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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2337-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANTZ E. VANEUS,
a/k/a FRANZ E. VANEUS,

Defendant-Appellant.

Argued November 9, 2021- Decided May 3, 2021

Before Judges DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No. 17-01-
0180.

Nakea J. Barksdale argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney; Nakea
J. Barksdale, of counsel and on the brief).

Katrina M. Koerner, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued the cause
for respondent (Cary Shill, Acting Atlantic County
Prosecutor, attorney; Mario C. Formica, Special

Deputy Attorney General/Acting Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

After a jury trial, defendant Frantz E. Vaneus was convicted of second-degree theft by deception, N.J.S.A. 2C:20-4, and second-degree passing a bad check, N.J.S.A. 2C:21-5. The court sentenced defendant to concurrent seven-year terms and ordered him to pay restitution in the amount of \$37,000. Defendant appeals his conviction and sentence, arguing that: (1) the State's multiple references at trial to defendant's financial situation were unduly prejudicial and violated his rights to a fair trial; (2) the judge ordered him to pay restitution without making adequate factual findings concerning his ability to pay; and (3) the judge erred during sentencing by failing to apply mitigating factor five. We reject defendant's arguments and affirm.

I.

A.

On July 16, 2015, defendant purchased a three-carat diamond ring from Tiffany and Company (Tiffany's) in Atlantic City. To finance his purchase, defendant applied for financing from Tiffany's. Defendant informed Dina Buttino, a Tiffany's salesperson, that he did not have sufficient funds in his bank account prior to submitting his financing application. Defendant partially

completed the application, leaving the section of the application regarding his bank information incomplete. After defendant submitted additional information about a Chase bank account that he allegedly controlled, Tiffany's approved him for financing, subject to defendant making a \$89,880 down payment on the total purchase price of \$179,760, and then making twelve monthly payments, interest free, beginning September 2015. Defendant knew there were insufficient funds in his Chase account¹ to cover the \$89,880 check, and the record shows defendant also knew that Chase had blocked his access to the account as of June 1. In fact, defendant's Chase account was closed on July 13. Nonetheless, defendant told Buttino he expected to sell his business to raise the funds needed to pay for the ring.

On July 17, 2015, one day after he bought it from Tiffany's, defendant pledged the ring to a pawnshop as collateral for a short-term \$37,000 loan. The pawnshop contract required defendant to pay back the loan within four months. Twelve days later, Tiffany's fraud department began an investigation into defendant's financial status after learning that Chase did not honor defendant's check. The fraud department contacted defendant and he promised

¹ The Chase account fluctuated between a high balance of twenty-five dollars on May 30 and a low balance of minus \$739.24 on June 30.

to make a payment. After repeated calls from Tiffany's, defendant made no payments on the ring. Defendant did not pay the pawnshop either; the shop sold the ring after defendant's four-month deadline for repayment expired.

On April 5, 2016, Tiffany's reported the case to the Atlantic City Police Department. Defendant was charged with two felony counts: second-degree theft by deception and second-degree passing a bad check.

Defendant filed a motion in limine prior to trial. After the hearing, the judge limited testimony about defendant's financial status, finding that the State would only be permitted to show the jury defendant's banking relationship over the "four or five weeks in advance of this . . . rather sizable transaction" The judge went on to instruct counsel that "the State isn't going to be given a broad brush" and that it would be limited to use of "return[ed] checks . . . or other reasons to show lack of sufficient funds"

At trial, the State talked about defendant's financial condition in three contexts. During its opening, the State accused defendant of devising a "scheme to lie, cheat, and steal a Tiffany's diamond ring so [defendant could] use it to get what he really wanted, fast cash." During trial, the State raised defendant's financial status before the jury while questioning one witness and

cross-examining defendant. During closing arguments, the State brought up defendant's financial status no less than seven times to the jury.

As part of his charge, the judge instructed the jury as to defendant's state of mind: "[Defendant's] knowledge may be gathered from his acts and his conduct and from all he said and did at a particular time and place and from all of these surrounding circumstances You alone decide whether the facts and circumstances shown by the evidence support an inference [of defendant's guilt.]"

The jury found defendant guilty on both counts. At sentencing, the judge found aggravating factors three, six, and nine, giving each factor "significant" weight. In applying mitigating factors, the judge gave "slight" weight to factors one, two, and six. He also considered and expressly rejected mitigating factor five, which contemplates whether the victim "induced" or "facilitated" the defendant's actions. N.J.S.A. 2C:44-1(b)(5). The judge found mitigating factor five inapposite because Tiffany's did not facilitate the crime. The judge ultimately found the aggravating factors substantially outweighed the mitigating factors, and sentenced defendant to two concurrent seven-year sentences.

After a restitution hearing, the judge took into consideration the presentence report, trial testimony, and N.J.S.A. 2C:44-2. The judge noted the presentence report showed defendant disclosed a monthly income of \$8,000 as the sole owner of his company, \$2,000 in his savings account, and holds a Bachelor of Science degree in finance from Pace University and a master's degree in business finance information from DePaul University. The judge considered defendant's testimony that he is "willing to pay the money no matter what [he] has to do[]" despite his financial struggles. He added that "the interest of justice requires the court to take into consideration the ill-gotten gain of the defendant as well as the harm done to the victim, albeit a corporate victim, in losing a stone, a gem of some significant value." Accordingly, the judge ordered restitution to Tiffany's in the amount of \$37,000 payable through the Department of Corrections.

On appeal, defendant makes the following arguments:

- I. DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR WAS PERMITTED TO USE EVIDENCE OF DEFENDANT'S INSUFFICIENT FUNDS AND BANKING ACTIVITY TO SHOW DEFENDANT HAD NO APPARENT MEANS OF INCOME AND HENCE WAS LIKELY TO COMMIT A THEFT OFFENSE.
- II. DEFENDANT WAS DENIED AN APPROPRIATE RESTITUTION HEARING AT WHICH TO SET THE

AMOUNT OF THE VICTIM'S LOSS AND THE COURT ERRED IN FINDING THAT DEFENDANT WAS ABLE TO PAY THE RESTITUTIONARY AMOUNT OF \$37,000.

III. DEFENDANT'S SENTENCE OF SEVEN YEARS FOR THEFT BY DECEPTION AND PASSING A BAD CHECK IS EXCESSIVE AND MUST BE REDUCED BECAUSE THE TRIAL JUDGE ERRED IN HIS FINDING AND WEIGHING OF AGGRAVATED AND MITIGATING FACTORS.

II.

A.

We begin with the well-established principle that "[e]videntiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Est. of Hanges v. Metro. Prop & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). An abuse of discretion "arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), or when "there has been a clear error of judgment[.]" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). In other words, a trial court is granted broad discretion to determine both the relevance of the evidence presented and whether its probative value is substantially outweighed by its

prejudicial nature. Wymbs v. Twp. of Wayne, 163 N.J. 523, 537 (2000). However, if the party appealing did not make its objection to admission known to the trial court, we "will reverse an evidentiary ruling only if it 'was so wide off the mark that a manifest denial of justice resulted.'" Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016) (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

"The fundamental principle guiding the admission of evidence is relevance." State v. Weaver, 219 N.J. 131, 149 (2014). Evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Nevertheless, even "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury; or (b) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403.

Defendant first argues that the State's multiple references to his financial situation at trial were unduly prejudicial under N.J.R.E. 403. Specifically, defendant contends that "the needless presentation of such cumulative evidence substantially outweighed its probative value." The parties do not dispute the relevancy of the evidence under N.J.R.E. 401; therefore, the

primary question before us is whether the judge found that the probative value of the evidence was not substantially outweighed by the risk of undue prejudice.

At the motion in limine hearing, the judge limited the State's proofs to "returned checks . . . or other reasons to show insufficient funds." These limited proofs were directly relevant to the charges defendant faced, theft by deception and knowingly passing a bad check. The State presented defendant's financial records, including the Chase check which defendant bounced to Tiffany's, as well as bank statements showing his low account balances during the relevant time period. During summations, the State referenced defendant's misrepresentations to Tiffany's about his financial status. The State also argued inferences drawn from the financial proofs that were admitted into evidence during trial.

The judge gave the jury the standard charge, including the specific instructions applicable to theft by deception and knowingly passing a bad check. With respect to each charge against defendant, the court noted the elements which required proof of defendant's knowledge and intent and related to the jury what the State had to prove to find the defendant guilty. The judge's instructions gave the jury sufficient guidance such that the State's

multiple references did not have the "probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence." State v. Trinidad, 241 N.J. 425, 449 (2020) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)). We conclude that the judge properly exercised discretion in finding that the probative value of the evidence was not "substantially outweighed" by "undue prejudice, confusion of issues, or misleading the jury" N.J.R.E. 403.

B.

Defendant next argues the State's introduction of his impoverished status is inadmissible as a general proposition under State v. Mathis, 47 N.J. 455 (1966), and State v. Terrell, 359 N.J. Super. 241 (App. Div. 2003). We are not persuaded, and our review of the cases does not reveal any support for such a proposition.

In Mathis and Terrell, we held that it is improper for the State to use poverty or lack of financial means as evidence of a defendant's motive to commit a crime. Mathis, 47 N.J. at 472 ("[T]here must be something more than poverty to tie a defendant into a criminal milieu."); Terrell, 359 N.J. Super. at 247. Accordingly, "[t]he introduction of evidence regarding whether or not a defendant has a regular source of income is, when a collateral issue,

prohibited in any form[,]" because a defendant's poverty or lack of income cannot be used to establish a criminal motive. Terrell, 359 N.J. Super. at 247 (emphasis added). See also Mathis, 47 N.J. at 471-72 (holding that presenting witnesses and inquiring of defendant's lack of funds were a collateral inquiry that was not germane to the case and, thus, prejudicial to the defendant).

Defendant was charged with theft by deception under N.J.S.A. 2C:20-4. "A person is guilty of theft if he purposely obtains property of another by deception." N.J.S.A. 2C:20-4. "A person deceives if he purposely: (a) [c]reates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind" Ibid. The Model Jury Charges also require the State to "prove beyond a reasonable doubt" that "not only must defendant's [statements] have been false, but defendant must have known of [its] falsity." See Model Jury Charges (Criminal), "Theft by Deception (N.J.S.A. 2C:20-4)" (rev. Apr. 15, 2013).

Defendant was also charged with passing a bad check in violation of N.J.S.A. 2C:21-5. N.J.S.A. 2C:21-5 provides that "[a] person who issues or passes a check . . . for the payment of money . . . knowing that it will not be honored by the drawee, commits an offense [of passing a bad check.]" Thus, the State must show the person issued or passed a bad check and he or she

knew it would not be honored by the drawee, but proof of fraudulent intent is not required. State v. Kelm, 289 N.J. Super. 55, 59 (App. Div. 1996).

Defendant's financial status and his knowledge thereof were necessary to prove certain elements of theft by deception and passing a bad check; therefore, these were not collateral issues. See N.J.S.A. 2C:20-4. See also N.J.S.A. 2C:21-5. The holdings of Mathis and Terrell do not bar admission of evidence of defendant's financial problems where the evidence is needed to prove the requisite elements of a crime. The cases stand for the principle that the State cannot argue that defendants are more inclined to commit crimes because they lack financial resources. Here, the State's references to defendant's lack of financial resources led to the permissible inference that defendant knew he didn't have the money before he persuaded Tiffany's to sell him the ring and bounced the Chase check to pay for it. Unlike the facts of Mathis and Terrell, the State's references to defendant's status do not suggest a general inclination on defendant's part to commit a crime because of financial difficulties. The evidence was essential to prove requisite elements of both crimes.

Defendant further contends the trial judge failed to give adequate limiting instructions to the jury concerning the financial references. The record shows that at the charge conference, the following colloquy took place:

THE COURT: I have not yet drafted a limiting instruction . . . which I offered to the parties in the event that the non-sufficient notices were coming in. [The] State didn't use them, didn't make [any] reference to them. [Defense counsel], the objection that you raised, it would appear it's been mooted at this point.

DEFENSE COUNSEL: Yes, Judge.

THE COURT: So[,] I won't give any kind of limiting instruction. [The jury] can take from the evidence that came in what they will.

The judge noted that the documentary evidence which defense sought to limit, insufficient funds notices, were not introduced by the State, nor used in any way. At that point in the charge conference, both the judge and counsel considered defendant's pending objection moot. To the extent that we consider this point on appeal, one which was not raised below, we do not find the absence of a specific limiting instruction to the jury to be plain error "clearly capable of producing an unjust result." R. 2:10-2.

C.

Defendant next argues the trial judge ordered him to pay restitution without making adequate factual findings into his ability to pay. An order of restitution is discretionary and entitled to our deference on appeal. State v. Harris, 70 N.J. 586, 595 (1976). However, if nothing in the record reflects the trial court's consideration of the defendant's ability to pay, remand is warranted. See State v. Pessolano, 343 N.J. Super. 464, 479 (App. Div. 2001). "A court in determining the amount of restitution is required to consider defendant's financial resources, including likely future earnings and ability to pay." State v. Orji, 277 N.J. Super. 582, 589 (App. Div. 1994) (citing N.J.S.A. 2C:44-2(c)(2)). N.J.S.A. 2C:44-2(c)(2) provides:

In determining the amount and method of payment of restitution, the court shall take into account all financial resources of the defendant, including the defendant's likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay.

The record shows the judge applied the standard, established the amount of the victim's losses and considered defendant's ability to pay. In State v. Orji, we affirmed a restitution award where:

[t]here was evidence in the [presentence report] that defendant [had] a bachelor's degree in marketing and

[was] gainfully employed as the owner-operator of a limousine-taxi service. From this evidence the judge properly could have inferred that defendant had the ability to pay the restitution ordered.

[277 N.J. Super. at 589].

The sentencing judge considered defendant's academic accomplishments and his business enterprise when evaluating defendant's ability to pay. We defer to the judge's findings and find no abuse of discretion on this record.

D.

Defendant finally argues the judge erred by rejecting the application of mitigating factor five during sentencing. Specifically, defendant contends that Buttino's conduct in granting defendant a Tiffany's credit line despite his apparent lack of financial resources, "induced or facilitated" the commission of the crime and should have been considered when determining whether to apply mitigating factor N.J.S.A. 2C:44-1(b)(5). We are not persuaded.

We review a court's sentence for an abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). We defer to the sentencing court's factual findings and do not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). If the sentencing court "follow[ed] the [Criminal] Code and the basic precepts that channel sentencing discretion[.]" the reviewing court should affirm the sentence, so long as the sentence does not "shock the judicial conscience."

Ibid. (citation omitted). Therefore, we will "affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 363-65 (1984)). "A judge's sentencing analysis is a fact-sensitive inquiry, which must be based on consideration of all the competent and credible evidence raised by the parties at sentencing." State v. Jaffe, 220 N.J. 114, 116 (2014).

The judge carefully considered all the relevant aggravating and mitigating factors, explaining why he found and rejected certain factors and discussed the weight assigned to each. We discern no basis to disturb the judge's decision to reject mitigating factor five and find no abuse of discretion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION