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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4019-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDRE L. HENDERSON,
a/k/a ANDRE LYDELL HENDERSON,

Defendant-Appellant.

Submitted May 2, 2017 – Decided May 17, 2018

Before Judges Ostrer, Leone, and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 12-06-0488.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Defendant Andrew L. Henderson appeals his February 13, 2015 judgment of conviction. We affirm.

I.

Officer Israel Valentin testified at trial as follows. On March 11, 2012, he was in uniform on routine patrol and stopped his marked police car briefly to mail a letter. As he left his patrol car, he heard someone screaming. When he attempted to cross the street, he was approached by defendant, who put his body against Valentin's and shouted "are you looking for me?" Valentin backed away until he reached his patrol car, at which point defendant "swung at [him] with his left fist and caught [him] on the right side of [his] face, followed by a right to the chin area which knocked [him] to the ground." Valentin fell on his back, and defendant began kicking him. After receiving "a blow to [his] right side rib area," Valentin became unconscious.

Officer Carlos Cancel, Jr. testified to the following. While his car was stopped at an intersection, he "saw a gentleman across the street screaming" and heard someone say "something to the effect of I'm going to punch you in the face." Cancel saw Officer Valentin "standing on the corner outside of his squad car" and "saw the attacker approach the police officer and proceed to attack the police officer." He witnessed "the officer receiving several punches to the face . . . and body." After getting out of his

car, he saw Valentin "on the ground, face down, and he was being kicked."

As Officer Cancel ran to help he saw Miguel Garcia pull a "baseball bat" out of his car and hit defendant to stop the attack. As defendant was being hit with the bat, he continued to kick Valentin, using the "officer's squad car sort of as leverage and kicking onto the police officer while he was down . . . in a stomping motion." Cancel described the force used as "excessive" and "extreme." He estimated the attack lasted forty or fifty seconds. Cancel used Valentin's radio to call for assistance.

Garcia testified as follows. Garcia was driving by when he observed defendant cross the street and punch Officer Valentin in the face and knocked him down. Garcia left his car, obtained a "softball bat" from his trunk, and approached defendant. Defendant kicked and stomped on Valentin at least ten times as hard as he could. Garcia yelled at defendant to stop. Defendant looked at Garcia but continued kicking Valentin. Garcia told him to stop again, and when he continued to kick Valentin, Garcia struck defendant's arm with the bat. That elicited no reaction from defendant, who kept kicking Valentin. Garcia then struck defendant in the head, prompting defendant to look at Garcia and ask if he "want[ed] some of this." Defendant stopped kicking Valentin and pursued Garcia. Another officer arrived, drew his service

revolver, and ordered defendant to get on the ground, which he did.

Garcia's wife checked on Officer Valentin, and found him unresponsive and spitting blood. Officers found Valentin was catatonic with a large bruise on his head. When Valentin regained consciousness, he was in great pain and could not move.

Dr. Madonna Lee, a surgical resident at Robert Wood Johnson University Hospital, testified as follows. She treated Officer Valentin on the day of the attack. He had five broken ribs and a "scattered foci subarachnoid hemorrhage," which "means that he has some blood in his brain." He had "a lump on his right temple," a laceration on his lip, and was complaining of chest pain and sternal pains. Due to the brain hemorrhage, Valentin was given anti-seizure medication. He was hospitalized for four days, was in pain, and required medical treatment and a hospital bed for two to three months, and was only able to return to work six months later.

The jury acquitted defendant of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3, but convicted him of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), and third-degree aggravated assault upon a law enforcement officer, N.J.S.A. 2C:12-1(b)(5). On the second-degree offense, the court exercised its discretion under N.J.S.A. 2C:44-3(a) and sentenced

defendant to an extended term of sixteen years in prison, with an 85% period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant received a concurrent sentence of five years in prison on the third-degree offense.

Defendant appeals, raising five points:

I. DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS A RESULT OF THE ADMISSION OF EVIDENCE THAT THE TRIAL COURT SHOULD HAVE PRECLUDED UNDER N.J.R.E. 403 DUE TO CONFUSION OF THE ISSUES OR MISLEADING THE JURY.

II. DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE COURT DENIED DEFENDANT'S MOTION TO DISMISS THE ATTEMPTED MURDER COUNT AND THE JURY WAS PERMITTED TO CONSIDER IT, NOTWITHSTANDING DEFENDANT'S ACQUITTAL ON THAT CHARGE.

III. DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE COURT, OVER DEFENDANT'S OBJECTION, ALLOWED LAY OPINION TESTIMONY THAT DEFENDANT USED EXCESSIVE FORCE AGAINST THE VICTIM.

IV. THE TRIAL COURT COMMITTED ERROR IN GRANTING THE STATE'S MOTION FOR A DISCRETIONARY EXTENDED-TERM SENTENCE.

V. THE SENTENCE OF 16 YEARS WAS EXCESSIVE.

II.

Defendant raises two evidentiary challenges. "'[C]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion.'" State v. Kuropchak, 221 N.J. 368, 385 (2015) (citation omitted). "In light

of the broad discretion afforded to trial judges, an appellate court evaluates a trial court's evidentiary determinations with substantial deference." State v. Cole, 229 N.J. 430, 449 (2017). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" Kuropchak, 221 N.J. at 385 (citations omitted). We must hew to that standard of review.

A.

Defendant called Dr. Daniel Paul Greenfield, a physician with specialty in psychiatry addiction medicine and general preventative medicine, who testified defendant's actions were consistent with a psychotic episode resulting from the use of PCP. On direct, defense counsel asked Dr. Greenfield whether defendant had brain damage:

> Q. . . . Was there some organicity?
>
> A. Yes, there was.
>
> Q. Okay.
>
> A. Slow on the uptake, difficulty, to some extent, following our discussion. . . .
>
> . . . .
>
> Q. Let's talk about organicity. Define organicity to the jury.

> A. Organicity is the – the simple way to describe it is some degree of brain damages, there's something wrong with the brain, with an individual's ability to think, focus, pay attention, concentrate, do things like that . . . .

In issuing his opinion that defendant was in a psychotic episode due to the effects of PCP, Greenfield reiterated that defendant had an "underlying organicity" which caused "vulnerability towards those affects."

During cross-examination by the prosecutor of Dr. Greenfield, the following exchange took place without objection:

> Q. You were retained and asked to give an opinion with respect to his state of mind at the time of the incident at issue here on March 11, 2012?
>
> A. In part, yes. That's part of what I was asked to do.
>
> Q. You were also retained for the purpose of determining whether or not the defendant was competent to stand trial?
>
> A. Yes.
>
> . . . .
>
> A. To develop an opinion from a clinical point of view. It's obviously the Court that determines whether a person is competent or not.
>
> . . . .
>
> Q. Now you found the defendant, your opinion was that the defendant was competent to stand trial?

A. Yes.

Later, the prosecutor asked: "For the purpose of determining or giving your opinion as to whether or not the defendant was competent to stand trial, did you find any underlying . . . mental disorder that disabled him in any way from . . . competency to stand trial?" At this point, defense counsel objected under N.J.R.E. 403, arguing it would confuse the jury. The prosecutor said he was trying to draw the distinction between a mental disorder and a substance-induced mental disorder. The prosecutor asked:

> Q. . . . There was no independent mental illness that . . . disabled this defendant from siting here and being competent to be here at trial today?
>
> A. No.

The trial court overruled defendant's objection. The prosecutor then asked, without objection, "[s]o he's got essentially nothing else going on regarding mental disorders other than . . . all that time ago the substance[-]induced psychotic disorder," and "so absent the PCP, no psychosis?," to which Greenfield responded "Definitely no psychosis no."

