.

III.

Next, defendant argues that he was denied his right to a fair trial because, in her summation, the assistant prosecutor asserted that defendant's testimony that he was conducting an investigation of several inmates was not consistent with the prison's investigative procedures. Defendant's argument is based on the following remarks:

> And don't you think that he would have told SID, who runs the criminal investigation to bust somebody by themselves? Number one, it's not safe, and number two, it just doesn't happen.
>
> How many investigators did you hear from in this case, ladies and gentlemen? You heard from one lead investigator and three or four others. You don't do a case by yourself. That just doesn't happen. It doesn't make sense, it's not reality.

Defendant contends the assistant prosecutor's remarks were improper. He claims there was no evidence presented at trial to support the statements. We disagree.

"Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the

scope of the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999). In criminal cases, prosecutors "are expected to make vigorous and forceful closing arguments to juries." Ibid. Nevertheless, "[t]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." State v. Ramseur, 106 N.J. 123, 320 (1987).

"It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Farrell, 61 N.J. 99, 105 (1972) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 2d 1314, 1321 (1935)). In their summation, however, prosecutors are "generally limited to commenting on the evidence and to drawing any reasonable inferences supported by the proofs[.]" State v. Dixon, 125 N.J. 223, 259 (1991).

In reviewing the record of the lower court to determine whether a prosecutor violated this duty, the court "must consider several factors, including whether 'timely and proper objections' were raised; whether the offending remarks 'were withdrawn promptly;' and whether the trial court struck the remarks and provided appropriate instructions to the jury." State v. Smith, 212 N.J. 365, 403 (2012), cert. denied, ___ U.S. ___, 133 S. Ct.

1504, 185 L. Ed. 2d 558 (2013) (citations omitted) (quoting Frost, supra, 158 N.J. at 83).

To warrant reversal of a conviction, "the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2011) (quoting State v. Roach, 146 N.J. 208, 219, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996)).

In this case, the State presented testimony from five witnesses regarding the investigation of defendant. They testified that the SID is responsible for investigating offenses committed in the State's correctional facilities, including offenses involving possession of narcotics, smuggling contraband into the prisons, an officer's undue familiarity with inmates, and assaults. Defendant was not an investigator and he was not assigned to the SID.

Here, the assistant prosecutor stated that defendant's claim that he undertook a personal investigation of several inmates without informing the SID made no sense. The prosecutor's statements were reasonable inferences supported by the evidence presented at trial.

Moreover, defense counsel did not object to the remarks when they were made, thereby indicating that counsel did not view the comments as improper or prejudicial. We therefore reject defendant's contention that the prosecutor's remarks were improper and denied him a fair trial.

IV.

Defendant also argues that his sentence is excessive. As noted previously, the trial court merged counts one and three into count two (charging second-degree official misconduct). The court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will commit another offense); four, N.J.S.A. 2C:44-1(a)(4) (a lesser sentence will depreciate the seriousness of defendant's offense because it involved a breach of the public trust); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law).

The court also found mitigating factors seven, N.J.S.A. 2C:44-1(b)(7) (defendant has no prior criminal record, and has led a law-abiding life for a substantial period of time before the commission of the present offense); and eight, N.J.S.A. 2C:44-1(b)(8) (defendant's conduct was the result of circumstances unlikely to recur). The court rejected mitigating factor nine, N.J.S.A. 2C:44-1(b)(9) (character and attitude of defendant indicate that he is unlikely to commit another offense).

The court found that the aggravating factors outweighed the mitigating factors, and sentenced defendant to seven years of incarceration, with five years of parole ineligibility. On appeal, defendant argues that the sentencing judge improperly found aggravating factor four (breach of the public trust) and gave it significant weight.

Defendant contends the finding of aggravating factor four constitutes impermissible double-counting because the offense of official misconduct involves a breach of the public trust. Defendant further argues that on the "scale" of second-degree bribery and official misconduct, the offenses here were on the "low end of the scale." Defendant asserts that the "benefit" involved was near the minimum of $200 required to make the crimes second-degree offenses.

An appellate court's review of the trial court's "sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We consider "whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether the 'factfinder [has applied] correct legal principles in exercising its discretion.'" Ibid. (quoting State v. Roth, 95 N.J. 334, 363 (1984)).

Our review should not set aside a trial court's sentence "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, supra, 95 N.J. at 364-65).

We reject defendant's contention that his sentence is excessive. The trial court found aggravating factor four, but refused to consider that the heaviest factor, as argued by the State. The court recognized that the seriousness of the offenses is already reflected in the penalty for the offense. In any event, even if the court erred by finding aggravating factor four, and that factor is eliminated, this essentially leaves the aggravating and mitigating factors in equipoise, as the State argues.

Therefore, sentencing defendant at the mid-point of the range for a second-degree offense is not an abuse of discretion. Defendant's contention that he should have been sentenced to a five-year term, with a five-year parole disqualifier, because his offenses were on "the low end" of the monetary scale for a breach of the public trust is without sufficient merit to warrant discussion. 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