SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0087-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARIEN E. GREENE, a/k/a STICKS GREEN, DARIEN D. GREENE, STICKS GREENE, DARIAN GREENE, and STYZ GREEN,

Defendant-Appellant.

Submitted February 28, 2022 – Decided June 7, 2022

Before Judges Messano and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 16-05-0328.

Joseph E. Krakora, Public Defender, attorney for appellant (Michele E. Friedman, Assistant Deputy Public Defender, of counsel and on the brief).

Scott A. Coffina, Burlington County Prosecutor, attorney for respondent (Alexis R. Agre, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Darien E. Greene appeals from his convictions and sentence following a bench trial. We affirm the convictions but vacate the sentence and remand for resentencing.

I.

In May 2016, a Burlington County Grand Jury indicted defendant, charging him with second-degree disarming a law enforcement officer, N.J.S.A. 2C:12-11(a) (count one), third-degree resisting arrest by using or threatening to use physical force or violence against an officer or other person while resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a) (count two), and fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2) (count three).

Defendant was tried in December 2016. Immediately before the trial commenced, defense counsel alerted the court that defendant wished to assert the affirmative defense of intoxication. The State objected, arguing defendant should be barred from advancing this defense because he did not comply with

Rule 3:12-1[1] and because "the [S]tate . . . ha[d] no way of knowing anything regarding the intoxication level . . . defendant had at" the time of his arrest. When the judge discussed the possibility of granting the State an adjournment to give it time to analyze defendant's medical records and determine if it wanted to secure an expert, the State made clear it already had defendant's medical records and likely would not secure an expert to address defendant's intoxication level at the time of his arrest if the matter was postponed. It also objected to delaying the trial, despite defendant's violation of Rule 3:12-1. Following

[1] This Rule provides, in part:

> A defendant shall serve written notice on the prosecutor if the defendant intends to rely on any of the following sections of the Code of Criminal Justice: . . . Intoxication, 2C:2-8(d)[.]
>
> No later than seven days before the Initial Case Disposition Conference . . . the defendant shall serve on the prosecutor a notice of intention to claim any of the defenses listed herein; and if the defendant requests or has received discovery . . . the defendant shall . . . furnish the prosecutor with discovery pertaining to such [a] defense[] at the time the notice is served.
>
> . . . . If a party fails to comply with this Rule, the court may take such action as the interest of justice requires.

argument on this issue, the judge granted defendant's request to advance the intoxication defense.

Next, the judge questioned counsel about opening statements, starting with the assistant prosecutor. The following exchange occurred:

> THE COURT: [F]irst of all, do you want to make an opening statement, sir?
>
> ASSISTANT PROSECUTOR: No, Your Honor. The [S]tate waives opening statement.
>
> THE COURT: [Defense counsel], would you like to make an opening statement?
>
> DEFENSE COUNSEL: Your Honor, if I do open[,] I'm going to reserve that right until if and when . . . the defendant has a case-in-chief.

Ultimately, neither attorney provided an opening statement.

The State produced Lumberton Township Police Corporal Joseph McHugh and Evesham Township Police Officer Patrick Hughes as its witnesses at trial.[2] It also played footage from Corporal McHugh's motor vehicle recorder (MVR) to show what occurred on the night of defendant's arrest. After the State concluded its case-in-chief, defendant testified on his own behalf.

[2] Officer Hughes was employed by the Lumberton Township Police Department at the time of defendant's arrest.

According to the police officers' testimony, on November 29, 2015, at approximately 7:30 p.m., they responded to a disturbance call about a male "acting up" at a local residential development. Upon their arrival at the caller's home, Officer Hughes knocked on the door but received no response. The officers heard a female yell, "down here," from a short distance away, so they drove toward her and found her with defendant. Once the officers exited their vehicles and approached defendant, he walked away. Corporal McHugh told defendant to stop, but defendant continued walking away from the officers. As he distanced himself from the police, he broke a window in front of a nearby townhome, shattering it with his hands.

Seeing this, Corporal McHugh immediately advised defendant he was under arrest and directed him to stop, but defendant "took off running." The officers chased him through the development and repeated commands for him to stop. Corporal McHugh also threatened to tase defendant if he did not stop.

At some point during the chase, defendant stumbled, and Officer Hughes was able to tackle him to the ground. Corporal McHugh joined his partner and attempted to assist him in handcuffing defendant, but defendant physically resisted and "pull[ed] away from [Corporal McHugh] constantly." The officers gave defendant "verbal commands the entire time" he was on the ground,

advising him to stop resisting and telling him he was under arrest, but defendant "[c]ontinued to fight with his hands . . . [and] was actually pushing up when he could." Defendant "tried to push [the officers] off of him, and . . . was kicking with his feet as well."

As the struggle continued, Corporal McHugh heard Officer Hughes shout, "stop grabbing my gun." Officer Hughes "could feel [defendant's] . . . fingers and . . . thumb around [his] firearm." When Officer Hughes removed defendant's grip from the gun, Corporal McHugh told his partner to disengage so he could tase defendant.

Although Corporal McHugh gave defendant another chance to voluntarily surrender, defendant got up and reengaged with the officers. Accordingly, Corporal McHugh shot his taser at defendant. Only one prong of the taser attached, so it failed to "deploy the proper electric charge" to defendant. Still, the officers managed to subdue and handcuff defendant. Following his arrest, defendant readily admitted to taking PCP. He was taken by ambulance to the hospital, accompanied by Officer Hughes.

During defendant's testimony, he stated that at the time of his arrest, he was a student at Rowan College and lived in a group home for individuals with mental health issues. He testified he suffered from bipolar disorder, depression,

and other mental health conditions, and had stopped taking his prescribed medication shortly before the November 29 incident.

Additionally, defendant stated that on the evening of November 29, he was with friends in Philadelphia and "self-medicated" with alcohol and marijuana laced with PCP. When he arrived home, he argued with his girlfriend. He recalled going outside and yelling because he "just wanted to get it out, the stress, tension, whatever." He screamed, "God's not dead or something like that," and saw "somebody c[o]me out [of] the woods." He remembered he "ran to the neighbor's house to ask for help" and knocked on what he believed to be their door — which turned out to be a window — "and then . . . the glass broke." Defendant denied trying to break the window.

Defendant stated he "took off running," thinking someone was trying to grab him. He testified he was unable to see officers were chasing him because he had been "staring into . . . the street lamp[]post," but recalled the person chasing him was "wearing all black."

According to defendant, when he fell to the ground, "someone was on top of [him] and [he] was trying to get away, . . . trying to push off [and] push back, just get away . . . [b]ecause it just felt wrong[.]" He denied hearing Corporal McHugh or Officer Hughes identify themselves as police officers, and claimed

he "didn't hear them screaming nothing at" him, because he "was screaming [him]self." Additionally, defendant stated he had no recollection of grabbing Officer Hughes' gun, being handcuffed, or admitting to ingesting PCP. But on cross-examination, he admitted he knew he smoked marijuana laced with PCP that evening and continued smoking it anyway.

At the conclusion of the bench trial, the judge briefly recessed before rendering his decision. In delivering his opinion, the judge initially credited the testimony of the officers, noting

> they did not testify with an intent to deceive the court. They had good recollection of the facts. Their testimony was . . . primarily consistent, not only with each other but with the MVR which was viewed in court.
>
> . . . . So I find both of their testimonies credible and I do accept them.

As to defendant, the judge stated:

> [T]he court does not find Mr. Greene's testimony to be credible for a variety of reasons. The court, in considering the credibility of the witness, can look at the witness'[s] interest in the outcome of the trial. And clearly Mr. Greene has an interest in the outcome of the trial. . . .
>
> . . . . Mr. Greene's power of discernment, his judgment, his understanding, his ability to reason, observe, recollect and relate are in question because of the

> ingestion [of PCP] and marijuana and perhaps other substances. His testimony was internally inconsistent.
>
> It appeared . . . Mr. Greene was testifying in a manner to benefit himself in that he had very poor recollection of some facts but very good recollection of other facts. . . . [I]t did appear . . . Mr. Greene's recollection when it came to anything that could incriminate him, that he had no recollection, but on anything that could exculpate him, he had a good recollection. Such as, ["]I didn't intentionally smash a window, I recall I was knocking on the door. I didn't know they were police officers; they were dressed in black. I did not know they were trying to arrest me. I did not reach for their gun.["]
>
> . . . . He doesn't recall anything about hallucinating, things of that nature, or telling the medical professionals that he was hallucinating. So[,] his testimony was kind of all over the place and he was internally inconsistent, and the fact that he had such poor recall of some of the pertinent facts but good recall of others causes this court not to accept his testimony as true. So[,] I give it very little weight.

The judge found the November 29 incident occurred as described by Corporal McHugh and Officer Hughes. The judge then referred to the elements the State was required to prove on count one and found the State "met the elements of disarming a law enforcement officer[,]" noting defendant "did exercise unlawful control of Patrolman Hughes' weapon" without "the permission or authority to remove the weapon[.]"

Next, the judge determined "[t]he State . . . also met the elements of count two, resisting arrest." He explained:

> A person is guilty if he, by flight, purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest. And so in order to convict defendant of this charge the State must prove that (1) in this case, Corporal McHugh and Patrolman Hughes were law enforcement officers, (2) that they were effecting an arrest, (3) that defendant knew or had reason to know that the officers . . . were law enforcement officers effecting an arrest, and (4) that defendant purposely prevented or attempted to prevent [either officer] from effecting the arrest.
>
> Element number one is not in question. Both [officers] testified at the time they were officers with the Lumberton Police Department. McHugh was a Corporal and Hughes was a patrolman. Number two, that they were effecting an arrest. When they pulled up to the scene, they tried to engage with the defendant and the defendant walks away, he smashes a window. He is then told to get onto the ground. He fails to do so. In fact, defendant tells the officers, ["]fuck you,["] and then he decides to run into the woods, he's given chase. Then subsequent to that, once he's tackled they try to handcuff him at that time and he further resists arrest.
>
> Number three is that defendant knew or had reason to know that either [officer] was a law enforcement officer effecting an arrest. Defendant says that he did not know that they were law enforcement, that he was looking into a street light, that he really didn't see, that they came from a wooded area, and that they were dressed in black. But the [MVR] shows that at the time the officers pulled up[,] defendant was not looking into a street light. His head was down. The

officers pull up in two marked police cars and they get out and they have their uniforms on with badges, the uniforms are black. But defendant should have known or had reason to know that they were law enforcement officers. And when he was given the command to get down on the ground after smashing a window, he should have reasonably known that they were trying to effect an arrest. And certainly when they were trying to handcuff him he knew they were trying to effect an arrest.

And finally, the fourth element is that the defendant purposely prevented or attempted to prevent the officers from effecting their arrest. And that's not really debatable. The initial time the defendant runs away. And then subsequent to that he resists arrest. He struggled — the two officers had to struggle with defendant to get him under control, and at some point he again reaches for the gun. All of that was an attempt to resist arrest, so the State has made out the elements of the resisting arrest by flight.

[(Emphases added).]

The judge also rejected defendant's intoxication defense, stating:

The court does not find Mr. Greene . . . was so prostrated as to deprive him of his will to act and ability to reason, rendering him incapable of acting and thus preventing him from committing the crimes charge[d] . . . .

[T]he only evidence of intoxication in this case really comes from the defendant himself. . . . There's some medical documentation, not entered into evidence because it was [a] hearsay document, which references defendant's consumption of PCP. . . . [T]he court . . .

> can[]not consider that . . . medical documentation as it was not properly presented.
>
> . . . .
>
> But . . . the issue still becomes was he so intoxicated as to render him incapable of acting purposely and knowingly. And I don't make that finding based on his testimony, based on . . . what the court would call selective failure to recollect other facts, based on the officers' observations and testimony[.]
>
> . . . .
>
> I find the defendant guilty under count one, disarming a law enforcement officer, and count two, resisting arrest by flight. Those are my findings.

Although the judge's findings demonstrate he confused count two, third-degree resisting arrest, with count three, fourth-degree resisting arrest by flight, neither attorney corrected the judge, despite having the opportunity to do so before the hearing concluded. The following colloquy then occurred:

> THE COURT: Anything else from the State?
>
> ASSISTANT PROSECUTOR: No, Your Honor. Thank you.
>
> THE COURT: Anything else from the defense?
>
> DEFENSE COUNSEL: No, Judge, thank you.
>
> THE COURT: Counsel, thank you very much for the presentation of the case. There's two counts. I found [defendant] guilty of counts one and two.

THE CLERK: And the third count?

THE COURT: There's no third count.

ASSISTANT PROSECUTOR: There was a fourth [-]degree resisting but it should merge.

THE COURT: There's a fourth[-]degree resisting. I found the elements of the third, so the fourth ha[s] been met; it will be merged. So[,] I guess technically he's found guilty of all three. . . .

THE CLERK: They're merged; okay, thank you.

Several months later, at sentencing, the judge imposed a six-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on count one.[3] Also, instead of merging counts two and three as anticipated at the conclusion of the trial, the judge sentenced defendant to a concurrent four-year term on count two, and an eighteen-month prison term on count three.

II.

Defendant now raises the following arguments for our consideration:

POINT I

THE TRIAL COURT ERRED BY FAILING TO DISMISS THE CHARGES SUA SPONTE WHEN THE STATE VIOLATED RULE 1:7-1(a), WHICH

[3] The judgment of conviction (JOC) was later amended to remove the mandatory parole ineligibility period on the disarming charge because it is not a NERA offense; the JOC also was subsequently amended to correct defendant's jail credits.

MANDATES THAT THE STATE MAKES AN OPENING STATEMENT. (Not Raised Below).

POINT II

THE COURT'S BASIS FOR FINDING THE POLICE OFFICERS CREDIBLE AND FOR DISCOUNTING THE DEFENSE WITNESS'S ACCOUNT OF THE FACTS WAS CLEARLY ERRONEOUS.

POINT III

COUNT TWO MUST BE VACATED BECAUSE THE TRIAL COURT, AS FACTFINDER, FAILED TO FIND EACH ELEMENT BEYOND A REASONABLE DOUBT. ALTERNATIVELY, THIS COURT SHOULD MERGE COUNT TWO INTO COUNT ONE. IN ADDITION, COUNT THREE SHOULD BE MERGED INTO COUNT ONE.

POINT IV

THE MATTER SHOULD BE REMANDED FOR RESENTENCING FOR CLARIFICATION OF WHETHER THE COURT FOUND MITIGATING FACTOR ELEVEN AND HOW, IF AT ALL, IT WEIGHED THIS MITIGATOR.

Having reviewed the record and considered the appropriate legal principles, we are satisfied the contention raised in Point II is completely lacking in merit. R. 2:11-3(e)(1)(E). Thus, we confine our analysis to the remaining arguments.

Regarding Point I, we note Rule 1:7-1(a) requires the State in a criminal action to make an opening statement, unless otherwise provided in a pretrial order. Opening statements on behalf of a defendant, however, are discretionary. R. 1:7-1(a); see also State v. Williams, 232 N.J. Super. 414, 418 (App. Div. 1989). "[T]he prosecutor's opening should be part of orderly trial procedure provided for the benefit of the jury, not the defendant." State v. Tilghman, 385 N.J. Super. 45, 56 n.1 (App. Div.), rev'd in part on other grounds, 188 N.J. 269 (2006) (quoting State v. Portock, 205 N.J. Super. 499, 505 (App. Div. 1985)).

Here, defense counsel lodged no objection when the judge made a pretrial determination to accept the State's waiver of its opening argument. Thus, we review defendant's contention about the waiver for plain error. R. 2:10-2. Under that standard, we are not convinced the judge's decision to allow the State to proceed without an opening statement was "clearly capable of producing an unjust result[.]" Ibid.

We reach this conclusion, in part, because no jury was deprived of an opening statement to assist in its fact-finding mission. Moreover, we are satisfied any intended benefits of the State's opening statement were not compromised in this case. In fact, defendant makes no showing as to how he was prejudiced by the lack of an opening statement from the State. Further, we

discern no plain error given the overwhelming evidence the State produced against defendant.

Regarding Point III, defendant contends we should vacate his conviction for third-degree resisting arrest because the judge failed to find defendant used or threatened to use physical force or violence against an officer or other person while resisting arrest. Alternatively, defendant argues we should remand this matter with instructions to the trial court to merge counts one and two because "the underlying facts of [the third-degree] offense were part-and-parcel of the very same conduct from which the trial court derived its findings under [c]ount [o]ne." Additionally, defendant argues the third- and fourth-degree offenses for resisting arrest should have merged at sentencing, given "the offenses were part of a larger episode that occurred on the evening in question" and the judge stated at the end of the trial these offenses would merge. We are not convinced.

Pursuant to N.J.S.A. 2C:12-11(a), a person is guilty of second-degree disarming of law enforcement when that person "knowingly takes or attempts to exercise unlawful control over a firearm or other weapon in the possession of a law enforcement . . . officer when that officer is acting in the performance of his [or her] duties[.]" Under N.J.S.A. 2C:29-2(a)(3)(a), a defendant is guilty of resisting arrest in the third-degree if he or she "purposely prevents or attempts

to prevent a law enforcement officer from effecting an arrest" and in the process "[u]ses or threatens to use physical force or violence against the law enforcement officer or another." And a defendant is guilty of fourth-degree resisting arrest if he or she "by flight, purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest." N.J.S.A. 2C:29-2(a)(2).

Here, the judge properly identified the requisite elements of second-degree disarming a law enforcement officer (count one), and fourth-degree resisting arrest (count three), before finding the State met its burden in proving these elements beyond a reasonable doubt. Although the judge inadvertently referred to the fourth-degree offense as "count two," this mistake is of no moment because his findings regarding these two counts are amply supported by the credible, competent evidence adduced at trial.

Moreover, we are convinced a fair reading of the record shows the judge made sufficient findings to support a conviction for the offense of third-degree resisting arrest. As the judge determined,

> defendant should have known or had reason to know that [Corporal McHugh and Officer Hughes] were law enforcement officers. And when he was given the command to get down on the ground . . . he should have reasonably known that they were trying to effect an arrest. And certainly when they were trying to handcuff him he knew they were trying to effect an arrest. And . . . that . . . defendant purposely prevented or

> attempted to prevent the officers from effecting their arrest[,] . . . that's not really debatable. The initial time the defendant runs away. And then subsequent to that he resists arrest. He struggled — the two officers had to struggle with defendant to get him under control, and at some point he again reaches for the gun. All of that was an attempt to resist arrest[.]
>
> [(Emphasis added).]

The judge's findings relative to the third-degree offense are well supported. Indeed, the officers testified that after Officer Hughes tackled defendant to the ground, defendant kicked and moved his hands, and grabbed Officer Hughes' gun while the officers struggled to handcuff him. Further, defendant testified that during the encounter "someone was on top of [him]" and he was "trying to push off [and] push back, just get away." Thus, we perceive no basis to vacate the conviction on count two.

Likewise, we are not persuaded the judge erred in failing to merge count two into count one or that count three should have merged into count one.

"The doctrine of merger is based on the concept that 'an accused [who] committed only one offense . . . cannot be punished as if for two.'" State v. Tate, 216 N.J. 300, 302 (2013) (alteration in original) (quoting State v. Davis, 68 N.J. 69, 77 (1975)). However, "[w]hen the same conduct of a defendant may

establish the commission of more than one offense, the defendant may be prosecuted for each such offense." N.J.S.A. 2C:1-8(a).

N.J.S.A. 2C:1-8(d) requires merger when one offense is established by proof of the same or less than all the facts required to establish the commission of another offense charged. See State v. Mirault, 92 N.J. 492, 502-03 (1983). It also is well established that "a separate sentence should not be imposed on the count which must merge with another offense." State v. Trotman, 366 N.J. Super. 226, 237 (App. Div. 2004).

The standard for merger of offenses as required under N.J.S.A. 2C:1-8 has been characterized as "mechanical." State v. Truglia, 97 N.J. 513, 520 (1984). Therefore, courts are to utilize the "preferred and more flexible standard" articulated in Davis when considering merger. State v. Diaz, 144 N.J. 628, 637 (1996); see also Tate, 216 N.J. at 307. "We must first determine whether the [L]egislature has in fact undertaken to create separate offenses." Davis, 68 N.J. at 77-78. After determining the Legislature's intent, the next step is to determine whether a defendant, facing separate charges, "can of necessity be convicted of but one crime by application of one of the 'offense-defining' tests for 'sameness.'" Id. at 81.

To resolve that question, "[a]s a practical matter [we may] employ a certain flexibility of approach to the inquiry of whether separate offenses have been established." Ibid. This approach

> would entail analysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.
>
> [Ibid.]

With these guiding principles in mind, merger of any of the defendant's offenses would have been improper. Here, each crime evolved from different conduct throughout the incident. Moreover, each offense is comprised of distinct factual elements. For example, the offense of third-degree resisting arrest requires the State to prove defendant used or threatened to use physical force or violence against an officer or other person while resisting arrest; the other two offenses do not. Similarly, only the fourth-degree offense implicates the element of flight. Further, the State was not required to prove defendant resisted arrest to establish the elements of the second-degree offense of disarming a law enforcement officer; instead, it had to establish defendant knowingly took or attempted "to exercise unlawful control over a firearm or

other weapon in the possession of a law enforcement . . . officer when that officer [was] acting in the performance of his [or her] duties[.]" Thus, we are satisfied the judge committed no error in declining to merge any of defendant's offenses at sentencing.

Regarding Point IV, defendant argues he is entitled to a remand for resentencing "because it is unclear whether the [trial] court found mitigating factor eleven, and if so, whether [it] properly weighted this mitigating factor." We agree.

Our review of a trial court's sentencing is "relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We will not disturb a sentence "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

"To facilitate meaningful appellate review, trial judges must explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 65 (2014)

(citing Fuentes, 217 N.J. at 74; R. 3:21-4(g) [subsequently amended and now R. 3:21-4(h)] (requiring the judge to state reasons for imposing the sentence, including the factual basis for finding aggravating or mitigating factors affecting the sentence)). Failure to give complete and specific reasons for the sentence imposed on defendant may result in a remand for the judge to provide amended reasons. State v. Martelli, 201 N.J. Super. 378, 384-85 (App. Div. 1985).

Here, the judge found aggravating factors three (risk of reoffense), six (criminal history), and nine (deterrence), N.J.S.A. 2C:44-1(a)(3), (6), and (9). In response to defense counsel's arguments for mitigating factors four, seven, nine and eleven, N.J.S.A. 2C:44-1(b) (4), (7), (9) and (11), the judge stated:

> [Mitigating factor f]our speaks to that there were substantial grounds tending to excuse or justify the defendant's conduct, both failing to establish defense, and that's based on defendant's voluntary intoxication. I'll find that particular factor[. W]ith respect to [m]itigating [f]actor [seven], that the defendant has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time prior to the commission of the present offense. I do not find an adequate factual basis to support that mitigating factor.
>
> Mitigating [f]actor [nine] is present, the character and attitude of the defendant indicates that he's unlikely to commit another offense. And [eleven], the [c]ourt will now find [eleven], that the imprisonment of the defendant would entail excessive hardship. So[,] I have found four, I have found nine, I've given them both

> moderate weight. In doing so, the aggravating factors [are] found to slightly outweigh the mitigating factors on a qualitative as well as a quantitative basis.
>
> [(Emphasis added).]

After making these determinations, the judge made no further findings regarding mitigating factor eleven, nor did he comment on what weight he attributed to this factor if he found it was applicable. Moreover, neither the JOC nor any amended JOC refers to this mitigating factor. Under these circumstances, we cannot discern whether the judge intended to find this factor and what weight, if any, it carried in his sentencing decision. Thus, we are constrained to remand this matter for resentencing to afford the judge the opportunity to clarify his findings relative to this factor.[4]

In sum, defendant's convictions are affirmed, the most recent JOC is vacated, and the matter is remanded for resentencing.

Affirmed in part, vacated in part, and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

[4] We also note the initial and amended JOCs refer to defendant's sentence having resulted from "a negotiated plea between the prosecutor and defendant." This clerical error should be eliminated from any JOC that issues upon defendant's resentencing.