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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2121-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OMAR GALVEZ, a/k/a ORLANDO
ROMERO, OMAR GAULEZ,

Defendant-Appellant.

Argued March 12, 2018 – Decided May 17, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Indictment
No. 15-06-0680.

Joshua D. Sanders, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Joshua D. Sanders, of counsel and on the
brief).

Jane C. Schuster, Deputy Attorney General,
argued the cause for respondent (Gurbir S.
Grewal, Attorney General, attorney; Jane C.
Schuster, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Omar Galvez appeals from his conviction and sixty-five-year sentence for first-degree murder, N.J.S.A. 2C:11-3(a)(1), following a jury trial. Defendant also appeals the trial court's order requiring he pay \$4,885 in restitution. Based on our review of the record in light of the applicable law, we affirm defendant's conviction and custodial sentence, and remand for reconsideration of the restitution order.

I.

Defendant and co-defendant Jose H. Martinez were indicted for one count of first-degree murder, N.J.S.A. 2C:11-3(a)(1). The indictment also charged Martinez with third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). The court severed Martinez's charges, and he had no involvement in defendant's subsequent trial. Martinez pleaded guilty to aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), and was sentenced to a twenty-year custodial term subject to the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Prior to his trial, defendant moved to suppress statements he made during a September 10, 2014 interrogation by a New Jersey State Police detective. Following an evidentiary hearing on the

motion, the court denied defendant's request to suppress his statements.¹ The matter subsequently proceeded to trial.

The trial evidence showed that on August 24, 2014, a hunter reported finding a woman's body in a wooded area in Millville. New Jersey State Police detective John Weber responded and observed the victim "sustained severe injuries to the head area." The State Police photographed and processed the scene, and assisted in the Medical Examiner's Office's removal of the body for an autopsy.

The State Police questioned a witness who said she attended a birthday party with the victim on August 23, 2014. The witness said the victim was intoxicated and interested in smoking crack. The witness explained the victim had a history of prostitution, often stole money from Mexican males, and told the witness at the party she was going to "depart with a Mexican male or two Mexican males."

Another witness testified he attended the birthday party, and saw the victim there on the night she was murdered. The witness saw the victim leave "in a white van with two" Mexican men.

¹ Defendant does not argue on appeal the court erred in denying his suppression motion and determining his statements were admissible at trial.

A third witness testified she attended the birthday party and knew defendant personally. She said defendant attended the party, and she saw him leave with an individual named "Alberto" and "a white lady."²

The autopsy conducted by Medical Examiner Dr. Ian Hood revealed that the victim suffered significant and multiple injuries to her head and face. Dr. Hood testified the majority of the victim's injuries were "not made with a padded object, like a fist," but rather, "something hard enough to lacerate skin and break bone." Dr. Hood testified that a hammer likely caused most of the injuries, and the other injuries could have resulted from blows from a "shod foot, a boot," or a sneaker. Dr. Hood concluded the combination of the blows "likely caused [the] final mechanism of death by inability to breathe through [the] face."

At trial, the State played the video and audio recording of defendant's September 10, 2014 interrogation,³ during which defendant admitted attending the birthday party and leaving with the victim and Martinez in Martinez's van. Defendant said Martinez drove to a secluded wooded area, and he remained in the vehicle

² It can reasonably be inferred from the trial evidence that the individual she identified as "Alberto" was Martinez.

³ The recording was admitted in evidence. The jury was provided with a transcript of the recording as an aid during the playing of the recording. The transcript was not admitted in evidence.

while Martinez and the victim had a sexual encounter outside the van.

Defendant explained Martinez said the victim stole from him, and defendant then exited the van and grabbed the victim by the shoulders. According to defendant, Martinez went to the van, and returned and hit the victim in the head with a hammer. Defendant asserted that he no longer held the victim after the hammer's first blow, but he kicked the victim one time as she laid on the ground. Defendant said Martinez repeatedly struck the victim with the hammer after she fell to the ground. Defendant and Martinez fled the scene in the van, leaving the injured victim behind.

The jury found defendant guilty of first-degree murder. At defendant's sentencing proceeding, the court found aggravating factors one, the nature and circumstances of the offense, defendant's role in the commission of the offense, and whether it was committed in an especially heinous, cruel or depraved manner, N.J.S.A. 2C:44-1(a)(1); three, the risk defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); six, the extent of defendant's prior record, N.J.S.A. 2C:44-1(a)(6); and nine, the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). The court did not find any mitigating factors. See N.J.S.A. 2C:44-1(b). The court determined the aggravating factors substantially outweighed the non-existent mitigating

factors, and sentenced defendant to a custodial term of sixty-five years subject to the requirements of NERA. The court also directed that defendant pay \$4,885 in restitution to the Victim of Crimes Compensation Office. This appeal followed.

Defendant's counsel presents the following arguments for our consideration:

POINT I

THE JURY CHARGE RELATIVE TO [DEFENDANT'S] STATEMENT WAS INSUFFICIENT TO ADVISE THE JURY OF THE NEED TO CRITICALLY AND EFFECTIVELY EVALUATE HIS STATEMENT IN LIGHT OF THE REALITY THAT JURORS HAVE GREAT DIFFICULTY DISTINGUISHING BETWEEN FALSE CONFESSIONS AND TRUE CONFESSIONS. U.S. CONST. AMEND. VI; N.J. CONST. ART. I, PAR. 10.

POINT II

GIVEN THE DISPARITY BETWEEN [DEFENDANT'S] SENTENCE AND THAT OF HIS MORE CULPABLE CO-DEFENDANT, REMAND FOR RESENTENCING UNDER STATE V. ROACH IS NECESSARY.

In his pro se brief, defendant makes the following arguments:

POINT I

GIVEN THE DISPARITY BETWEEN [DEFENDANT'S] SENTENCE OF N.J.S.A. 2C:11-3(a)(1) OF MURDER, FOR A CONVICTION OF 65 YEAR[S] 85% AND THAT OF HIS CO-DEFENDANT JOSE MARTINEZ TO MANSLAUGHTER FOR A 20 YEAR TERM [], WHO IS ACTUALLY MORE CULPABLE THAN INSTANT DEFENDANT. RESENTENCING IS APPROPRIATE BECAUSE THERE WAS NO INDICTMENT FOR A CHARGE OF ACCOMPLICE LIABILITY [] TO PROVIDE NEXUS TO A CONVICTION OF MURDER [] AGAINST [DEFENDANT]. FURTHER, CONTRARY TO THE COURT'S DICTUM THAT "THE

DEFENDANT IS A REPETITIVE OFFENDER" [] THE COURT DID NOT HAVE THE EXTENDED TERM ELIGIBILITY REQUIRED BY R. 3:21-4(e), BECAUSE THE DEFENDANT DOES NOT FALL UNDER THE THREE-STRIKES-LAW, NOR UNDER THE PERSISTENT OFFENDER STATUTE. BECAUSE HE ONLY HAD "ONE INDICTABLE CONVICTION" [] AT THE TIME OF SENTENCING. CHANGE OF SENTENCE IS APPROPRIATE TO VACATE THE CHARGE OF MURDER. BECAUSE THE DEFENDANT'S CONDUCT OF "ONE KICK" [] ONLY PLACES CRIMINAL LIABILITY NEXUS TO THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT []. RESENTENCING IS REQUIRED BY NOVATION TO A CHARGE OF N.J.S.A. 2C:12-1(a)(1) IN A NEW ENTRY OF A JUDGMENT OF CONVICTION TO SATISFY THE CONVICTION AT TIME SERVED[.]

A. The court did not have the enhanced punishment available by either persistent offender nor by the three strikes law.

POINT II

IMPOSITION OF DEFENDANT'S SENTENCE BEYOND THE STATUTORY MAXIMUM BASED ON JUDICIAL FACT-FINDING OF AGGRAVATING FACTORS 3, 6, 9 [] WHICH W[]ERE NEVER ADMITTED TO BY DEFENDANT [] OR SUBMITTED TO A JURY [] AND PROVED BEYOND A REASONABLE DOUBT VIOLATED BOTH HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS, BECAUSE HE DOES NOT HAVE A PRIOR CONVICTION OF "SIMILAR NATURE" THAT ESTABLISHES A POINT OF ORIGIN TO ASSERT ANY AGGRAVATING FACTORS AS PRIMA FACIE EVIDEN[CE] IN HIS COURT HISTORY [].

POINT III

THE SENTENCE IMPOSED BY THE COURT, I.E. 65 YEAR[S] 85% [] VIOLATES THE SPIRIT AND INTENT OF THE CODE OF CRIMINAL JUSTICE, THUS, RENDERING DEFENDANT'S SENTENCE ILLEGAL.

POINT IV

THE IMPOSITION OF FINES AND RESTITUTION []
W[]ERE IMPOSED ILLEGALLY WITHOUT HOLDING A
HEARING FOR A[B]ILITY TO PAY, REQUIRES
REVOCATION OF THE REMAINING FINES AND
RESTITUTION, AND TO REIMBURSE TO DEFENDANT ALL
AMOUNTS COLLECTED.

II.

Defendant argues the judge erred by failing to charge the jurors concerning how they must "receive, analyze, and weigh" defendant's statement to the police as required by the Court in State v. Hampton, 61 N.J. 250 (1972). The State contends the court instructed the jury concerning defendant's statement "exactly as defendant" requested, and the failure to give a Hampton charge did not amount to reversible error because defendant's "whole theory of the case was that his statement was reliable and should be believed by the jury."

Although a Hampton charge must be given regardless of "[w]hether [it is] requested or not," failure to give the charge is "not reversible error per se." State v. Jordan, 147 N.J. 409, 425 (1997). A trial court's omission of a Hampton charge "imposes a significant burden on the State to demonstrate that such an error is not plain error." Id. at 430; see State v. Anthony, 443 N.J. Super. 553, 570 (App. Div. 2016) (citing Hampton, 61 N.J. at 272, and noting that "[t]he critical role of the jury in evaluating

the truthfulness of a defendant's statement has been long-recognized by our courts"). The error must have been "clearly capable of producing an unjust result" to warrant reversal. State v. Miller, 205 N.J. 109, 126 (2011).

A failure to provide a Hampton charge is most commonly capable of producing an unjust result where "the defendant's statement is critical to the State's case and . . . the defendant has challenged the statement's credibility." Jordan, 147 N.J. at 425. The Court in Jordan made it clear, however, that "if the defendant has acknowledged the truth of his statement, the failure to give a Hampton charge would not be reversible error." Id. at 426; see also State v. Jones, 287 N.J. Super. 478, 495 (App. Div. 1996) (commenting that "the failure to give a Hampton charge in a case where a defendant adopts as true the statement given to the police, may not raise a Hampton issue at all").

In Jones, the defendant argued it was plain error for the trial court to fail to give a Hampton charge after holding a Miranda⁴ hearing and determining the defendant's prior statement was admissible. 287 N.J. Super. at 493. We noted that when a defendant asks for a Hampton charge, he "has 'a federal constitutional right to raise the issue of voluntariness before

⁴ Miranda v. Arizona, 384 U.S. 436 (1966).

the trial judge and upon an adverse ruling to place in issue the credibility of his statement.'" Ibid. (quoting State v. Bowman, 165 N.J. Super. 531, 537 (App. Div. 1979)). Distinguishing the case from one where a defendant "adopts as true the statement given to the police," we determined that the defendant put the credibility of his statement at issue "by defense counsel's cross examination and summation," and that "the failure to charge Hampton . . . [cannot] be justified in terms of harmless error where a defendant has not adopted as true statements attributable to him while in police custody." Id. at 495.

In Jordan, 147 N.J. at 425-26, the State had two statements from the defendant, one of which was taped. The Court determined the failure to provide a Hampton charge was not plain error in part because defense counsel urged "the jury to believe defendant's taped statement" over his first statement to police. Id. at 426. Thus, the Court determined that "the jury knew that it had to decide between the credibility of defendant's two statements." Ibid.

Here, defendant argues the court's failure to provide a Hampton charge requires reversal because "the only evidence linking [defendant] to the death of the victim was his statement." But at trial defense counsel not only consistently "acknowledged the truth of [defendant's] statement[s]," he expressly relied on

defendant's statements to support his theory of the case – that defendant was not culpable for murder because he kicked the victim only once and held her for a brief period before Martinez repeatedly hit her. See Jordan, 147 N.J. at 426. There is no plain error in a failure to give a Hampton charge where a defendant acknowledges the truth of his statement. Ibid.