Defendant argues this line of questioning was irrelevant because Dr. Greenfield was called to testify about defendant's PCP-induced psychosis on the day of the assault, not his mental

health at the time of trial. However, Dr. Greenfield also opined that defendant's vulnerability to PCP was increased by organic brain damage which caused problems with his ability to think and understand. As a result, defendant's mental health and ability to think and understand were relevant, as was the information the prosecutor elicited on cross: that Dr. Greenfield found that defendant had sufficient ability to think and understand to be competent to stand trial, and that he had no mental illness preventing him from doing so. "Such impeachment to expose the weaknesses of an expert's testimony potentially might assist in the search for the truth, one of the recognized goals of our law of evidence." James v. Ruiz, 440 N.J. Super. 45, 75 (App. Div. 2015). "'[A]n expert witness is always subject to searching cross-examination as to the basis of his opinion[.]'" State v. Martini, 131 N.J. 176, 259 (1993) (citation omitted).

Defendant claims the trial court nonetheless should have excluded that information as confusing under N.J.R.E. 403. Under Rule 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403 (emphasis added). The "trial court's weighing of probative value against prejudicial effect 'must stand

unless it can be shown that the trial court palpably abused its discretion'" and committed "'a clear error of judgment.'" Cole, 229 N.J. at 449 (citations omitted).

The trial court did not abuse its discretion in allowing the prosecutor to elicit Dr. Greenfield's opinions on defendant's mental health and ability to think and understand. Moreover, there was no evidence the information confused the jury, particularly after being clarified in the prosecutor's final questions. "We accord substantial deference to the trial court's 'highly discretionary determination.'" State v. Cook, 179 N.J. 533, 568 (2004).

In any event, any error was harmless. It was obvious that defendant had not been found incapable of standing trial because he was standing trial. Moreover, his defense was centered on PCP-induced psychosis, not mental illness. Eliciting that he did not have a mental illness rendering him incompetent to stand trial was not "clearly capable of producing an unjust result." R. 2:10-2.

B.

Defendant also challenges the following question to Officer Cancel:

> Q. Could you tell whether or not the force of the attack increased when the defendant started using the patrol car for leverage?

> A. Yes, it was an excessive force that was being put onto the officer.

Defendant argues that "excessive" means "extreme," that "extreme" is an element of second-degree aggravated assault, and that Cancel's answer was thus improper lay opinion about an ultimate issue. Every part of defendant's argument is mistaken.

First, "excessive" simply means "exceeding what is usual, proper, necessary, or normal." Merriam-Webster's Collegiate Dictionary 435 (11th ed. 2014). Second, extreme force is not an element of second-degree aggravated assault. Rather, a person is guilty of that crime if he "[a]ttempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury[.]" N.J.S.A. 2C:12-1(b)(1). Extreme indifference is a "mental state," not a measure of physical force. State v. Villar, 292 N.J. Super. 320, 327 (App. Div. 1996).

Third, as an eyewitness to the assault, Officer Cancel properly could give a lay opinion that defendant was using "excessive" or "extreme" force. "N.J.R.E. 701 sets forth the prerequisites for the admission of lay opinion testimony[.]" State v. Bealor, 187 N.J. 574, 586 (2006). N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions

> or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

Officer Cancel's testimony describing the amount of force defendant used was "rationally based on the perception of" Cancel, who saw defendant stomping on Officer Valentin using his patrol car for leverage. It would also serve to "assist [the jury] in . . . determining a fact in issue," ibid., including whether defendant was attempting to cause death, serious bodily injury, or bodily injury. N.J.S.A. 2C:11-3(a)(1); N.J.S.A. 2C:11:12-1(b)(1), (5); see N.J.S.A. 2C:5-1. Knowing the amount of force used is relevant, although not necessarily dispositive, to defendant's state of mind and the extent of the injuries caused by defendant.

Fourth, N.J.R.E. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." "If lay . . . opinion testimony is otherwise competent under N.J.R.E. 701 . . . , the fact that it may embrace the ultimate fact issue in dispute does not render it incompetent." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 704 (2018).

There was also no error when the prosecutor later asked Officer Cancel to "describe the level of force that you saw the defendant using upon" Officer Valentin, and Cancel responded: "It was extreme force that he used." Moreover, defendant's only objection to that question was "asked and answered," and he does not challenge it on appeal.

In any event, Officer Cancel's "excessive" and "extreme" comments were not the only evidence on the amount of force defendant used on Officer Valentin. Several eyewitnesses testified without objection that defendant was "kicking and stomping on" Valentin "[a]s hard as you can," and "jumping on top of him with all his might." Thus, Officer Cancel's comments were not "clearly capable of producing an unjust result." <u>R.</u> 2:10-2.

III.

Defendant argues the trial court erred in not granting his motion at the close of the State's case for dismissal of the attempted-murder charge. Under <u>Rule</u> 3:18-1, "if the evidence is insufficient to warrant a conviction," the trial court may enter "a judgment of acquittal[.]" Even if the evidence was insufficient, defendant was not prejudiced, as the jury ultimately acquitted defendant of the attempted-murder charge.

Defendant claims the effect of not dismissing that charge was to give the jury "the propensity to find defendant guilty of a

lesser offense than the attempted murder charge." It was once permissible for a defendant acquitted of a murder charge to claim the prosecution of the charge created a real "possibility that the jury, in the absence of sufficient evidence to sustain a first degree murder charge, may have reached a compromise verdict" of guilty on a lesser charge. State v. Christener, 71 N.J. 55, 69-70 (1976).

However, our Supreme Court overruled Christener in State v. Wilder, 193 N.J. 398, 403 (2008); see State v. Kornberger, 419 N.J. Super. 295, 304 (App. Div. 2011). The Court in Wilder found it was "'pure fancy' to speculate that a jury's verdict on a lesser offense was a compromise." 193 N.J. at 415. The Court noted such "jury-overcharge" claims were impermissibly "premised on the assumption that jurors ignore the trial court's instructions regarding compromise verdicts," and improperly "encourag[ed] a reviewing court to speculate on the jury's thinking." Id. at 415, 418. "Moreover, it also is wasteful of judicial resources to have appellate courts attempting to second-guess what may have transpired during jury deliberations. And, it is wasteful of the trial court's time if perfectly sound jury verdicts, supported by sufficient evidence, are overturned based on speculation of a compromise verdict." Id. at 416.

The Supreme Court in Wilder held that such "jury-overcharge" claims instead "should be subjected on appeal to the same 'unjust result' standard established in Rule 2:10-2." Id. at 418. The Court then observed: "Very likely, few jury-overcharge cases would meet the 'unjust result' standard for error because a party must present cognizable evidence that an error occurred." Id. at 418.

Defendant makes his jury-overcharge claim "without any evidence of jury compromise[.]" Id. at 415. He offers no evidence the jurors disregarded the trial court's instructions that they could not convict defendant of aggravated assault unless "the State has proven each element beyond a reasonable doubt," that "the defendant is entitled to have each Count considered separately," and that a juror must "not surrender your honest conviction as to the weight or effect of evidence . . . solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." Therefore, defendant cannot show the denial of his motion to dismiss a charge on which he was later acquitted was "clearly capable of producing an unjust result[.]" R. 2:10-2.

In any event, the trial court did not err in denying defendant's motion to dismiss the attempted-murder charge. Under State v. Reyes, 50 N.J. 454, 459 (1967),

> the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

"On appeal, we utilize the same standard as the trial court in determining whether a judgment of acquittal was warranted." State v. Ellis, 424 N.J. Super. 267, 273 (App. Div. 2012).

A defendant is guilty of attempted murder if he purposefully did anything with purpose of, and made a substantial step toward, causing the victim's death. N.J.S.A. 2C:5-1(a)(2); N.J.S.A. 2C:11-3(a)(a).

Defendant took a substantial step toward causing Officer Valentin's death, and his purpose to cause death could be inferred from his actions. He launched an unprovoked attack on Valentin, punching him in the head. He continued to assault Valentin after he was knocked to the ground, and even after he was lying unconscious. Defendant, who weighed 250 to 275 pounds, kicked and stomped on Valentin's head and chest with all his might, holding onto the patrol car so he could jump with both feet onto Valentin and thus increase the force of his stomping. He did not stop kicking and stomping Valentin when bystanders begged him, when another police officer arrived, or even when Garcia first hit him

with a bat. When Garcia hit him again with the bat, defendant stopped only to pursue Garcia.

Even though interrupted, defendant's attack caused Valentin five broken ribs, lumps and bruises on his head, and a blood hemorrhage in his brain, which Dr. Lee testified could cause Valentin to have seizures and stop breathing. Moreover, eyewitnesses saw no indication defendant would have stopped kicking and stomping Valentin if Garcia and others had not intervened. The trial court properly found this evidence was sufficient to allow the attempted-murder charge to be considered by the jury.

Defendant complains the trial court also cited Officer Valentin's testimony that "I thought I was going to die that date at that time right there." However, Valentin's perception of the severity of the attack was properly considered though not dispositive. In any event, the court recognized this was just "his testimony," and considered the other eyewitness testimony and medical testimony on the severity of the attack, which was more than ample evidence.

IV.

Lastly, defendant challenges his sentence. "Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing

courts." State v. Case, 220 N.J. 49, 65 (2014) (citation omitted). Thus, disturbing a sentence is permissible in only three situations: "(1) the trial court failed to follow the sentencing guidelines, (2) the aggravating and mitigating factors found by the trial court are not supported by the record, or (3) application of the guidelines renders a specific sentence clearly unreasonable." State v. Carey, 168 N.J. 413, 430 (2001).

Defendant argues the sentencing court erred in imposing an extended-term sixteen-year sentence for second-degree aggravated assault. Under N.J.S.A. 2C:44-3, a court may grant the State's motion to sentence a person to an extended term if "(a) [t]he defendant has been convicted of a crime of the first, second or third degree and is a persistent offender."

> A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.
>
> [N.J.S.A. 2C:44-3(a).]

Defendant has never disputed he met all of those statutory requirements. In fact, defendant had five prior criminal convictions, for third-degree drug distribution in 1997, third-

degree drug possession in 1998, first-degree drug distribution in January 2003, and second- and third-degree drug distribution offenses in November 2003. His 2003 offenses were within ten years of the 2012 assault, and his release from confinement for the 2003 offenses was in 2009.

Because defendant was statutorily eligible, he "could lawfully be sentenced within a range of between five and twenty years." State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016). "Where, within that range of sentences, the court chooses to sentence a defendant remains in the sound judgment of the court," based on "the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public." State v. Pierce, 188 N.J. 155, 168-69 (2006). In reviewing the sentencing court's choice we "apply an abuse of discretion standard[.]" Id. at 169-70.

The trial court found aggravating factors one, two, three, six, and nine, and no mitigating factors. Based on its finding that "there is a need for protection of the public," the court granted the State's motion. The court sentenced defendant to sixteen years, which "plainly falls within the statutory range." Abril, 444 N.J. Super. at 564.

Defendant argues that the trial court did not do an evaluation of public protection, that there was no evidence that defendant

had a propensity to dangerous conduct, and that the extended-term sentence was not necessary to protect the public. To the contrary, the court explicitly addressed the need for public protection. Moreover, the court explained that defendant's repeated commission of crimes despite being given probation and other diversionary opportunities showed he posed a risk to commit another offense, and that there was a need to deter defendant and others. In any event, "a finding of 'need to protect the public' is not a precondition to a defendant's eligibility for sentencing up to the top of the discretionary extended-term range." Pierce, 188 N.J. at 170.

Defendant argues the assault was an isolated incident resulting from his PCP use. However, the trial court did not find defendant's expert credible and did not believe PCP played any part in the assault.

Defendant notes that this was his first conviction for assault and that all his prior convictions were drug-related. However, the persistent offender statute does not require that the defendant's prior crimes be violent, State v. Bauman, 298 N.J. Super. 176, 211 (App. Div. 1997), or similar to his current crime, cf. ibid.

Defendant contends the trial court double-counted the prior record used to qualify him for an extended term when it considered

"[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted." N.J.S.A. 2C:44-1(a)(6). However, "other aspects of the defendant's record, which are not among the minimal conditions for determining persistent offender status, such as a juvenile record, parole or probation records, and overall response to prior attempts at rehabilitation, will be relevant factors in adjusting the base extended term." State v. Dunbar, 108 N.J. 80, 92 (1987). Ignoring two convictions to trigger the extended-term statute, defendant had three other serious criminal convictions, five municipal court convictions, two juvenile adjudications, and a violation of probation. Cf. State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005) (finding error where the judge "raise[d] the presumptive extended base term on account of defendant's only prior conviction, the very conviction which both allowed and required an extended term"). The other offenses were sufficient to find aggravating factor six.

Defendant argues the sentencing court erred in finding aggravating factors one and two. "[A]n appellate court should not second-guess a trial court's finding of sufficient facts to support an aggravating or mitigating factor if that finding is supported by substantial evidence in the record." State v. O'Donnell, 117 N.J. 210, 216 (1989).

Aggravating factor one addresses "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]" N.J.S.A. 2C:44-1(a)(1). "Under this factor, the sentencing court reviews the severity of the defendant's crime, 'the single most important factor in the sentencing process,' assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." State v. Lawless, 214 N.J. 594, 609 (2013) (citation omitted). "[A] sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense" or where "'defendant's behavior extended to the extreme reaches of the prohibited behavior.'" State v. Fuentes, 217 N.J. 57, 75 (2014) (citation omitted).

The trial court found that, even "without double counting," defendant's assault on Officer Valentin was "despicable, heinous, [and] depraved." The court did not specifically state the facts on which it relied. However, any error was harmless, as the facts plainly supported finding aggravating factor one. Defendant hit Officer Valentin for no reason, then continuously kicked and stomped on Valentin with two feet, using the patrol car as leverage. "[T]he extraordinary brutality" of defendant's attack

on Valentin "extended to the extreme reaches of" aggravated assault. Fuentes, 217 N.J. at 75. Moreover, his attack was random, unprovoked, and senseless. See State v. Bowens, 108 N.J. 622, 639 (1987) (citing "the brutal, senseless nature of the stabbing"); see also Lawless, 214 N.J. at 610 (citing Bowens).

Aggravating factor two addresses

> [t]he gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance . . . .
>
> [N.J.S.A. 2C:44-1(a)(2) (emphasis added).]

Aggravating factor two "focuses on the setting of the offense itself with particular attention to any factors that rendered the victim vulnerable or incapable of resistance at the time of the crime." Lawless, 214 N.J. at 610–11. The factor "does not limit 'vulnerability' to age or other physical disabilities of the victim." State v. O'Donnell, 117 N.J. 210, 218-19 (1989).

Again eschewing double counting, the trial court found aggravating factor two applied because Officer Valentin "was getting out of his car at the time, going to mail a letter at the post office, was not responding to a call as to this person as the time," when defendant sucker-punched him. We have upheld a finding

that a gas station attendant alone at night is "'particularly vulnerable.'" State v. Faucette, 439 N.J. Super. 241, 272 (App. Div. 2015). In any event, after Valentin was prone and unconscious he became particularly vulnerable and incapable of resistance, yet defendant continued to kick and stomp on him. See O'Donnell, 117 N.J. at 218-19 (finding a victim particularly vulnerable after being tied up by the defendant).

Defendant also argues the trial court erred in finding aggravating factor twelve, "[t]he defendant committed the offense against a person who he knew or should have known was 60 years of age or older[.]" N.J.S.A. 2C:44-1(a)(12). However, the judge explicitly stated "I do not find that [factor] 12 applies." Thus, we need not consider whether aggravating factor twelve would have been appropriate given that Officer Valentin was sixty years old.

The trial court did not abuse its discretion in considering the aggravating and mitigating factors, or in imposing the extended-term sentence, which was not excessive.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION