

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5163-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

N.K.,

Defendant-Appellant.

Argued September 18, 2017 – Decided February 5, 2018

Before Judges Messano, Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 13-
02-0159.

Alan L. Zegas argued the cause for appellant
(Law Offices of Alan L. Zegas, attorneys; Alan
L. Zegas and Cissy M. Rebich, on the briefs).

Meredith L. Balo, Special Deputy Attorney
General/Acting Assistant Prosecutor argued
the cause for respondent (Thomas K. Isenhour,
Acting Union County Prosecutor, attorney;
Meredith L. Balo, of counsel and on the
brief).

PER CURIAM

Defendant N.K. appeals his conviction and sentence for sexual
assault, endangering the welfare of a child and lewdness. Based

on our review of the record in light of the applicable legal principles, we affirm defendant's conviction and sentence but remand for an amendment of the judgment of conviction to accurately reflect his entitlement to jail credits.

I.

Defendant was charged in an indictment with second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count one), third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count two), and fourth-degree lewdness, N.J.S.A. 2C:14-4(b)(1) (count three). The charges were based on allegations defendant exposed and touched his penis in the presence of a twelve-year-old boy, R.O.

At defendant's jury trial, R.O. testified that while taking a shower in the bathroom at a community pool, he saw defendant taking a shower at the showerhead next to his. R.O. and defendant each wore swim trunks.

R.O. saw defendant pull down his swim trunks and pull on his exposed penis. Defendant twice asked R.O. to take out his penis, and told R.O. not to be afraid and that no one was watching. R.O. said "No."

R.O. left the bathroom and sat outside. Defendant exited the bathroom and laid on a towel on the grass. R.O. returned to the shower and defendant did as well. According to R.O., defendant

took his penis out again and did not touch it, but R.O. observed it "start[] to get bigger" and "more stiff."

Defendant again told R.O. to take out his penis and that nobody was watching. Defendant asked R.O. if he could take out R.O.'s penis for him. R.O. said "No." Defendant told R.O. to "just try it," and asked if he could suck on R.O.'s penis. R.O. testified his penis was never out of his swim trunks and he was never touched by defendant.

Following the second encounter, R.O. left the shower and told his aunt, E.M., who was with him at the pool, about what occurred. R.O. saw defendant and pointed him out to E.M. She walked up to defendant and slapped him. Defendant said, "Why did you slap me," and E.M. responded, "You know what you did." Defendant replied, "I didn't touch him," and told R.O. to "[t]ell her I didn't touch you."

E.M. told someone to call the police. She testified she saw defendant walk down a pathway and believed he was attempting to leave. She followed him and saw a woman stop defendant near a gate and say, "Stop, you're not going anywhere." The police arrived and arrested defendant.

Defendant testified at trial, and acknowledged being at the pool, going into the shower and seeing R.O. standing under a showerhead without the water running. According to defendant, he

went to the showerhead farthest from R.O., turned on the water, and saw R.O. with his penis exposed, masturbating. Defendant told R.O., "This is a public shower, it's not a place to be playing with yourself." R.O. said he was washing his privates. Defendant told R.O. it was not possible to wash privates with no water running. R.O. told defendant "to go 'F' [himself]," and defendant told R.O. "to get lost." According to defendant, R.O. reached into his pants, exposed his penis, and said, "Suck my dick." Defendant said, "Okay," because he "had enough of the conversation."

At some point, R.O. screeched and defendant realized R.O. had turned on the water. Defendant asked R.O. if he was okay, and R.O. said the water was too hot. Defendant told R.O. to use a different showerhead. After R.O. began showering, defendant put his hand out towards R.O. and said "My name is [N]," and "Are we okay?" R.O. responded, "Yeah" and "My name is [R.]"

Defendant testified that after he and R.O. left the bathroom, R.O. went to defendant and said "the reason . . . he was doing what he was doing in the bathroom was because his mom [would] not let him have any girlfriends." Defendant told R.O. he should listen to his mom, and that "this is not the proper place to be doing what he was doing." Defendant testified R.O. walked away.

Defendant explained that as he later walked towards the concession stand, E.M. punched him in the face. Defendant asked her "why she punched [him]." E.M. said defendant disrespected R.O. in the shower. Defendant walked toward the manager's office, which was located near the exit, to request a call to the police because he "had just gotten assaulted and wanted the police to get there." Defendant denied attempting to leave the scene. He told the manager he had been assaulted and was told the police were called.

Defendant testified he never touched or exposed himself in the shower for his own sexual gratification or to demoralize or insult R.O. Defendant opined that R.O. fabricated the story because R.O. must have assumed defendant was going to report what R.O. was doing in the shower.

The original jury deliberated for about one hour on the first day, and about two and one-half hours the second day. At the conclusion of the second day, the court excused a deliberating juror due to a scheduled surgery the following day. An alternate juror was substituted, and the following day the reconstituted jury was instructed to begin its deliberations anew. During deliberations, the reconstituted jury made two requests for read-backs of testimony. After more than three hours of deliberation, the jury found defendant guilty on all three counts.

Defendant moved for a new trial claiming he was under the influence of drugs and alcohol during the trial, the court erred by substituting the juror, and the sexual assault charge should have been dismissed. The court found the motion was untimely, see Rule 3:20-2, but addressed the merits in a written opinion and denied the motion.

At sentencing, the court imposed an aggregate six-year custodial term subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2. This appeal followed.

On appeal, defendant makes the following arguments:

POINT ONE

THE TRIAL COURT ERRED IN DENYING DEFENDANT A HEARING TO DETERMINE WHETHER THERE WAS A REASONABLE CAUSE TO BELIEVE DEFENDANT WAS INCOMPETENT TO TESTIFY DURING TRIAL DUE TO HIS ONGOING DRUG AND ALCOHOL ABUSE, RESULTING IN A DENIAL OF HIS CONFRONTATION AND DUE PROCESS RIGHT.

POINT TWO

DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE OF THE TRIAL COURT'S ERROR IN DENYING DEFENDANT A JUDGMENT OF ACQUITTAL BASED ON INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION BEYOND A REASONABLE DOUBT AS TO COUNT ONE (SEXUAL ASSAULT)[.]

POINT THREE

THE ADMISSION OF BOTH INADMISSIBLE HEARSAY AND HIGHLY PREJUDICIAL TESTIMONY BY THE TRIAL COURT WAS CLEARLY ERRONEOUS AS TO HAVE HAD THE CAPACITY TO BRING ABOUT AN UNJUST RESULT AND

THEREFORE DEFENDANT'S CONVICTION MUST BE VACATED.

POINT FOUR

THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF THE DEFENDANT TO DUE PROCESS AND TO A FAIR TRIAL WERE VIOLATED BECAUSE THE COURT SUBSTITUTED A JUROR AFTER THE JURY CLEARLY DEMONSTRATED IT WAS DEADLOCKED WHICH RESULTED IN AN UNJUST VERDICT.

POINT FIVE

THE TRIAL COURT ERRED IN FAILING TO PROPERLY APPLY THE AGGRAVATING AND MITIGATING FACTORS DURING SENTENCING AND IN DISREGARDING THE FACT THAT DEFENDANT HAD NOT BEEN GIVEN HIS PRESCRIBED MEDICATIONS; THEREFORE HIS CONVICTION MUST BE VACATED.

II.

A.

Defendant first argues the court erred by failing to grant an evidentiary hearing on his new trial motion. More particularly, he claims the court should have held a hearing to determine if he was entitled to a new trial based on his claimed incompetency. We disagree.

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div.) (alteration in original) (quoting State v. Russo, 333 N.J.

Super. 119, 137 (App. Div. 2000), certif. denied, 228 N.J. 239 (2016). "A trial court's ruling on a motion for a new trial 'shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.'" Id. at 305 (quoting R. 2:10-1).

"No person who lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N.J.S.A. 2C:4-4(a). "The test for competency to stand trial arises from basic concepts of due process." State v. Purnell, 394 N.J. Super. 28, 47 (App. Div. 2007). "A defendant tried or convicted while incompetent to stand trial has been deprived of his or her due process right to a fair trial." Ibid. A person is considered mentally competent to stand trial on criminal charges if the proofs satisfy the requirements of N.J.S.A. 2C:4-4(b). See State v. Gorthy, 226 N.J. 516, 531-33 (2016).

There is a "strict" standard of review of a court's decision not to hold a competency hearing. State v. Harris, 181 N.J. 391, 458 (2004). A court's decision "will not be reviewed on appeal, unless it clearly and convincingly appears that defendant was incapable of standing trial." Ibid. (quoting State v. Lucas, 30 N.J. 37, 73-74 (1959)). In order to satisfy "the clear and

convincing standard on appeal, a defendant must show a 'bona fide doubt as to [his] competence to stand trial.'" Ibid. (alteration in original) (quoting Spivey, 65 N.J. at 37).

"The evidence necessary to establish the requisite bona fide doubt as to a defendant's competence is difficult to articulate" State v. Lambert, 275 N.J. Super. 125, 129 (App. Div. 1994). "[T]here are 'no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed.'" Gorthy, 226 N.J. at 530 (2016) (quoting Drope v. Missouri, 420 U.S. 162, 180 (1975)). In Drope, the United States Supreme Court explained, for example, that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient." 420 U.S. at 180. However, "'[m]ere suggestion' of incapacity is not sufficient." Spivey, 65 N.J. at 36. The court is not required to conduct a competency hearing "in the absence of . . . substantial evidence of the existence of a degree of mental disorder which would unfit the defendant from conducting his cause or instructing his counsel." Id. at 36-37 (citations omitted).

The clear and convincing standard of review of a court's decision not to hold a competency hearing "is consistent with the view that defense attorneys are in a better position to assess a defendant's competency" Harris, 181 N.J. at 458. Counsel's failure to raise the issue of competency weighs against a finding there was clear and convincing evidence a defendant is incompetent because "judges must depend to some extent on counsel to bring [these] issues into focus." Ibid. (alteration in original) (quoting Drope, 420 U.S. at 176-77). "[B]ecause defense attorneys are in a better position than the trial court to question a defendant's competency, the fact that [counsel finds] no reason to question [a defendant's] competency must be given substantial weight" in determining if a hearing was required. Ibid.

Although the foregoing principles were developed in cases considering whether a competency hearing was required before or during a criminal trial, we discern no basis for applying a different standard here. Defendant's new trial motion required the court to decide the identical issue: whether a hearing was required to determine if defendant was competent to stand trial.

Applying these principles, we are convinced the court correctly determined a hearing on defendant's competency was not necessary. In support of his motion, defendant presented only a self-serving certification stating he used heroin during the trial

and expressing a self-diagnosis that his alleged intoxication caused sleepiness. According to defendant, he was sleepy and unaware of what was happening during some undefined periods of the trial.

Defendant's certification does not directly address any of the issues a court must consider under N.J.S.A. 2C:4-4 to determine competency, and is untethered to any medical support. Cf. State v. Kahn, 175 N.J. Super. 72, 77-78 (App. Div. 1980) (finding competency hearing was required in part because several psychiatrists disagreed as to the defendant's competence to stand trial). Moreover, his assertions are directly contradicted by the court's observations and findings. As the judge explained, after seeing defendant momentarily close his eyes during the early stages of jury selection, she not only mentioned her observations to defense counsel, she thereafter purposely paid very close attention to defendant during trial. The judge affirmatively found she never saw defendant appear sleepy again and never saw him asleep.

The judge also observed, and the record shows, that defendant was alert and responsive during his direct testimony and the State's vigorous cross-examination. As found by the judge, there was no indication during the trial that defendant was intoxicated or that he slept during any portion of the trial. Cf. Purnell,

394 N.J. Super. at 49 (finding judge's assessment of defendant supported a determination there was a bona fide doubt about the defendant's competency).

Moreover, after advising defense counsel of her observation during jury selection, defense counsel never raised any issue as to defendant's competence. Defense counsel's certification in support of defendant's new trial motion does not assert any facts supporting defendant's claimed incompetence, does not state counsel observed that defendant was intoxicated during trial, and does not cite to any examples of defendant's lack of understanding of the proceedings or inability to assist in his own defense. To the contrary, counsel's certification cites to, and relies solely upon, defendant's conclusory assertion that "intoxication prevented him from assisting in his own defense."¹ In addition, defense counsel's certification offers no explanation for his failure to raise defendant's competence as an issue with the court during trial.

In denying defendant's request for a hearing on the new trial motion, the court was entitled to give great weight to counsel's

¹ Defense counsel asserts defendant's "conduct was also noted and reported by sheriff's officers who told defendant to wake up and asked him if he was ok." The court could not consider counsel's assertion because the officer's purported observations were not within counsel's personal knowledge. See R. 1:6-6.

failure to raise the competency issue and provide any facts supporting the incompetency claim in his certification. Defense counsel was in the best position to assess defendant's competency, yet provided no evidence supporting defendant's claim. See Harris, 181 N.J. at 458.

When considered in the totality of the circumstances presented to the trial court, defendant failed to "provide 'clear and convincing evidence' that raise[d] a 'bona fide doubt' that he failed to meet the competency standards set forth in N.J.S.A. 2C:4-4(a)."² Id. at 459. The court therefore correctly denied his new trial motion based on his claim of incompetency without an evidentiary hearing. See Spivey, 65 N.J. at 38 n.7 (noting that in State v. Hale, 116 N.J. Super. 106 (Law Div. 1971), aff'd, 120 N.J. Super. 469 (App. Div. 1972), the defendant's "background revealed disturbed behavior due primarily to excessive drinking,"

² We reject defendant's claim that his incompetency was established because he allegedly used heroin following the court proceeding on the day he testified, and made arrangements to leave the United States. Defendant's self-serving, unsupported and uncorroborated claim is contradicted by his actions. As the court correctly observed, although defendant claimed his use of heroin following the court session rendered him incompetent, during that time he quickly made arrangements to fly to a foreign country, arranged for timely transportation to the airport, contacted his attorney to advise he would not be in court for the trial, took all of the necessary steps to arrive at the airport and made arrangements for accommodations upon his arrival at this destination.

but "[c]ompetence to stand trial was never brought into question," he "conducted himself normally and cooperated fully at trial," and "[n]othing in the record gave rise to a bona fide doubt of defendant's capacity to stand trial").

B.

We next consider defendant's argument the court erred by denying his motion for acquittal on the sexual assault charge. In our review of a trial court's denial of a motion for a judgment of acquittal, we consider the evidence in its entirety and give the State the benefit of all favorable inferences that may be drawn from the evidence to determine if a jury could find defendant guilty of the offense beyond a reasonable doubt. State v. Spivey, 179 N.J. 229, 236 (2004).

"An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim." N.J.S.A. 2C:14-2(b). To support a conviction for the offense, the State must prove the following elements beyond a reasonable doubt: "(1) a victim who is less than thirteen years old, (2) a defendant-actor who is at least four years older than the victim, and (3) a sexual contact with a victim under the critical age." State v. Zeidell, 154 N.J. 417, 428 (1998). Defendant claims the State failed to prove the third element of the offense.

In pertinent part, "sexual contact" is defined as "an intentional touching by the . . . actor, either directly or through clothing, of the . . . actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor." N.J.S.A. 2C:14-1(d); see also Zeidell, 154 N.J. at 428. "Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present." N.J.S.A. 2C:14-1(d); see also Zeidell, 154 N.J. at 428.

Defendant argues there is insufficient evidence that he touched his penis for his own sexual gratification or to degrade or humiliate R.O. He argues R.O. testified defendant was not masturbating, and therefore he could not have been sexually arousing himself. He ignores R.O.'s testimony that, in addition to pulling on his own penis, defendant asked R.O. to expose his penis, followed R.O. into the shower a second time and exposed his penis again, asked R.O. to expose his penis and asked if he could suck on R.O.'s penis. Defendant's argument there was insufficient evidence to support his conviction lacks sufficient merit to warrant any further discussion in a written opinion. R. 2:11-3(e)(2).

C.

Defendant contends the court erred by permitting R.O. to testify that he "felt like he was about to be raped" by defendant.

Defendant also challenges the court's decision permitting E.M. to testify she heard an unidentified woman say to defendant, "stop, you're not going anywhere," as he moved toward the exit of the pool. Based on our review of the record, we find that any errors related to the admission of the testimony were not clearly capable of producing an unjust result. R. 2:10-2.

"A trial court's ruling on the admissibility of evidence is reviewed on appeal for abuse of discretion." State v. Rose, 206 N.J. 141, 157 (2011). Under this standard, the trial court's decision to allow evidence should not be overturned "unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide [of] the mark that a manifest denial of justice resulted." State v. Lykes, 192 N.J. 519, 534 (2007) (alteration in original) (quoting Verdicchio v. Ricca, 179 N.J. 1, 34 (2004)). If the trial court does not determine the admissibility of evidence under the correct legal standard, however, its decision is not afforded any deference and we review the issue de novo. State v. Reddish, 181 N.J. 553, 609 (2004).

The court overruled defendant's objection to E.M.'s testimony about the woman's statement, finding it was not introduced to prove the truth of the implicit assertion defendant was attempting to flee. See State v. Coder, 198 N.J. 451, 464 (2009) (finding a statement is hearsay only if it is introduced to prove the truth

of the matter asserted). The court determined the testimony about the statement was admissible to show defendant stopped when he was told to do so.

Independent of the testimony about the woman's statement, the undisputed evidence showed defendant did not leave the premises prior to the arrival of the police. Thus, as defendant correctly argues, the statement was probative only as an affirmative assertion that defendant attempted to flee. When viewed in that manner, the statement constituted inadmissible hearsay. The court therefore erred in overruling defendant's objection and allowing the testimony.

Nonetheless, we are satisfied admission of the testimony constituted harmless error because it was not "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. The State never argued the statement demonstrated that defendant attempted to flee. Moreover, defendant's actions and movements following R.O.'s report were otherwise detailed in the testimony. Thus, any suggestion defendant attempted to flee was of no moment. In addition, there was evidence undermining the notion that defendant tried to flee, including the actions he took to report that he had been assaulted by E.M. When considered in the context of the other trial evidence, the testimony concerning the statement is "[in]sufficient to raise a reasonable doubt as

to whether [it] led the jury to a result it otherwise might not have reached." State v. Scott, 229 N.J. 469, 484 (2017) (second alteration in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)).

We also consider defendant's claim the court erred by permitting R.O. to testify that when he was in the shower, he felt he was about to be raped by defendant. The court allowed the testimony over defendant's objection, finding it showed R.O.'s state of mind and reason for reporting defendant's conduct. Defendant does not challenge the relevancy of the testimony, and instead contends its probative value was substantially outweighed by its risk of undue prejudice. See N.J.R.E. 403.

R.O.'s reference to his belief he might be raped had a potential for prejudice and was unnecessarily cumulative because his testimony concerning his interactions with defendant provided ample evidence explaining his motivation to report defendant. The court, however, promptly instructed the jury there was no evidence defendant had physical contact with R.O. and immediately following the instruction, the prosecutor questioned R.O. and confirmed defendant never touched him.

The testimony represented a twelve-year-old boy's characterization of his fears when confronted with defendant's criminal sexual conduct. His use of the term "rape" in that

context and for that purpose, when considered in the absence of any evidence of physical contact by defendant, did not "have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issues of the case." State v. Covell, 157 N.J. 554, 568 (1999) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)). We therefore discern no basis to conclude the court's finding that the risk of undue prejudice in admitting the testimony did not substantially outweigh its probative value, N.J.R.E. 403; see State v. Morton, 155 N.J. 383, 453 (1998), was "so wide of the mark that a manifest denial of justice resulted," State v. Marrero, 148 N.J. 469, 484 (1997) (quoting State v. Kelly, 97 N.J. 178, 216 (1984)).

Moreover, and for the same reasons, even if the court erred in admitting R.O.'s testimony, it was not clearly capable of producing an unjust result under the harmless error standard. R. 2:10-2. Admission of the testimony does not "raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. R.B., 183 N.J. 308, 330 (2005) (alteration in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)).

D.

Defendant argues the court erred in substituting a juror and further erred by denying his motion for a mistrial based on the

substitution. "Our review of a trial court's decision to remove and substitute a deliberating juror because of an 'inability to continue,' pursuant to Rule 1:8-2(d)(1), is deferential. We will not reverse a conviction [on that basis] unless the court has abused its discretion." State v. Musa, 222 N.J. 554, 564-65 (2015).

Rule 1:8-2(d)(1) provides, if a juror is discharged because of an inability to continue, "the court may direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged." When there is a substitution of a juror, the court must "instruct the jury to recommence deliberations and shall give the jury such other supplemental instructions as may be appropriate." Ibid.

"Rule 1:8-2(d)(1) delicately balances two important goals: judicial economy and the right to a fair jury trial." State v. Ross, 218 N.J. 130, 146 (2014) (quoting State v. Jenkins, 182 N.J. 112, 124 (2004)). "Declaring a mistrial imposes enormous costs on our judicial system, from the expenditure of precious resources in a retrial to the continued disruption in the lives of witnesses and parties seeking closure." Jenkins, 182 N.J. at 124.

The juror substitution procedure does not "offend our constitutional guaranty of trial by jury." Ross, 218 N.J. at 146 (quoting State v. Miller, 76 N.J. 392, 406 (1978)). "Such a

substitution, however, contravenes constitutional norms if it impairs the mutuality of deliberations – the 'joint or collective exchange of views among individual jurors.'" Id. at 146-47 (quoting State v. Williams, 171 N.J. 151, 162 (2002)). "Given the competing interests at stake . . . the trial court must determine the cause of the juror's concern and assess the impact of the juror's departure on the deliberative process . . . [and] must ascertain whether a reconstituted jury will be in a position to conduct open-minded and fair deliberations." Id. at 147.

In Ross, the Court declared four principles "to guide a trial court's determination as to whether a reconstituted jury will meaningfully deliberate." Id. at 151.

First, the trial judge should conduct any inquiry of the juror seeking to be excused with caution, and should direct the juror not to reveal confidential jury communications. Second, the trial court may consider the duration of the jury's deliberations prior to the departure of the juror. Without applying an inflexible rule that would preclude substitution after a specific amount of time has elapsed, the trial court should determine whether the jury appears to have progressed to a stage at which issues have been decided and deliberations cannot commence anew. Third, if a partial verdict has been rendered, or the circumstances otherwise suggest that jurors have decided one or more issues in the case, the trial court should not authorize a juror substitution, but should declare a mistrial. Finally, if the trial court permits the substitution of an alternate juror for an excused juror, it must instruct the newly

composed jury before its
deliberations

[Id. at 151-52 (internal citations omitted).]

"[W]hen the circumstances suggest a strong inference that the jury has affirmatively reached a determination on one or more factual or legal issues, the trial court should not substitute an alternate for an excused juror." Id. at 151; see also State v. Corsaro, 107 N.J. 339, 344-45 (1987) (finding a mistrial was necessary where a partial verdict was rendered); Jenkins, 182 N.J. at 132-33 (finding a lengthy colloquy with the juror suggested the other jurors had made up their minds and that but for the juror's holdout position, the case would have been resolved, and the alternate juror would have "felt pressured to fall in line with the already committed eleven jurors").

Defendant contends the court erred by substituting a juror because the jury progressed to a stage at which deliberations could not commence anew. Defendant argues the jurors reached a partial verdict or decided one or more issues prior to the substitution of the juror, and thus, the court should have granted his mistrial motion. The record does not support defendant's contentions.

As the court found in its well-reasoned written decision denying defendant's new trial motion, the jury deliberated for

about one hour on the first day and for about two and one-half hours on the second day prior to the juror substitution. Shortly after the commencement of deliberations on the second day, the jury asked what would happened if they did not agree on all charges, "i.e., guilty on only two out of the three? Does the verdict have to be consistent across the board?" The judge interpreted the note as an inquiry "about what would happen since they had not yet reached a conclusion," and instructed them to continue deliberations. Defendant did not object to the court's interpretation of the note or the instructions.

Defendant argues on appeal that the inquiry suggested the jury had reached a partial verdict. Subsequent events showed otherwise. Later on the second day of deliberations, the jury sent a note stating, "We cannot come to a conclusion. Some people have to leave at 4:30 p.m."

The court understood the note as an expression that the jury would be unable to reach a verdict before some members of the jury had to leave for the day. The judge inquired if the jury had reached a verdict on "any of the questions," and the jury foreperson said "No," and explained the jury needed more time to deliberate. Thus, there was "[n]othing in the original jury's communications with the trial court suggest[ing] that any juror had reached a determination on a factual or legal issue," Ross,

218 N.J. at 152; see also id. at 154 (holding that a trial court may substitute an alternate for an excused juror after an initial declaration of a deadlock and a Czachor³ charge), and the court's inquiry to the foreperson confirmed the jury had not "reached a determination of guilt or innocence," id. at 150 (quoting Williams, 171 N.J. at 169).

It was only after the foreperson confirmed the jury had not reached a decision on any of the questions on the verdict sheet that the court dismissed the jury for the day, with the exception of a juror who requested to be excused because she had surgery scheduled for the following day. The court questioned the juror about her surgery and excused her without objection from the State or defendant. The juror was excused for personal reasons and not as a result of "issues derived from [her] interaction with the other jurors or with the case itself.'" Id. at 147 (quoting Williams, 171 N.J. at 163); cf. Jenkins, 182 N.J. at 132-33 (alteration in original) (finding proceeding with reconstituted jury was improper where substituted juror stated she was the sole juror voting for an acquittal and she could not agree with what the other jurors "want[ed]").

³ See State v. Czachor, 82 N.J. 392 (1980).

In sum, the court was not presented with any "circumstances suggest[ing] a strong inference that the jury has affirmatively reached a decision on one or more factual or legal issues" Ross, 218 N.J. at 151. The court therefore correctly substituted the juror. Ibid.

Jury deliberations resumed the following day. The trial court instructed the jury to commence deliberations anew, and "we presume that its instructions were followed." Ross, 218 N.J. at 152. Over the following three and one-half hours, the jury deliberated, requested two read-backs of trial testimony and announced its verdict.

The requests for read-backs suggest the jury had not reached a determination before the juror substitution. See id. at 151. In addition, defendant's failure to object to the substitution of the juror signifies that "in the context of the trial[,] the [alleged] error was actually of no moment." State v. Ingram, 196 N.J. 23, 42 (2008) (quoting State v. Nelson, 173 N.J. 417, 471 (2002)).

We are convinced the court did not abuse its discretion by substituting the juror or by subsequently denying defendant's new trial motion. The record simply does not permit a strong inference the original jury had reached a determination of any of the issues, and the judge scrupulously followed the procedure prescribed by

the Court in Ross for the substitution of a juror. See Ross, 218 N.J. at 151-52.

E.

Defendant argues his sentence should be vacated because the court incorrectly found aggravating factors, failed to find applicable mitigating factors, and erred in its award of jail credits. We review a "trial court's 'sentencing determination under a deferential [abuse of discretion] standard of review.'" State v. Grate, 220 N.J. 317, 337 (2014) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)). We affirm a sentence if: (1) the trial court followed the sentencing guidelines; (2) its findings of fact and application of aggravating and mitigating factors were based on competent, credible evidence in the record; and (3) the application of the law to the facts does not "shock[] the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Defendant claims the court erred by finding aggravating factor six, the extent and seriousness of his prior record, N.J.S.A. 2C:44-1(a)(6). He argues the court's finding is inconsistent with its finding of mitigating factor seven, that he led a law abiding life for a substantial period of time prior to commission of the offense, N.J.S.A. 2C:44-1(b)(7). We disagree.

The court's findings are supported by the record and are not inconsistent. The court's finding of aggravating factor seven was based on defendant's convictions for four prior disorderly persons offenses. See State v. Ross, 335 N.J. Super. 536, 543 (App. Div. 2000) (finding the defendant's four prior disorderly persons convictions support in part a finding of aggravating factor six). The court's finding of aggravating factor six is consistent with its finding of mitigating factor seven because the last of defendant's disorderly persons convictions was eight years prior to the commission of the current offenses. A finding of aggravating factor seven does not require that the court ignore a defendant's convictions for offenses occurring immediately prior to a substantial period of law-abiding activity.

We also reject defendant's assertion that the court erred by failing to find mitigating factors eight, his conduct was the result of circumstances unlikely to recur, N.J.S.A. 2C:44-1(b)(8), and nine, his character and attitude indicate he is unlikely to reoffend, N.J.S.A. 2C:44-1(b)(9). The court considered defendant's supporters' attestations to his character, but reasoned that the nature of defendant's offenses, the manner in which defendant committed them, and his misrepresentations to the police at the time of his arrest were inconsistent with findings he has the character indicating he is unlikely to reoffend and his

conduct was the result of circumstances unlikely to recur. The court's determination is supported by the record.

The court also correctly rejected defendant's request that it find mitigating factor twelve, the willingness of defendant to cooperate with law enforcement, N.J.S.A. 2C:44-1(b)(12). Defendant asserts he cooperated with the police when they arrived at the scene, but the court found that based on the jury's rejection of defendant's trial testimony, he lied when he spoke to the police. The record is devoid of any evidence that his purported cooperation by defendant provided any benefit to the State. See State v. Read, 397 N.J. Super. 598, 613 (App. Div. 2008) (questioning whether defendant's confession constituted "cooperation" under mitigating factor twelve in the absence of any showing he "identified other perpetrators or assisted in solving other crimes").


We are satisfied the trial court followed the sentencing guidelines, and its findings of fact and application of the statutory sentencing factors were based on competent credible evidence in the record. The custodial term imposed does not shock the judicial conscience. See Bolvito, 217 N.J. at 228.

Defendant last argues, and the State agrees, defendant's judgment of conviction contains an error in the award of jail credits. Defendant is entitled to ten days of jail credit for

time spent in the custody of the U.S. Marshals that are not reflected in the judgment of conviction. The court awarded 264 days of jail credit during the sentencing proceeding, but the judgment of conviction awards only 254 days. We therefore remand for entry of an amended judgment of conviction awarding a total 264 days of jail credit.

Affirmed. Remanded for entry of an amended judgment of conviction. 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