RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2253-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

K.C.,

Defendant-Appellant.

———————————————

Argued February 16, 2022 – Decided May 2, 2022

Before Judges Hoffman, Whipple, and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 17-09-1321.

Scott M. Welfel, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Scott M. Welfel, of counsel and on the brief).

Carey J. Huff, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Lori Linskey, Acting Monmouth County Prosecutor, attorney; Carey J. Huff, of counsel and on the brief).

PER CURIAM

Defendant appeals from his bench trial conviction for violating a condition of Community Supervision for Life (CSL), N.J.S.A. 2C:43-6.4(d).[1] Defendant is on CSL because of his 2003 convictions for second-degree sexual assault and endangering the welfare of a child. Defendant was ordered by parole authorities to attend sex offender counseling. He refused, prompting the current criminal prosecution. Defendant contends the trial judge erred by denying his motion for judgment of acquittal on the grounds that the State was required, but failed, to prove beyond a reasonable doubt that sex offender counseling was necessary to protect the public or foster his rehabilitation.

After carefully considering the record in view of the governing principles of law, we affirm. Defendant's argument misconstrues the elements of the crime for which he was charged. In a criminal prosecution for violating a special condition of CSL, it is not for a jury or judge sitting as the trier of fact to decide if a special condition of CSL is necessary and appropriate. That is for the Parole Board to decide. The role of the trier of fact in a prosecution under N.J.S.A. 2C:43-6.4(d) is to determine if defendant knowingly violated a condition of CSL

[1] We use initials because the record is impounded. R. 1:38-3(f)(4); see also R. 1:38-3(c)(9). Additionally, we use initials for federal case names that refer to defendant.

imposed by parole authorities and if so, whether there was good cause to do so. It is not a jury's role to decide whether that condition should have been imposed. Applying the evidence adduced by the State to the elements of the offense, the trial court properly denied defendant's motion for judgment of acquittal and found him guilty of the fourth-degree crime beyond a reasonable doubt. We likewise reject defendant's argument, raised for the first time on appeal, that the specific condition of CSL to attend sex offender counseling violated his First Amendment right to free speech and his substantive due process rights.

I.

This matter has a long and complex history. To provide context for defendant's present contentions—some of which are raised for the first time in this latest appeal—we briefly summarize the procedural history and pertinent facts that we discern from the record.

The case arises from the sexual abuse of a nine-year-old girl. The victim claimed that defendant, who was in a romantic relationship with the victim's mother at the time, touched her breasts, buttocks, and vagina on numerous occasions. The victim reported this information to the police. See State v. K.C., A-0391-03 (App. Div. Dec. 9, 2004) (slip op. at 6–9).

In October 2002, a jury found defendant guilty of second-degree sexual assault, N.J.S.A. 2C:14-2(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). Defendant was sentenced to concurrent seven-year prison terms. The trial court ordered that defendant comply with all provisions of Megan's Law,[2] including CSL, N.J.S.A. 2C:43-6.4.[3] We affirmed defendant's

[2] N.J.S.A. 2C:7-1 to -23.

[3] The trial court issued the following instructions:

> Defendant must register with the chief law enforcement officer of the municipality in which he resides, or if the municipality does not have a local police force, the Superintendent of State Police, and, if the defendant is considering changing his residence, he must notify the law enforcement agency where he is registered, and must re-register with the appropriate law enforcement agency no less than ten (10) days before the defendant intends to reside at the new address. Defendant must verify his address with the appropriate law enforcement agency annually. If the defendant fails to register, he may be found guilty of a crime of the fourth degree. Community supervision for life is imposed, pursuant to N.J.S.A. 2C:43-6.4. If the defendant violates a condition of a special sentence of community supervision for life, defendant may be found guilty of a crime of the fourth degree. It is ordered that defendant shall provide a DNA sample as a condition of the sentence imposed.

conviction, State v. K.C., A-0391-03 (slip op. at 14), and the Supreme Court denied certification, 182 N.J. 629 (2005).[4]

After the Court denied certification, defendant filed his first petition for post-conviction relief (PCR). We affirmed the trial court's denial of PCR. State v. K.C., A-6334-06 (App. Div. Apr. 30, 2008). The Supreme Court denied certification, 196 N.J. 343 (2008). In April 2009, the trial court denied defendant's second petition for PCR. In March 2013, the trial court denied defendant's third PCR petition.[5]

In 2007, defendant was released from prison and began the CSL component of his sentence. On April 20, 2007, defendant signed a form in which

[4] Although defendant raised numerous contentions in his direct appeal, it does not appear that he challenged the imposition of CSL under Megan's Law. See K.C., A-0391-03 (slip op. at 2–6).

[5] Defendant has raised other issues in collateral appeals. In July 2014, defendant filed a petition for a writ of habeas corpus, 28 U.S.C. § 2254. See [K.C.] v. Att'y Gen. of N.J., No. 14-4632, 2014 U.S. Dist. LEXIS 147887 (D. N.J. Oct. 17, 2014). Defendant also sought emergency injunctive relief, requesting an order restraining New Jersey from prosecuting an indictment charging a violation of CSL. Id. at *2. The district court administratively terminated the habeas corpus petition for failure to submit the application on the proper form and denied the motion for injunctive relief. Id. at *5.

he acknowledged certain general conditions of CSL.[6] Additionally, the form incorporated two special conditions: (1) "I am to enroll and participate in an appropriate mental health program for the treatment of sex offenders as designated by the District Parole Office and continue in said program until discharge from this condition is recommended by treatment staff and approved by the State Parole Board," and (2) "I am to refrain from the purchase, the possession and any use of alcohol." The form also included the following acknowledgements: (1) "I understand that I shall be subject to any special conditions that may be imposed by the District Parole Supervisor, or Assistant District Parole Supervisor or the designated representative of the District Parole Supervisor and which is affirmed by the appropriate Board panel"; (2) "I understand that I will be under the supervision of the Division of Parole of the State Parole Board until I am released from community supervision by the Superior Court"; and (3) "I understand that a violation of a condition specified above without good cause constitutes a crime of the fourth degree."

[6] We note that the form does not specify the length or number of visits required to complete the sex offender treatment other than to state that treatment will continue until defendant is discharged from this condition by the Parole Board upon recommendation by treatment staff.

During the fall of 2013 and through the winter of 2016, Parole Officer Christie Piemonte supervised defendant's compliance with the general and special conditions of CSL. On October 30, 2014, defendant "was directed to re-enroll into sex offender counseling" after the completion of his 2014 trial for a CSL violation occurring in 2013.[7] At defendant's 2019 trial, Officer Piemonte testified that after "his [2014] trial for a previous violation of CSL was complete[], . . . he would have came [sic] to the Red Bank office for essentially another first visit." On October 30, 2014, the Parole Board issued a Notice of Effectuation of General Condition to defendant.[8] The Notice of Effectuation explained,

> CSL/PSL General Condition #12 requires you to participate in and successfully complete a community or residential counseling or treatment program as directed by the assigned parole officer. The determination has been made to effectuate the general

[7] We note that the record is ambiguous regarding defendant's prior enrollment in sex offender treatment. It appears that defendant, at some point, was enrolled in treatment with Sharii Battle of the University of Medicine and Dentistry of New Jersey (UMDNJ) and Thomas Calabrese of the Comprehensive Center for Psychotherapy. However, he was "negatively discharged from both of those programs." The record does not contain any specific information about these treatments, including the length of time defendant was enrolled.

[8] We note that the Notice of Effectuation does not appear to contemplate the length or number of visits required to complete the sex offender treatment. See also supra note 7.

> condition in your case. Accordingly, you are required to:
>
> **Attend Sex Offender Counseling as scheduled, follow all rules, participate, and successfully complete the program.**
>
> Violating this condition of supervision may subject you to arrest and prosecution (CSL/PSL) or may result in the issuance of a parole warrant and the revocation of your parole status (PSL/MSV).

Importantly for purposes of this appeal, the Notice of Effectuation also provided an explanation for requiring defendant to attend sex offender counseling:

> Your attendance and participation in Sex Offender Counseling will assist you with methods of treatment designed around Cognitive/Behavioral theory and the philosophy of Personal Responsibility. Sex Offender Counseling will assist you with taking responsibility for your own decisions and is essential to progressing through treatment. Sex Offender Counseling will include cognitive restructuring, relapse prevention, theories of addiction, and techniques of reality therapy. Imposition of this program will also assist us in ensuring that you are abiding by your CSL conditions and will assist you with stability, thus fostering positive community adjustment and providing a public safety feature.

Officer Piemonte testified that she read the Notice of Effectuation to defendant before he reviewed the form and signed it. Defendant added the words "under duress" below his signature. The record also indicates that after the

Notice of Effectuation was provided to defendant, there was a period where he was not required to attend counseling because he had a habeas corpus appeal in federal court. See supra note 5. The requirement to attend counseling was temporarily held in abeyance while the federal habeas litigation was pending.

On September 4, 2015, Officer Piemonte notified defendant that "if his appeal is closed or administratively dismissed, he will [be] directed to immediately re-enroll into sex offender counseling with an accredited sex offender counselor within [thirty] days." Officer Piemonte testified that defendant stated he understood. On September 14, 2015, and again on October 6, 2015, Officer Piemonte provided similar reminders to defendant.

On November 4, 2015, the Parole Board's Legal Unit determined that defendant would be required to enroll in sex offender counseling within thirty days, despite the pending habeas petition, and that a failure to do so would result in a violation of CSL. Officer Piemonte testified that the Legal Unit "made a distinction regarding direct appeal and PCR . . . . [T]hey determined that if you have a PCR pending it doesn't exclude [an individual] from participating in sex offender counseling. So that information was relayed down the chain of command and was informed to [defendant]." Officer Piemonte testified that defendant seemed to understand that he had thirty days to enroll in counseling

and understood the consequences of failing to enroll. Officer Piemonte subsequently learned that defendant's habeas petition had been "administratively closed."

On November 10, 2015, Officer Piemonte visited defendant at his home. She reminded him of his obligation to find a counselor. On December 2, 2015, Officer Piemonte met with defendant at the Red Bank Parole Office; defendant told her he had not yet found a counselor. Defendant was again reminded of the timeframe for finding a counselor and the consequences for failing to do so. On December 4, 2015, Officer Piemonte saw defendant again, and he still had not found a counselor.

Officer Piemonte arranged for defendant to attend counseling provided by Shan Reeves, a counselor in Toms River, Ocean County. Defendant was given a start date of December 17, 2015. That information was relayed to defendant, and he seemed to understand. On December 18, 2015, defendant told Officer Piemonte he did not attend the counseling session because it was too far and that public transportation would get him back home too late.

Officer Piemonte reminded defendant that failure to attend counseling would constitute a violation of his CSL. Defendant told her he would provide medical documentation to show that the distance to Toms River was too far for

him to travel. He had previously reported being in the hospital and having balance issues and had provided written documentation in that instance. Officer Piemonte testified that defendant understood he could provide medical documentation to support his contention that he could not travel to Tom's River for counseling.[9]

Subsequently, defendant sent a letter to Officer Piemonte, dated December 31, 2015. In the letter, defendant asserted that the Parole Office did not have good cause to require him to participate in counseling. He argued that the Parole Office did not have an "empirical/reasonable basis" to require counseling and that attending counseling would hinder his ability to address his medical conditions. Defendant declared emphatically in the letter, "I will neither now nor ever, go to any type of so-called 'counseling.'"

On January 4, 2016, Officer Piemonte spoke with defendant over the phone and asked if he was going to provide her any medical documentation to support his contention that he could not travel to Tom's River to attend

[9] The record shows that defendant has multiple health conditions, including sciatica, arthritis in his left hip, squamous cell carcinoma, osteoarthritis in his left knee, and Meniere's disease that affects his balance and requires weekly chiropractic visits and physical therapy. At defendant's 2019 trial, he testified that his medical conditions caused him to fall four times on his bicycle in 2015. Officer Piemonte was aware of these medical conditions.

counseling. Defendant advised her that he was not going to provide any such documentation and reaffirmed that he was refusing to attend any sex offender counseling.

Officer Piemonte reminded defendant once again that failure to attend counseling would constitute a violation of CSL. She also directed defendant to report to the Red Bank office on January 6, 2016, at 9:00 am. On January 6, 2016, defendant arrived as required and Officer Piemonte reminded him yet again that failure to attend counseling is a violation. Defendant acknowledged that he did not bring medical documentation to support his contention that Tom's River was too far to travel for counseling. He also acknowledged that he had not found a counselor on his own. Defendant then reaffirmed that he was refusing to attend counseling.

Officer Piemonte administered defendant Miranda[10] warnings verbally and in writing. Defendant signed the form waiving the rights before any written statement was provided. After waiving his rights, defendant repeated his refusal to attend counseling. He dictated a statement, which Officer Piemonte wrote it down. Defendant then signed the statement below her handwriting. The statement reads, "I refuse to attend sex offender counseling as directed by Sgt.

[10] Miranda v. Arizona, 384 U.S. 436 (1966).

Borr and Lt. Ortiz on April 18, 2015; November 4, 2015; December 4, 2015; and December 9, 2015." After defendant signed the Miranda waiver and provided the statement to Officer Piemonte, Sergeant Borr charged defendant with violating CSL and placed him under arrest.

In September 2017, a grand jury returned two separate indictments charging defendant with violating CSL between November 4, 2015, and January 6, 2016, and between January 7–12, 2016. Defendant subsequently filed a motion to dismiss both indictments, contending (1) the State failed to provide evidence to the grand jury as to each element of defendant's alleged violation of CSL, and (2) the State misstated the facts and presented irrelevant and incorrect information to the grand jury. On January 11, 2019, the trial court denied defendant's motion, finding that the State had presented evidence pertaining to all of the elements of the crimes charged in the indictments. The judge also found that the State had not engaged in prosecutorial misconduct during the grand jury proceedings.

After the trial court denied the motion to dismiss, defendant waived his right to a jury trial and proceeded to a bench trial on the indictment charging a CSL violation between November 4, 2015, and January 6, 2016. The one-day bench trial was convened on April 22, 2019.

Defendant testified in his own defense, acknowledging that he did not go to sex offender counseling between November 4, 2015, and January 6, 2016. When asked why, defendant responded, "[w]ell, I know that I am innocent." Defendant also testified that he could not attend counseling because of transportation issues. He also claimed that he did try to call a few counselors but could not recall who he had called or whether he ever advised Officer Piemonte of those calls. Defendant further asserted that "parole never gave me an explanation as to how [sex offender counseling] was appropriate to expect me to go there . . . [and did not explain their] assessment of risk of future criminal activity." Defendant also testified as to his December 31, 2015 letter, explaining, "this is the United States of America, and I just don't do what anybody tells me to do, if I think there is an issue with it. The government owes me a response, an explanation. This isn't North Korea."[11]

At the close of evidence, defendant moved for a judgment of acquittal, which was denied. The trial court found defendant guilty of violating CSL, N.J.S.A. 2C:43-6.4(d). On December 16, 2019, defendant was sentenced to thirty days in the Monmouth County Correctional Institution. After sentencing,

[11] As we have noted, the Parole Board's October 30, 2014 Notice of Effectuation provide an explanation for ordering defendant to attend sex offender counseling.

defendant entered a guilty plea as to the remaining count of the indictment charging a CSL violation between January 7–12, 2016, later amended to disorderly conduct, N.J.S.A. 2C:33-2(a)(1). On January 9, 2020, defendant was sentenced on the guilty plea conviction to fines only. This appeal followed.[12]

Defendant raises the following contentions for our consideration:

> POINT I
>
> BECAUSE THE STATE FAILED TO INTRODUCE ANY EVIDENCE THAT SEX OFFENDER COUNSELING WAS REASONABLY NECESSARY TO PROTECT THE PUBLIC FROM DEFENDANT OR FOSTER HIS REHABILITATION, THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A JUDGMENT OF ACQUITTAL AFTER THE STATE'S CASE AND ENTERING A GUILTY VERDICT.
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> A. TO PROVE A VIOLATION OF THE CONDITION THAT A CSL SUPERVISEE ATTEND "APPROPRIATE COUNSELING OR TREATMENT," THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT SUCH COUNSELING WAS NECESSARY FOR THE SUPERVISEE'S REHABILITATION OR TO PROTECT THE PUBLIC FROM THE SUPERVISEE.
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> B. BECAUSE THERE WAS NO EVIDENCE THAT SEX OFFENDER COUNSELING WAS "APPROPRIATE TREATMENT OR COUNSELING" FOR [DEFENDANT], NO

[12] We note that it appears defendant is only appealing the non-jury trial verdict, not the guilty plea.

JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT [DEFENDANT] VIOLATED THIS CSL CONDITION, AND THE TRIAL COURT THUS ERRED IN DENYING [DEFENDANT'S] MOTION FOR A JUDGMENT OF ACQUITTAL PURSUANT TO RULE 3:18-1 AND ON ENTERING A GUILTY VERDICT AFTER TRIAL.

C. PROSECUTING AND PUNISHING A DEFENDANT FOR FAILING TO PARTICIPATE IN TREATMENT THAT IS NOT NECESSARY FOR THE DEFENDANT'S REHABILITATION OR TO PROTECT THE PUBLIC WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO FREE SPEECH AND DUE PROCESS.

1. PROSECUTING AND PUNISHING A DEFENDANT FOR FAILING TO PARTICIPATE IN TREATMENT THAT IS NOT NECESSARY FOR DEFENDANT'S REHABILITATION OR TO PROTECT THE PUBLIC WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO FREE SPEECH.

2. PROSECUTING AND PUNISHING DEFENDANT FOR FAILING TO PARTICIPATE IN TREATMENT THAT IS NOT NECESSARY FOR DEFENDANT'S REHABILITATION OR TO PROTECT THE PUBLIC WOULD VIOLATE STATE AND FEDERAL RIGHTS TO SUBSTANTIVE DUE PROCESS.

3. PAROLE DEPRIVED [DEFENDANT] OF PROCEDURAL DUE PROCESS BY UTTERLY FAILING TO RESPOND TO HIS ATTEMPT TO CHALLENGE THE PROPRIETY OF THE CONDITION OF SEX OFFENDER COUNSELING.

POINT II

BY FAILING TO CONSIDER PAROLE'S AFFIRMATIVE STATUTORY OBLIGATIONS TO IMPOSE ONLY REASONABLE CONDITIONS AND ASSIST SUPERVISEES IN COMPLYING WITH CONDITIONS, THE COURT ERRED IN ITS LEGAL ANALYSIS OF "GOOD CAUSE," AND THIS COURT SHOULD ACCORDINGLY VACATE THE CONVICTION AND REMAND FOR RECONSIDERATION UNDER THE CORRECT LEGAL STANDARD.

II.

The gravamen of defendant's argument on appeal is that the State failed to prove beyond a reasonable doubt that sex offender counseling was necessary for his rehabilitation or to protect the public. Defendant contends that proving the appropriateness of the counseling special condition is an implicit material element of the offense defined in N.J.S.A. 2C:43-6.4(d). We reject that contention and decline to read into the statute a material element that is not expressly codified.

The offense defined in N.J.S.A. 2C:43-6.4(d) is designed to deter unexcused violations of general and special conditions of CSL. Stated differently, this provision of the New Jersey Code of Criminal Justice (penal code), N.J.S.A. 2C:1-1 to 104-9, serves to create incentives for persons convicted of Megan's Law crimes to comply with conditions imposed by the Parole Board. To put defendant's arguments in context, we first consider the nature and purpose of CSL and how it relates to and differs from parole supervision.

In State v. Schubert, our Supreme Court explained:

> Community supervision for life has its statutory source in N.J.S.A. 2C:43–6.4, the Violent Predator Incapacitation Act. The statute is one component of a series of laws that are referred to generally as "Megan's Law . . . ." [Under the 1994 version], N.J.S.A. 2C:43–6.4(a) directed that a trial court, when imposing a sentence for certain enumerated offenses, "shall include, in addition to any sentence authorized by this Code, a special sentence of community supervision for life."
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> [212 N.J. 295, 305 (2012).]

In State v. Hester, the Court explained that under the CSL framework, "convicted sex offenders . . . are 'supervised as if on parole and subject to conditions appropriate to protect the public and foster rehabilitation." 233 N.J. 381, 387 (2018). However, unlike parole, a violation of CSL is "only punishable

as a crime." Sanchez v. N.J. State Parole Bd., 368 N.J. Super. 181, 184 (App. Div. 2004). The Parole Board has no ability to revoke parole administratively and return a contumacious defendant to prison—the remedy often pursued when a parolee willfully violates a condition of parole.[13]

In Schubert, the Court acknowledged that "[w]hile N.J.S.A. 2C:43-6.4(a) provides for community supervision for life, it does not delineate its scope." 212 N.J. at 306. Rather, the general conditions of CSL can be "found in accompanying regulations . . . N.J.A.C. 10A:71-6.11." Ibid. Those regulations also provide procedural safeguards to CSL supervisees, such as requiring written

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[13] The penal code was amended in 2003 to replace CSL with Parole Supervision for Life (PSL). L. 2003, c. 267, § 1, eff. Jan 14, 2004; N.J.S.A. 2C:43-6.4 ("Special sentence of parole supervision for life imposed on persons convicted of certain sexual offenses"). Under the revised framework for dealing with convicted sex offenders subject to Megan's Law, violation of a general or specific condition of PSL can be handled administratively by the Parole Board as with any other violations of a parole condition. Criminal prosecution under N.J.S.A. 2C:43-6.4(d) is also an available option. We emphasize in this regard that N.J.S.A. 2C:43-6.4(d) makes it an offense to violate a condition of CSL or PSL. However, as to PSL defendants, the option to pursue administrative revocation of parole may make it unnecessary to initiate a new criminal prosecution.

The revised PSL framework does not apply retroactively to persons, such as defendant, convicted of sex crimes committed before the law was amended to replace CSL. In practical effect, the revised law prospectively displaced the lifetime supervision system in effect when defendant was convicted of sexually abusing a child in 2002. Accordingly, violations of CSL conditions can only be enforced by criminal prosecution pursuant to N.J.S.A. 2C:43-6.4(d).

notice of CSL conditions and requiring the supervisee to acknowledge and sign the certificate. N.J.A.C. 10A:71-6.11(j).

Of particular importance in this appeal, N.J.A.C. 10A:71-6.11(b)(15), provides, "[t]he offender shall: . . . [p]articipate in and successfully complete an appropriate community or residential counseling or treatment program as directed by the assigned parole officer." As we have already explained, if a supervisee violates any such directive by the assigned parole officer, he or she is subject to criminal prosecution under N.J.S.A. 2C:43-6.4(d). See Sanchez, 368 N.J. Super. at 184. The core issue before us in this appeal is who decides whether a counseling or treatment program is "appropriate"—parole authorities, or a jury or judge sitting as the trier of fact in a criminal trial?

A.

We begin our analysis by acknowledging certain basic principles of statutory construction. The Supreme Court has clearly stated that "[t]he overriding goal of all statutory interpretation 'is to determine as best we can the intent of the Legislature, and to give effect to that intent.'" State v. S.B., 230 N.J. 62, 67 (2017) (quoting State v. Robinson, 217 N.J. 594, 604 (2014)). As a result, "[t]o determine the Legislature's intent, we look to the statute's language and give those terms their plain and ordinary meaning because 'the best indicator

of that intent is the plain language chosen by the Legislature[.]'" State v. J.V., 242 N.J. 432, 442–43 (2020) (first citing DiProspero v. Penn, 183 N.J. 477, 492 (2005); and then quoting Johnson v. Roselle EZ Quick, LLC, 226 N.J. 370, 386 (2016)). Accordingly, "[i]f, based on a plain and ordinary reading of the statute, the statutory terms are clear and unambiguous, then the interpretative process ends, and we 'apply the law as written.'" Id. at 443 (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). It is inappropriate for "[a] court . . . [to] rewrite a plainly[ ]written enactment of the Legislature [or to] presume that the Legislature intended something other than that expressed by way of the plain language." Ibid. (quoting O'Connell v. State, 171 N.J. 484 (2002)). Only "[i]f . . . the statutory text is ambiguous, [can courts] resort to 'extrinsic interpretative aids, including legislative history,' to determine the statute's meaning." Ibid. (quoting S.B., 230 N.J. at 68).

The plain text of N.J.S.A. 2C:43-6.4(d) provides that the State must prove beyond a reasonable doubt that "(1) that the defendant was subject to conditions imposed upon him/her . . . ; (2) that the defendant knowingly violated a condition imposed on him/her . . . ; [and] (3) that the defendant did not have good cause to violate the alleged condition." See Model Jury Charges (Criminal),

"Violation of a Condition of Parole Supervision for Life Fourth Degree (N.J.S.A. 2C:43-6.4(d))" (approved Jan. 13, 2014).[14]

Defendant argues that N.J.A.C. 10A:71-6.11(b)(15) imposes three requirements that the State must prove in order to satisfy the second element of N.J.S.A. 2C:43-6.4(d): "(a) [defendant's] parole office directed him to participate in and successfully complete Sex Offender Specific Counseling; (b) the Sex Offender Specific Counseling was an appropriate community counseling program; and (c) that [defendant] failed to participate in or successfully complete the program." (emphasis added). Defendant further argues that "appropriate" must be interpreted to mean necessary. In other words, according to defendant, an individual required to attend sex offender counseling cannot be convicted of violating that requirement unless a jury or judge sitting as a trier of fact, applying the proof-beyond-a-reasonable-doubt standard, concurs with the parole official's determination that such counseling or treatment is appropriate and necessary.

We decline to import into the text of the criminal statute the regulatory provisions that explain how parole officials decide whether and in what

[14] As we have noted, the crime defined in N.J.S.A. 2C:43-6.4(d) applies both to violations of CSL and PSL. See supra note 13. Consequently, there is no distinct model jury charge concerning a violation of a condition of CSL.

circumstances to prescribe special CSL conditions, including sex offender counseling. The plain text of N.J.S.A. 2C:43-6.4(d) is clear and unambiguous. That text does not contain the modifiers "necessary" or "appropriate" with respect to the "condition of a special sentence of community supervision for life or parole supervision for life imposed pursuant to this section." The Legislature, we emphasize, defines the material elements of criminal offenses in the text of the penal code, not by implicitly incorporating administrative regulations by reference. Cf. N.J.S.A. 2C:35-2 (defining the term "controlled dangerous substance" for use in criminal drug prosecutions by express reference to "schedules" that may be "modified by any regulations issued by the Director of the Division of Consumer Affairs in the Department of Law and Public Safety pursuant to the Director's authority as provided in section 3 of P.L. 1970, c.226 . . . ."). The Legislature, in other words, knows how to incorporate by reference regulations in the text of a criminal statute, but did not do so with respect to N.J.S.A. 2C:43-6.4(d). Accordingly, there is no need for us to look to administrative regulations to determine the material elements of the crime that

must be found by the trier of fact at trial.[15] See N.J.S.A. 2C:1-14 (defining the terms "element of an offense" and "material element of an offense").

We add that the statutory construction urged by defendant would have an anomalous effect, turning a criminal trial into a dispute over a defendant's treatment needs. We believe that the Legislature did not intend for juries in a criminal prosecution to decide such matters, especially considering that a comprehensive examination of a defendant's sex offender treatment needs would likely sweep into evidence background facts and expert opinion that might be prejudicial to a defendant at trial.[16] Rather, the jury question presented in a

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[15] We note that N.J.A.C. 10A:71-6.11(b)(15) is merely one of twenty-four conditions of CSL identified in the regulatory framework. None of these conditions supplement the material elements of N.J.S.A. 2C:43-6.4(d). We add that N.J.A.C. 10A:71-6.11(l) is the only one of those provisions that explicitly mentions N.J.S.A. 2C:43-6.4(d): "an offender who violates a condition of a special sentence of community supervision without good cause is guilty of a crime of the fourth degree." N.J.A.C. 10A:71-6.11(l).

[16] We recognize that defendant waived the right to a jury trial, ostensibly because the fact that a defendant is subject to CSL suggests a prior conviction for a sex crime—a predicate fact that could be prejudicial if presented to a jury, even with a careful limiting instruction. The point, however, is that the material elements of a crime do not vary depending on whether the case ultimately is heard by a jury or a judge sitting as trier of fact. We believe the Legislature did not intend for a jury in a criminal matter to review the exercise of discretion by parole authorities in directing a CSL supervisee to attend sex offender counseling.

prosecution under N.J.S.A. 2C:43-6.4 is whether the defendant knowingly violated a condition of CSL that had been imposed by the Parole Board or its designee, and if so, whether there was good cause to excuse any such violation. If a defendant wants to challenge a special condition of CSL, he or she may, of course, do so by appealing the agency decision administratively or by appropriate judicial review of a final agency decision. See N.J.A.C. 10A:71-6.6(b);[17] R. 2:2-3; cf. Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 247 (2008) (noting that a supervised offender that wishes to contest a matter simply needs specific notice of the claimed misconduct or improper behavior and an opportunity to respond). The time to challenge a special condition of CSL, however, is before, not during, a criminal trial for violation of that condition. A defendant is not privileged to willfully violate a special condition of CSL and then argue to a jury that it was not necessary for the supervising agency to have imposed that condition.

[17] That regulation provides in pertinent part that a parolee may "apply to the appropriate Board panel at any time for a modification or vacation of a condition of parole."

B.

We next address defendant's argument that N.J.S.A. 2C:43-6.4(d) would be unconstitutional as applied to him unless we interpret the statute to require proof that the special condition of CSL was necessary.[18] Specifically, defendant argues for the first time in this appeal that his constitutional rights to free speech and due process would be violated unless we construe the statute to require the State to prove that counseling or treatment was necessary. Defendant relies on the Supreme Court's decision in J.I. v. N.J. State Parole Bd., which remarked, "[t]o read our statutory scheme as allowing greater restrictions on the liberty of CSL offenders than are necessary would needlessly raise questions about its constitutionality." 228 N.J. 204, 227 (2017).

We accept the general proposition that, whenever possible, statutes should be construed to avoid constitutional concerns. State in the Interest of T.C., 454 N.J. Super. 189, 198 (App. Div. 2018) (quoting State v. Fortin, 198 N.J. 619, 631 (2009)) ("A court should interpret a statute 'in a manner to avoid

[18] We note that even if we agreed with defendant's as-applied constitutional argument, the proper forum to address this issue would be a motion to dismiss the indictment, see Rule 3:10-2, not to have the trier of fact—typically a jury—decide whether the special condition was properly imposed. Here, defendant did not move to dismiss the indictment on the constitutional grounds he now asserts.

constitutional infirmities,' if it 'fairly can do so.'"). In this instance, however, there is no need to perform "judicial surgery" on the statute as defendant suggests because his constitutional rights were not violated by this prosecution. See ibid.

We start by noting that defendant raises these constitutional arguments for the first time on appeal. Our case law on issues not raised at the trial level is clear: "[a]ppellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." State v. Robinson, 200 N.J. 1, 19 (2009). Therefore, "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super 542, 548 (App. Div. 1959)).

Here, there was ample opportunity for defendant to raise his newly-minted constitutional arguments in his motion to dismiss the indictment charging him with violation of N.J.S.A. 2C:43-6.4(d). However, because the constitutional

questions concerning enforcement of CSL conditions might be of public interest, we chose to address defendant's arguments on their merits.

We first address defendant's contention that "compelled participating [sic] in counseling unrelated to a legitimate penological interest implicates the First Amendment . . . ." Defendant does not contend that the First Amendment categorically prohibits the conviction and incarceration of a CSL supervisee for refusing to participate in sex offender counseling. Rather, defendant argues that "any CSL condition compelling speech through participation in sex offender counseling 'must be tailored to deterring crime, protecting the public, or rehabilitating the defendant' . . . and 'specifically tied to the individual parolee's underlying offenses.'" United States v. Holena, 906 F.3d 288, 295 (3d Cir. 2018); State v. R.K., 463 N.J. Super. 386, 418 (App. Div. 2020).

The New Jersey Supreme Court has recognized that "an individual subject to . . . CSL does not possess the 'full panoply of rights.'" J.B. v. N.J. State Parole Bd., 229 N.J. 21, 41 (2017) (quoting Jamgochian, 196 N.J. at 242). Nevertheless, "even those who possess a conditional or limited freedom have a right to protection from arbitrary government action." Ibid.

We also acknowledge that while the U.S. Constitution provides "strong protections to our rights of free speech," the New Jersey Constitution "provides

even broader protections than the familiar ones found in its federal counterpart." Borough of Sayreville v. 35 Club, LLC, 208 N.J. 491, 494 (2012). Courts in New Jersey may nonetheless rely on "federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264 (1998) (quoting Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998)).

It is axiomatic that "[t]he First Amendment, [which is] applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, [courts'] precedent[] distinguish between content-based and content-neutral regulations of speech." Nat'l Inst. of Fam. v. Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based . . . . By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.
>
> [Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 643 (1994) (citations omitted).]

Content-based speech is subject to strict scrutiny—the most rigorous level of judicial review. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163–64 (2015). Conversely, content-neutral speech is subject to what is characterized as

intermediate scrutiny. Turner Broad. Sys., 512 U.S. at 642 ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."). In the present matter, we deem the appropriate level of scrutiny to be intermediate rather than strict because the applicable statute and regulations are content-neutral; no protected speech appears to be favored or disfavored on the basis of views or ideas.[19] Id. at 643.

"In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (quoting McCullen v. Coakley, 573 U.S. 464, 486 (2014)). This means that "the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Ibid. This is the case even when a condition is placed upon supervised release. See Holena, 906 F.3d at 294. "[A] condition is 'not "narrowly tailored" if it restricts First

[19] We wish to make clear that defendant does not argue, for example, that participation in sex offender treatment would chill him from advocating for less restrictive or severe criminal laws concerning an adult's sexual penetration or contact with minors. Defendant is not advocating ideas and is not claiming that he is being punished for doing so.

Amendment freedoms without any resulting benefit to public safety.'" Ibid. (quoting United States v. Loy, 237 F.3d 251, 266 (3d Cir. 2001)).

It is beyond dispute that protecting children from sexual abuse is an important governmental interest. This is especially so in the context of CSL, which is predicated on the State's interest "to protect the public from recidivism by defendants convicted of serious sexual offenses." J.B., 229 N.J. at 41 (citing Jamgochian, 196 N.J. at 237–38). The United States Supreme Court has expressly recognized that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people, . . . and that a legislature 'may pass valid laws to protect children' and other sexual assault victims." Packingham, 137 S. Ct. at 1736 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 244–45 (2002)). However, "the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.'" Id. at 1736 (quoting Stanley v. Georgia, 394 U.S. 557, 563 (1969)).

Applying these foundational principles to the matter before us, we conclude that the CSL condition directing defendant to attend sex offender counseling is "narrowly tailored to serve a significant governmental interest," Packingham, 137 S. Ct. at 1736, and thus does not violate defendant's First

Amendment free speech rights. First, as we have already noted, the government has a legitimate interest in protecting minors from sexual abuse, especially by convicted sex offenders subject to CSL. J.B., 229 N.J. at 41. Furthermore, courts have recognized that counseling or treatment for sex offenders can serve the public interest by reducing recidivism. See, e.g., McKune v. Lile, 536 U.S. 24, 68 (2002) (Stevens, J., dissenting) (noting that "treatment programs can reduce the risk of recidivism by sex offenders"); In re Civil Commitment of W.X.C., 204 N.J. 179, 214 n.7 (2010) (Albin, J., dissenting) (noting that certain "cognitive-behavioral treatment and relapse prevention [programs] intended to minimize future sexually harmful behavior . . . are associated with a reduction in sexual recidivism"). The combination of protecting children and aiding offenders through a rehabilitation process clearly outweighs any potential burden on speech that may be experienced through the sex offender counseling process. See also J.B., 229 N.J. at 41 (noting that "an individual subject to . . . CSL does not possess the 'full panoply of rights'").

In sum, we are satisfied that the requirement to attend sex offender counseling does not, as applied to defendant, violate his free speech rights for the reasons that were explained to him in the October 30, 2014 Notification of Effectuation. We reproduce that explanation again for emphasis:

> Your attendance and participation in Sex Offender Counseling will assist you with methods of treatment designed around Cognitive/Behavioral theory and the philosophy of Personal Responsibility. Sex Offender Counseling will assist you with taking responsibility for your own decisions and is essential to progressing through treatment. Sex Offender Counseling will include cognitive restructuring, relapse prevention, theories of addiction, and techniques of reality therapy. Imposition of this program will also assist us in ensuring that you are abiding by your CSL conditions and will assist you with stability, thus fostering positive community adjustment and providing a public safety feature.

We add that defendant's adamant belief that he does not need sex offender counseling or treatment misses the point. The imposition of this CSL condition was not just for his benefit, but rather for the benefit of society. The fact that defendant was not found to be a "repetitive and compulsive" sex offender when evaluated following his 2002 conviction explains why he was not ordered to serve the custodial portion of his sentence at the Adult Diagnostic and Treatment Center. See N.J.S.A. 2C:47-3(b) and N.J.A.C. 10A:71-6.11(e). That psychological evaluation and finding does not mean that there would be no benefit in his participation in a community-based counseling program. Cf. State v. Harris, 466 N.J. Super. 502, 540–41 (App. Div. 2021) (noting the value of legislation that does not allow convicted addicts in denial to decide whether they need to participate in court-ordered substance abuse treatment). We thus

conclude that the decision by parole officials to require him to submit to sex offender counseling is not "arbitrary government action," J.B., 229 N.J. at 41, and does not impermissibly infringe upon defendant's First Amendment rights.

For substantially similar reasons, we also reject defendant's argument that the State was required to prove at trial that sex offender counseling is necessary to avoid infringing upon his substantive due process rights. In State in Interest of C.K., our Supreme Court held,

> The guarantee of substantive due process requires that a statute reasonably relate to a legitimate legislative purpose and not impose arbitrary or discriminatory burdens on a class of individuals. Although all laws are presumed to be constitutional, no law can survive scrutiny under Article I, Paragraph 1 unless it has a rational basis in furthering some legitimate state interest. Therefore, a statute that bears no rational relationship to a legitimate government goal and that arbitrarily deprives a person of a liberty interest or the right to pursue happiness is unconstitutional.
>
> [233 N.J. 44, 73 (2018).]

In Doe v. Poritz, the Court addressed the constitutionality of the registration and community notification provisions of Megan's Law. 142 N.J. 1, 12 (1995). In sustaining those provisions from constitutional challenge, the Court recognized "that '[p]ublic safety is unquestionably within the Legislature's

powers and protecting the public from recidivistic sex offenders is a legitimate state interest.'" Id. at 93 (alteration in original).

The U.S. Supreme Court, moreover, has issued rulings that recognize limitations on the constitutional rights of convicted sex offenders. In McKune, for example, a sex offender refused to participate in a treatment program that required written admission of responsibility and disclosure of all prior sexual activities. 536 U.S. at 31. The Supreme Court rejected his argument that attending such treatment would violate his Fifth Amendment right against self-incrimination. Id. at 48. The Court opined that "[s]ex offenders are serious threats" and as a result, "states have a vital interest in rehabilitating convicted sex offenders" in order to avoid recidivism. Id. at 33–34.

As we explained in our discussion of defendant's First Amendment contentions, requiring a convicted sex offender to submit to community-based counseling is rational in order to further the State's interest in protecting the public from recidivism and aiding offenders in rehabilitation.

C.

We turn next to defendant's argument that the trial court erred in denying his motion for judgment of acquittal. In State v. Reyes, the Court explained

> 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.
>
> [50 N.J. 454, 458–59 (1967); see also State v. Martin, 119 N.J. 2, 8 (1990) (emphasis in original) (quoting State v. Brown, 80 N.J. 587, 592 (1979)) ("In assessing the sufficiency of the evidence, the relevant inquiry is whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'").]

The same standard applies to a motion for a judgment of acquittal notwithstanding the verdict. State v. Kluber, 130 N.J. Super. 336, 341–42 (App. Div. 1974). A reviewing court, moreover, must apply the same standard as the trial court. State v. Fuqua, 234 N.J. 583, 590 (2018) (citing State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990)).

When considering whether to grant a judgment of acquittal, "the court 'is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State' . . . and 'no consideration may be given to any evidence or inferences from the defendant's case.'" State v. Zembreski, 445 N.J. Super. 412, 431 (App. Div. 2016) (first quoting Kluber, 130 N.J. Super. at 342; and then quoting Reyes, 50 N.J. at 459).

Applying this standard to the facts presented at trial, we do not hesitate to conclude that defendant's motion for acquittal was properly denied. The trial court applied the appropriate standard and carefully reviewed the evidence pertaining to the elements of the crime.

We add that the trial court properly considered whether there was good cause to excuse defendant's refusal to attend counseling.[20] The model jury charge defines "good cause" as " a substantial reason that affords a legal excuse for the failure to abide by the condition." Model Jury Charge (Criminal), "Violation of a Condition of Parole Supervision for Life Fourth Degree (N.J.S.A. 2C:43-6.4(d))" (approved Jan 13, 2014). An annotation to the model jury charge explains:

> The statute does not define good cause. It has been noted that "it is impossible to lay down a universal definition of good cause for disclosure and inspection,

[20] Defendant argues that we should review the trial court's analysis of good cause de novo because he is challenging the legal standard that was applied by the trial court. Defendant argues that the trial court should have applied the following standard: "parole is statutorily mandated to impose only reasonable conditions and to assist parolees in complying with those conditions, where complying with a condition would impose an unreasonable burden on a parolee, the parolee has good cause for violating the condition." In practical effect, that contention is another way of expressing defendant's principal argument that it is for the trier of fact to determine whether the CSL special condition alleged to have been violated was necessary and proper and does not violate a defendant's constitutional rights.

> or an all-inclusive and definitive catalogue of all of the circumstances to be considered by a court in determining whether there is good cause." Ullmann v. Hartford Fire Ins. Co., 87 N.J. Super. 409, 414 (App. Div. 1965). Since the statute does not define good cause, the definition in this Model Jury Charge is adapted from the term's use in cases involving the opening of a default which would appear to be analogous to the conduct being proscribed by the alleged crime as it relates to a party's actions as opposed to the attorney's actions. See Nemeth v. Otis Elevator Co., 55 N.J. Super. 493, 497 (App. Div. 1959) ("Whenever the words 'good cause' appear in statutes or rules relating to the opening of defaults they mean (in the absence of other modifying or controlling words) a substantial reason that affords legal excuse for the default.").
>
> [Model Jury Charge (Criminal), "Violation of a Condition of Parole Supervision for Life Fourth Degree (N.J.S.A. 2C:43-6.4(d))" (approved Jan 13, 2014), n. 17.]

The trial court carefully considered defendant's testimony and arguments. The court acknowledged the fact that attending counseling in Toms River would result in an eight-hour round trip because defendant would need to take public transportation. The court also recognized, however, that the only reason defendant was scheduled for a counseling appointment in Toms River is because he did not supply parole with other options after being afforded an opportunity to find a closer approved counselor. Additionally, defendant had previously been "negatively discharged" by counselors in Monmouth County, which is what

prompted parole to look elsewhere for approved counselors. See supra note 7. The record does not suggest that defendant ever asked for assistance from parole in traveling to the appointment in Toms River. Nor did defendant provide medical documentation to support his contention that Toms River was too far to travel.

Even accepting for the sake of argument that we should review the trial court's decision de novo,[21] see supra note 20, we concur with the trial court's conclusion that there was no good cause to excuse defendant's failure to comply with the special condition of CSL to attend sex offender counseling.

III.

We need only briefly address defendant's contention that his procedural due process rights were violated. Specifically, defendant claims that "(1) there is no evidence [he] was informed of this right [to challenge the CSL special condition] or how to go about it; and (2) [his] December 31, 2015 letter to

[21] Our own interpretation of the facts presented at trial convinces us that defendant had no intention of ever attending sex offender counseling, regardless of commuting distance, because he was adamant that such counseling was unnecessary. We do not believe that defendant's firm and steadfast opinion that counseling is unnecessary provides good cause to violate this special condition of CSL.

Piemonte did challenge the counseling condition, but there is no evidence in the record that the letter received any response." (emphasis in original).

Due process is satisfied by providing written notice to the CSL offender of the proposed condition, and allowing the CSL offender the opportunity to respond to the recommendation by letter with supporting attachments, such as certifications or affidavits. J.I., 228 N.J. at 233; Jamgochian, 196 N.J. at 247. To merit a hearing, the CSL offender must first deny the allegations or contest the conclusions to be drawn from the rationale supporting the condition. Jamgochian, 196 N.J. at 247.

The record shows that defendant was given written notice of the condition to attend sex offender counseling and could have challenged it. In view of the extensive history of litigation following defendant's conviction for sexual abuse of a child, we deem it implausible that defendant was not aware of the process for challenging that condition. Instead, he chose not to comply with it.

To the extent we have not specifically addressed them, any remaining contentions raised by defendant lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

Affirmed.