Moreover, in both his opening statement and summation, defense counsel relied on the credibility of defendant's statements to support the contention that defendant held the victim briefly before he knew Martinez would strike her, and kicked her only once as she laid on the ground. Acceptance of defendant's argument required the jury to also accept the credibility of defendant's statements. Further, during the charge conference, defense counsel did not request a Hampton charge or object to the proposed instructions which failed to include it, and instead requested the court to instruct the jury, in accordance with his statement, that he only kicked the victim once. There was no plain error because defendant, through his counsel, adopted as true the statements he made to the police as the fulcrum upon

which his defense to the murder charge turned. Jones, 287 N.J. Super. at 495; Jordan, 147 N.J. at 426.⁵

III.

Defendant argues his custodial sentence should be vacated and the matter remanded for resentencing because the court committed a "patent injustice" by imposing a sentence more than "three times greater" than the sentence imposed on Martinez who, defendant contends, was "[b]y comparison" more culpable in the murder. Defendant claims the record does not "justify the disparity in treatment."

"Appellate review of a sentence is generally guided by the abuse of discretion standard." State v. Robinson, 217 N.J. 594, 603 (2014); see also State v. Grate, 220 N.J. 317, 337 (2015); State v. Miller, 449 N.J. Super. 460, 475 (App. Div. 2017). An appellate court "must not substitute its judgment for that of the sentencing court," and defers to the trial court's sentencing determination unless: "(1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible

⁵ Because we find the court's failure to give a Hampton charge was not plain error, it is unnecessary to address defendant's contention, raised for the first time on appeal, that the Hampton charge in Model Jury Charges (Criminal), "Statements of Defendant" (rev. June 14, 2010), is inadequate.

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. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

N.J.S.A. 2C:11-3 provides in part that an individual convicted of first-degree murder "shall be sentenced . . . to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole." Following a murder conviction, a trial court has the "discretion to impose a sentence within the statutory range of thirty years to life based on its consideration of the applicable sentencing factors." State v. Abdullah, 184 N.J. 497, 508 (2005).

The court's finding of aggravating factors one, three, six and nine is supported by the record. The court found no basis in the record supporting a finding of any mitigating factors. The court carefully weighed the factors, determined the aggravating factors substantially outweighed the nonexistent mitigating factors and, consistent with that determination, sentenced defendant at the upper end of the statutory sentencing range for first-degree murder. See *ibid.* We discern no basis to conclude the court abused its discretion by violating the sentencing

guidelines or erred in its finding and weighing of the aggravating and mitigating factors. Fuentes, 217 N.J. at 70.

To be sure, the court imposed a lengthy custodial sentence, but the record shows the court carefully considered the circumstances of the offense for which defendant was convicted, correctly found and weighed the aggravating and mitigating factors, and imposed a sentence within the statutory sentencing range in accordance with the applicable legal principles that does not shock our judicial conscience. State v. Bolvito, 217 N.J. 221, 228 (2014). As we explained in State v. M.A., 402 N.J. Super. 353, 370 (App. Div. 2008), "[t]he test is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review."

We reject defendant's contention the trial court committed "a clear error of judgment" warranting modification of his sentence on appeal because Martinez only received a twenty-year sentence following his plea to aggravated manslaughter. See State v. Noble, 398 N.J. Super. 574, 598-99 (App. Div. 2008) (quoting Roth, 95 N.J. at 364). Defendant argues Martinez was more culpable in the victim's murder and there is nothing in the record justifying the imposition of such disparate sentences. We are not persuaded.

Defendant relies on State v. Roach, 146 N.J. 208, 216 (1996) (Roach I), where the Court considered disparate sentences imposed by different judges on co-defendants convicted of identical crimes. Roach was sentenced to two consecutive life terms with sixty years' parole ineligibility, while his co-defendant was sentenced to two consecutive life terms with thirty years' parole ineligibility. Ibid. The Court determined that although "there was nothing intrinsically wrong with [the defendant's] sentence," State v. Roach, 167 N.J. 565, 567 (2001) (Roach II), there was no "acceptable justification of [the] defendant's sentence in light of the sentence imposed on his co-defendant," Roach I, 146 N.J. at 233.

The Court found that "[a] sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant's sentence is lighter." Id. at 232 (quoting State v. Hicks, 54 N.J. 390, 391 (1969)). However, "there is an obvious sense of unfairness in having disparate punishments for equally culpable perpetrators." Ibid. (citations omitted). The Court held that where there are disparities in co-defendants' sentences, "[t]he trial court must determine whether the co-defendant is identical or substantially similar to the defendant regarding all relevant sentencing criteria," and "then inquire into the basis of the sentences imposed on the other defendant," considering "the

length, terms, and conditions of the sentence imposed on the co-defendant." Id. at 233.

Here, defendant's reliance on Roach I is misplaced. He and Martinez were not convicted of identical offenses with the same degrees of culpability. Martinez was convicted of first-degree aggravated manslaughter by "recklessly caus[ing] [the victim's] death under circumstances manifesting extreme indifference to human life." N.J.S.A. 2C:11-4(a)(1). The sentencing range for first-degree aggravated manslaughter under N.J.S.A. 2C:11-4(a)(1) is between ten and thirty years. N.J.S.A. 2C:11-4(c). Martinez received the maximum sentence permitted under his plea agreement: a twenty-year custodial sentence.

Unlike Martinez, defendant was found guilty of first-degree murder by "purposely caus[ing] death or serious bodily injury resulting in death." N.J.S.A. 2C:11-3. The crime for which Martinez was convicted carries a maximum sentence of thirty years, N.J.S.A. 2C:11-4(c), while a thirty-year custodial term is at the bottom of the sentencing range for the murder for which defendant was convicted, and the maximum sentence is life imprisonment. See N.J.S.A. 2C:11-3(b). Thus, contrary to defendant's conclusory assertion that Martinez was less culpable and received an inequitably less severe sentence, the record shows otherwise. Defendant was convicted of a more serious offense which

concomitantly exposed him to a more severe sentence. The trial court therefore did not err by failing to compare the two defendants or consider Martinez's sentence in its imposition of the sixty-five-year custodial term defendant received for the victim's murder. The two defendants are not "equally culpable." Roach I, 146 N.J. at 233.

We are, however, persuaded the court erred by ordering that defendant pay \$4,885 in restitution. To properly determine the amount of restitution, a sentencing court must "take into account all financial resources of the defendant, including the defendant's likely future earnings, and . . . set the amount . . . that is consistent with the defendant's ability to pay." N.J.S.A. 2C:44-2(c)(2); see also State v. Orji, 277 N.J. Super. 582, 589-90 (App. Div. 1994) (finding a restitution hearing was not necessary where there was no dispute as to the amount, trial counsel suggested the defendant had the ability to pay, and the presentence report included employment and financial information supporting a finding the defendant had the ability to pay); State v. McLaughlin, 310 N.J. Super. 242, 264-65 (App. Div. 1998) (remanding for a restitution hearing to determine the defendant's ability to pay where the court made no findings as to defendant's ability to pay and the presentence investigation report did not contain any information showing defendant's ability to pay). Where


necessary, the court must conduct a hearing to determine "the amount the defendant can pay and the time within which he can reasonably do so." State v. Topping, 248 N.J. Super. 86, 90 (App. Div. 1991) (quoting State v. Paladino, 203 N.J. Super. 537, 547 (1985)).

The presentence investigation report showed defendant had no assets, and did not include any information concerning his income or employment history. The record is otherwise bereft of any information related to defendant's ability to pay, and the court made no findings concerning defendant's ability to pay. We are therefore constrained to vacate the restitution order and remand for reconsideration of defendant's obligation, if any, to make restitution. See McLaughlin, 310 N.J. Super. at 264-65.

We have carefully considered defendant's remaining arguments, and they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We affirm defendant's conviction and custodial sentence, vacate the judgment of conviction's order that defendant make restitution, and remand for reconsideration of the State's request for restitution. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION