SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0062-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KWADIR FELTON,

Defendant-Appellant.

Argued March 2, 2017 – Decided May 4, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 11-05-0043.

David A. Gies, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Gies, on the briefs).

Emily R. Anderson, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Anderson, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Kwadir Felton appeals from a May 29, 2014 judgment of conviction after a jury trial. We affirm defendant's conviction and defendant's sentence except we discern the trial judge failed to explain the basis for the consecutive sentences imposed on counts thirty-three and thirty-five, requiring we vacate these sentences and remand for resentencing. Finally, we require the judgment of conviction be corrected to properly recite the statute under which defendant was convicted on count thirty-three.

On May 19, 2011, defendant was indicted for second-degree conspiracy to launder money and sell PCP, heroin, and marijuana, N.J.S.A. 2C:5-2; second-degree possession of a weapon for an unlawful purpose during a drug distribution conspiracy, N.J.S.A. 2C:2-6 and N.J.S.A. 2C:39-4(a)(2); second-degree unlawful possession of a weapon, as a principal or an accomplice, N.J.S.A. 2C:2-6 and N.J.S.A. 2C:39-5(b); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4). On November 14, 2013, after hearing the following summarized testimony, the jury returned a guilty verdict on all counts.

In July 2009, the Jersey City Police Department (JCPD) and New Jersey State Police (NJSP) initiated an undercover investigation of a narcotics distribution network involving Dempsey Collins, David Gilliens, Rasheed Boney, and others in

Jersey City. JCPD Detective Rebecca Velez and Sgt. Thomas McVicar were assigned to the investigation. Velez, the lead detective, was engaged in undercover narcotic buys, while McVicar was supervisor of the surveillance team. Beginning in December 2009, a surveillance team began monitoring phone lines registered to Gilliens and Collins. Police heard the name "Kwa" mentioned in phone calls and heard someone identified as Kwa speak during some calls. On one call, Kwa discussed his inventory of drugs with Collins. On another, Collins told Gilliens Kwa was outside selling drugs. Kwa informed Gilliens on another call how much heroin he had. It was not until January 10, 2010, the police identified Kwa as defendant.

On January 10, 2010, McVicar learned a suspected drug sale was about to occur in the area of the ring's "headquarters" that would involve Collins' red Acura TL. McVicar parked his truck across the street from an unoccupied red Acura. McVicar had a JCPD radio, a NJSP radio, his personal cell phone, and a department-issued Nextel push-to-talk "chirp" phone. From where McVicar was parked, he could see the Acura through his windshield. The windshield and front side windows of McVicar's truck were not tinted, but the rear windows had a tint.

McVicar locked the doors of his truck, placed the keys in the center console, and climbed into the backseat of his truck and sat

"longways" across the bench seat. He rested his head against the rear side window behind the driver's seat. McVicar was wearing his police badge around his neck and he had his .45 caliber handgun in the holster.

McVicar testified he observed a black SUV pull up alongside the red Acura. Collins exited the SUV and proceeded to go back and forth between the Acura and the SUV, until the SUV drove away. After a few minutes, Collins drove away in the red Acura with Gilliens. While McVicar waited to see if the Acura returned, he sensed someone was behind him. When he turned slightly to look out the window, he noticed defendant leaning against the driver's side window of the truck looking in to the truck crossways. McVicar testified he "tried to get a hold of the State police radio" but "was a little freaked out" because he had not heard or seen anyone approach his truck. His police radio fell to the floor of the truck, startling defendant. McVicar testified defendant then looked fully into the rear window, bent down from his view, and McVicar "heard the racking of the slide of a . . . pistol."

According to McVicar, defendant "stood back up and reappeared" in the driver side window with the gun held up against his chest and started looking in to the windows. McVicar took his gun out of his holster and testified defendant looked straight

through the driver side window and pointed the firearm into the interior of the car towards him. Fearing for his life, McVicar aimed his gun at defendant and fired one shot striking defendant's head. McVicar exited his truck from the passenger side door and found defendant lying on the ground with a gunshot wound to his head. A .9 millimeter handgun was lying next to him. McVicar radioed dispatch for an ambulance.

JCPD Sergeant Joseph Sarao arrived within seconds of McVicar's call. Sarao testified when he arrived, defendant was lying on the ground near the front of McVicar's truck bleeding from a gunshot wound to his temple. Sarao observed broken glass on the ground, McVicar's truck window was shattered, and there was a gun on the ground near defendant's head. Jersey City Emergency Medical Services transported defendant to the hospital.

Following the shooting, numerous phone calls were intercepted between Gilliens, Collins and others discussing defendant's shooting and conferring what to do because defendant had "the other ratchet."[1] Collins directed one of his confederates to go to the hospital to see what happened but cautioned him to leave his gun in his vehicle before entering the hospital. Police arrested several individuals outside the hospital and found a .40

[1] According to police testimony "ratchet" is slang for gun.

caliber handgun inside their vehicle. More intercepted calls between Collins and Gilliens contained discussions about defendant's possession of a handgun and narcotics. Gilliens called defendant's mother and told her defendant would receive bail money if she did not have it, and asked if defendant had a lawyer and said to call him if anything happens. Sergeant Keith Ludwig of the JCPD testified to the contents of a January 13, 2010, wiretap recording where Collins asked someone if they wanted to "get[] some weed from Kwa." Defense counsel underscored, and Ludwig agreed, defendant was in the hospital when this call occurred. However, Ludwig testified when a runner was arrested, Collins and Gilliens typically tried to recover the runner's "stash" of drugs. Numerous other state and defense witnesses testified regarding procedures, the subsequent police investigation, and ballistics testing from the shooting. Other witnesses offered ballistics and fingerprint testimony.

Defendant testified that on January 10, 2010, he attended church in the morning, went to the park, and then went to the store for a neighbor. Defendant met a friend inside a neighbor's apartment building, where the police stopped the two, frisked them, and let them go. From there, he attended a baby shower where he walked through a metal detector and security patted him down. Defendant testified police were present at the center where

the shower was held. After the shower, defendant helped load gifts and food into cars and then walked towards a corner store.

As defendant turned the corner, he heard a voice yell: "Hey, yo Kwa. Yo Kwa." Defendant testified he saw a red truck with tinted windows. Defendant said "Who that," and the person responded, "Look, you little black mother fucker, you better get the fuck down before I blow your fuckin' brains out." Defendant testified the driver side window was open about four to five inches. Defendant yelled back, "Who's that?" but no one responded, so he said, "suck my dick."

Defendant testified he felt as if someone punched him and he fell to the ground. He sat up and realized someone shot him. Defendant testified his vision was fading but he saw someone get out of the driver-side door of the truck. Defendant described the man as a "heavyset guy, fat, with a fat face," and he thought he was black. Defendant felt someone push him to the ground with force and kick his leg. Someone took his hood and hat off his head and searched his pockets. Defendant's next memory was waking up in the hospital, handcuffed to the bed.

Defendant denied selling drugs for Collins or Gilliens. He testified he had been friends with Boney as a child but their relationship faded away because Boney was selling drugs. Defendant recounted when Boney had shown defendant guns and drugs inside his

car and defendant refused to get in because "that's not [him]. [He] was raised better than that." Defendant knew Collins and Gilliens through Boney and defendant had helped at Collins' father's barbershop. While defendant did not receive a paycheck, sometimes Collins would give him alcohol or "a bag of weed to smoke" as compensation.

Defendant testified he made phone calls for Collins and Gilliens but denied selling drugs. Defendant testified during one phone call when he told Collins there was no more "product," he meant he had smoked all of the marijuana Collins had given him.

C.J.[2] testified on the day of the shooting, he was sitting on his porch and noticed a person sitting behind the driver's seat of a parked vehicle with the window open. He saw a man walk down the street, who he identified as defendant. C.J. heard a gunshot then saw the man in the vehicle exit the driver's side door and bend down to defendant lying on the ground. C.J. did not see a weapon on the ground, but it was dark outside and the vehicle partially blocked his view.

Defendant's sister testified she attempted to collect bail money from Collins because she and her mother were unemployed, but

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[2] We use initials to protect the identity of non-party witnesses.

denied defendant sold drugs for Collins and Gilliens and stated Collins never gave her bail money.

Defendant moved for a new trial, arguing the prosecutor's summation resulted in an unjust verdict and the verdict was unsupported by the evidence. On January 10, 2014, the court denied defendant's motion.

In March 2014, defendant filed a second motion for a new trial, this time arguing two jurors failed to provide relevant background information during voir dire. The judge rejected the arguments concerning juror ten but determined it was necessary to interview juror one. On March 21, 2014, after interviewing the juror, the court denied the motion as meritless. On May 29, 2014, the court sentenced defendant to an aggregate sixteen-year prison term with a six-year period of parole ineligibility. This appeal followed.

On appeal, defendant raises the following arguments:

> POINT ONE
> THE TRIAL COURT'S ATTEMPT TO CURE THE PROSECUTOR'S CLEARLY AND UNMISTAKABLY IMPROPER COMMENTS DURING SUMMATION FAILED TO CORRECT THE ERROR SO THAT THE DEFENDANT WAS DENIED A FAIR TRIAL.
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> POINT TWO
> THE DEFENDANT WOULD HAVE EXERCISED A PEREMPTORY CHALLENGE ON JUROR 1 IF HE HAD KNOWN OF THE JUROR'S FAMILIARITY WITH HIS RELATIVES AND THE CRIME SCENE.

POINT THREE

NOT ONLY DID THE TRIAL COURT ERR WHERE IT IMPROPERLY INSTRUCTED THE JURY REGARDING COUNT 33, BUT NO EVIDENCE WAS PRESENTED TO CREATE A TEMPORAL AND SPATIAL LINK BETWEEN THE FIREARM AND THE DRUGS.

POINT FOUR

THE VERDICT AS TO THE CONSPIRACY ALLEGED IN COUNT 2 WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD BE SET ASIDE.

POINT FIVE

THE TRIAL COURT SHOULD HAVE MERGED COUNT 33 INTO COUNT 2 WHERE THE USE OF THE WEAPON TO COMMIT THE SUBSTANTIVE OFFENSE PROVIDED THE FACTUAL UNDERPINNING FOR DRAWING AN INFERENCE THAT THE WEAPON WAS POSSESSED FOR AN UNLAWFUL PURPOSE.

POINT SIX

THE TRIAL COURT'S FAILURE TO ARTICULATE ITS REASON FOR IMPOSING THREE CONSECUTIVE TERMS IS AN ABUSE OF DISCRETION.

POINT SEVEN

THE DEFENDANT'S SENTENCE WAS INAPPROPRIATE WHERE THE TRIAL COURT FAILED TO ARTICULATE ITS REASONS FOR FINDING THE SOLE AGGRAVATING FACTOR OUTWEIGHED THE TWO APPLICABLE MITIGATING FACTORS.

Defendant raised the following issues in a pro se supplemental brief:

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR IN THE JURY INSTRUCTION AS TO "A COMMUNITY GUN" PURSUANT TO N.J.S.A. 2C:39-4(A)(2) (SUPPLEMENTAL TO COUNSEL'S POINT III).

POINT II

THE TRIAL COURT'S ABUSE OF DISCRETION DURING APPELLANT['S] MOTION TO COMPEL RELEVANT

INFORMATION OF SGT. THOMAS MCVICAR['S] INTERNAL AFFAIRS RECORDS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

POINT III
THE TRIAL COURT'S ABUSE OF DISCRETION VIOLATED APPELLANT'S RIGHT[S] DURING A NEW TRIAL MOTION TO DUE PROCESS A VIOLATION OF THE FOURTEENTH AMENDMENT [sic].

A. BEING PRESENT ACCORDING TO NEW JERSEY SUPREME [COURT] RULE 3:16(B) FOR A NEW TRIAL MOTION

B. FAILURE TO MAKE A RECORD OF THE IN CAMERA INTERVIEW ACCORDING TO NEW JERSEY SUPREME [COURT] RULE 1:2-2, VERBATIM RECORD OF PROCEEDING

I.

We first address defendant's argument that statements made by the prosecutor during summation substantially prejudiced his right to a fair trial and the trial court erred in its curative instruction, requiring reversal of defendant's conviction.

Reversible error occurs when a prosecutor makes a comment so prejudicial that it deprives a defendant of his or her right to a fair trial. State v. Mahoney, 188 N.J. 359, 376, cert. denied, 549 U.S. 995, 127 S. Ct. 507, 166 L. Ed. 2d 368 (2006). Moreover, the prosecutor can make fair comments about the evidence presented. State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008).

After reviewing the record, we reject defendant's argument. When assessing whether prosecutorial misconduct requires reversal

we must determine whether "the conduct was so egregious that it deprives the defendant of a fair trial." State v. Loftin, 146 N.J. 295, 386 (1996) (quoting State v. Ramseur, 106 N.J. 123, 322 (1987)). We consider such factors as whether defense counsel made a timely objection, whether the remark was withdrawn promptly, whether the trial judge ordered the remarks stricken, and whether the judge instructed the jury to disregard them. Ramseur, supra, 106 N.J. at 322-23. While prosecutors are given "considerable leeway" in summarizing their case to the jury, prosecutors may not make "inaccurate legal or factual assertions" and must "confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." State v. Smith, 167 N.J. 158, 177-78 (2001) (citations omitted).

At the start of the prosecutor's summation, he said:

> Now, I have — there was a lot of things here, throughout the trial. And one of the things is that Ms. Barnett, defense counsel, she like[s] to misstate facts. She like[s] to manipulate the facts. She doesn't think very highly of myself as a Prosecutor, doesn't think very highly of the Court, or even yourself as the jurors.

Defense counsel objected; however, the prosecutor continued until the trial judge chastised the prosecutor at sidebar. Defense counsel requested a limiting instruction, and the court instructed

the jury, "to disregard any comment that [defense counsel] does not respect this Court or yourselves."

The prosecutor's comments were not based on the evidence in the record nor inferences that could be drawn from the evidence. See Smith, supra, 167 N.J. at 178. However, the trial court appropriately addressed the impropriety immediately after it occurred. While the court could have expanded the instruction to clarify the comment was improper and the jury had to decide the case based solely on the evidence at trial, the court's failure to do so does not warrant reversal. The comment was not so egregious as to deny defendant a fair trial. See State v. Frost, 158 N.J. 76, 83 (1999).

Later, the prosecutor criticized the manner in which defense counsel cross-examined Sarao. He said,

> She [defense counsel] mentioned to you the testimony that came out of him [Sarao]. This is the transcript from that testimony . . . [defense counsel] asked these questions with regards to the .9 millimeter. Okay?
>
> The question is: "Okay. Now, it was your testimony, though Sergeant, that you had directed an officer - who-who-who you can't recall his name, take the — this .9 millimeter to the South District. Correct?"
>
> Answer, . . . "Not that gun, McVicar's gun."
>
> Okay? We wanted to start confusing the .9 millimeter, the .45 and the .40 caliber.

> Of course, from members, including myself, who are not familiar with guns, absolutely. Three guns? It would confuse anybody. But here it is.
>
> Question by — by [defense counsel]. "Okay. . . . so it's your testimony that you don't know who took the .9 millimeter? What happened to the .9 millimeter? What happened to this gun? This gun, right here, the .9 millimeter?"

The prosecutor continued:

> Ms. Barnett, as if she quite — didn't quite understand it up until this point. "So, just for clarification, it's your testimony that it wasn't the .9 millimeter that was taken down. You indicated on direct examination . . . . Fennell was the one who watched the gun." "The gun?" "Yes." "This gun right here?"
>
> Answer: "The defendant's gun."

The prosecutor then added, "Okay? Let's not misstate the facts."

Defense counsel did not object to these comments; therefore, we review the statement under the plain error standard pursuant to Rule 2:10-2. Defendant argues these comments constituted improper personal attacks directed at defense counsel. However, the prosecutor read the transcript to dispel the notion police mishandled the weapons after the shooting. The prosecutor's remarks here were based on evidence at trial, constituting comment on defendant's theory of the case, and did not deprive defendant of a fair trial. See Smith, supra, 167 N.J. at 178-82.

The additional comments defendant challenges also concerned defendant's theory "five different [law enforcement] agencies" had conspired to frame him and used confidential informants to do so, and his challenges to the credibility of the police witnesses. Defense counsel did not object to these comments at trial.

As to these and the remaining comments defendant challenges, we conclude the remarks did not deny defendant a fair trial, as the prosecutor was responding to remarks made by defense counsel in her summation. See State v. DePaglia, 64 N.J. 288, 297 (1974).

II.

Next, we address defendant's argument he was denied a fair trial because juror one failed to provide relevant information during voir dire, which would have prompted defendant to exclude her from the jury with a peremptory challenge. Defendant also alleges the court denied him due process and the right to be present for a critical proceeding when the court issued its decision on the record without defendant's presence and when it held an in camera interview of juror one. We disagree.

After the trial, defendant's sister saw a picture on social media. Defendant's sister recognized the woman in the picture as juror one. According to defendant's investigator, one of defendant's acquaintances and juror one, the acquaintance's grandmother, live at the same address. The acquaintance and

defendant have a number of mutual friends. Defendant moved for a new trial.

The judge conducted an in camera hearing, where juror one reported she had not lived in the same house as defendant's acquaintance for several years and did not know of defendant prior to trial. She also reported while on the jury, she did not discuss the trial or defendant with her granddaughter. Finding no juror misconduct, the court denied defendant's motion for a new trial.

A court should grant a motion for a new trial only if the defendant's submissions "clearly and convincingly" establish "a manifest denial of justice." R. 3:20-1; State v. Loftin, 287 N.J. Super. 76, 107 (App. Div.), certif. denied, 144 N.J. 175 (1996). A trial court's ruling on a motion for new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice." State v. Perez, 177 N.J. 540, 555 (2003) (quoting R. 2:10-1).

Defendant argues he would have exercised a peremptory challenge to remove juror one from the jury if he had known about the connection to defendant's acquaintance, and therefore, he was unfairly denied the opportunity to exercise a peremptory challenge.

"When a juror incorrectly omits information during voir dire, the omission is presumed to have been prejudicial if it had the

potential to be prejudicial." State v. Cooper, 151 N.J. 326, 349 (1997) (citation omitted). The Court in In re Kozlov, 79 N.J. 232, 239 (1979), explained:

> Where a juror on voir dire fails to disclose prejudicial material . . . a party may be regarded as having been denied [a] fair trial. This is not necessarily because of any actual or provable prejudice to his case attributable to such juror, but rather because of his loss, by reason of that failure of disclosure, of the opportunity to have excused the juror by appropriate challenge, thus assuring with maximum possible certainty that he be judged fairly by an impartial jury.

Here, juror one did not withhold relevant information during jury selection. She reported she had no knowledge of defendant prior to trial, nor did she know her granddaughter knew him. Therefore, juror one did not withhold any relevant information and defendant was not denied a fair trial.

Defendant further argues the court denied him due process and the right to be present at two court proceedings, the March 21, 2014 decision denying his second motion for a new trial and the in camera hearing of juror one.

The right to be present at trial is grounded in the Confrontation Clause of the Constitution. State v. Trent, 157 N.J. Super. 231, 241 (App. Div. 1978), rev'd on other grounds, 79 N.J. 251 (1979). However, the right to be present is not unlimited. Ibid. The right to be present

> extends not to every aspect of the proceeding but rather only to critical stages of the trial, heretofore defined by the Supreme Court as "anything . . . new to the proceeding and in conflict with . . . [the] right to be confronted by the witnesses, to be represented by counsel, and to maintain . . . [the] defense upon the merits."
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> [Ibid. (quoting State v. Auld, 2 N.J. 426, 433 (1949)).]

A defendant may be excluded from an in camera interview without offending the right to be present, particularly if the defendant did not request to be present, if the issue "was singularly one whose investigation and resolution may well have been impeded by defendant's presence," and the defendant was not prejudiced by the absence. Ibid.

Here, defendant was not denied due process or the right to be present. At the March 21, 2014 decision, no witnesses were present, no counsel were present, no arguments were made, and the judge did nothing more than read her decision into the record. Defendant did not miss a critical stage of the trial by not being present when the court issued its decision denying his motion for a new trial. Defendant also had no right to be present for the in camera hearing of juror one. We discern no reason defendant should be entitled to a new trial as his due process rights were not violated.

III.

Defendant argues the court erred by charging the jury on N.J.S.A. 2C:39-4.1(a), possession of a weapon during the distribution of controlled dangerous substance (CDS) or a conspiracy to distribute CDS, when the original count charged possession of a community weapon, contrary to N.J.S.A. 2C:39-4(a)(2). Because the State moved to amend the indictment, and defense counsel did not object to changing the statute cited from N.J.S.A. 2C:39-4(a)(2) to N.J.S.A. 2C:39-4.1(a) prior to trial, defendant's argument the court charged the jury with the wrong statute is meritless. However, the judgment of conviction erroneously cited N.J.S.A. 2C:39-4(a)(2) as the statute applicable to that count; therefore, we remand to the trial court to correct the error.

Additionally, defendant argues the State failed to prove he was acting as part of a conspiracy to commit a narcotics offense at the moment he was shot and found in possession of a firearm in order to satisfy a conviction under N.J.S.A. 2C:39-4.1(a). N.J.S.A. 2C:39-4.1(a) states, "Any person who has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a [narcotics offense] . . . is guilty of a crime of the second degree." There must be "a temporal and spatial link between the possession of the firearm and the

drugs that defendant intended to distribute." State v. Spivey, 179 N.J. 229, 239 (2004). Defendant argues the only evidence offered in support of the conspiracy charge were a few telephone conversations in which he allegedly participated. He underscores his full name was never used in the calls, only the name "Kwa," and prior to the shooting, he was not a suspect in the drug ring.

The court did not err in finding that the conspiracy conviction was supported by the evidence. N.J.S.A. 2C:5-2(a) provides:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Subsection (d) provides that while an overt act in furtherance of the conspiracy is usually required to establish the crime, that is not the case for conspiracy to distribute drugs. N.J.S.A. 2C:5-2(d).

Here, police recorded telephone calls between defendant and members of the drug ring discussing drug sales. The jury listened

to the calls at trial and during deliberations. The jury evidently rejected defendant's contention he was either relaying messages for his friends or asking Collins for marijuana to smoke, and not to sell. Nothing in the record suggests that the jury erred or the jury's verdict as to count two, conspiracy pursuant to N.J.S.A. 2C:5-2, is against the weight of the evidence and should be set aside.

IV.

Defendant argues the trial court erred by denying his request for discovery of McVicar's personal and internal affairs records. We disagree.

"The Sixth Amendment to the United States Constitution and Article 1, Section 10 of the New Jersey Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'" State v. Harris, 316 N.J. Super. 384, 397 (App. Div. 1998) (quoting Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974)). That right, however, "does not require disclosure of any and all information that might be useful in contradicting unfavorable testimony." Ibid.

In requests for police personnel records, the court must balance "the public interest in maintaining the confidentiality of police personnel records and a defendant's guarantee of cross-

examination under the Confrontation Clause." Id. at 397-98 (citation omitted). Therefore, the party who requests an in camera inspection "must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.'" Id. at 398 (quoting State v. Kaszubinksi, 177 N.J. Super. 136, 139 (Law Div. 1980)).

The trial court denied the request for McVicar's records because defendant failed to present a factual predicate for them. Defendant's position was the records could provide relevant information to support the theory McVicar was the initial aggressor. Defendant contends McVicar's records were relevant to McVicar's credibility and to establish whether he had a pattern of excessive force. However, defendant did not present a factual basis to support his request; therefore, we find the trial court properly denied defendant's request for discovery as to personnel and internal affairs records.

V.

Defendant argues the court erred in failing to merge count thirty-three, N.J.S.A. 2C:39-4.1(a), into count two, N.J.S.A. 2C:5-2. We disagree.

Because defendant did not raise this issue below, we review it under the plain error standard and will only address it if "it

is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

The merger doctrine prevents a defendant from receiving multiple punishments for a single wrongdoing. State v. Tate, 216 N.J. 300, 302 (2013). In deciding whether to merge offenses, our Court explained,

> [w]e follow a "flexible approach" . . . that "requires us to focus on the 'elements of the crimes and the Legislature's intent in creating them,' and on 'the specific facts of each case.'" State v. Cole, 120 N.J. 321, 327 (1990) (quoting State v. Miller, 108 N.J. 112, 116-17 (1987)). The overall principle guiding merger analysis is that a defendant who has committed one offense "'cannot be punished as if for two.'" Miller, supra, 108 N.J. at 116 (quoting State v. Davis, 68 N.J. 69, 77 (1975)). Convictions for lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge.
>
> [State v. Brown, 138 N.J. 481, 561 (1994).]

Defendant argues count thirty-three should have merged into count two because the two crimes constituted a single wrongdoing. We disagree. Count thirty-three and count two require different elements. Count thirty-three, N.J.S.A. 2C:39-4.1(a), requires possession of a firearm in the course of committing, attempting to commit, or conspiring to commit a narcotics offense. Count two, N.J.S.A. 2C:5-2(a), does not require the possession of a

weapon to find a conspiracy to sell drugs. Thus, count thirty-three required a proof in addition to the proofs required for count two.

Defendant erroneously argues the anti-merger provision in N.J.S.A. 2C:39-4.1(d) is not applicable because the indictment charged him with N.J.S.A. 2C:39-4(a)(2), not N.J.S.A. 2C:39-4.1, and he was not convicted of a crime under chapter 35 or chapter 16, to which N.J.S.A. 2C:39-4.1(d) applies. N.J.S.A. 2C:39-4.1(d) states, in relevant part, "a conviction arising under this section shall not merge with a conviction for a violation of any of the sections of chapter 35 or chapter 16 referred to in this section nor shall any conviction under those sections merge with a conviction under this section." Defendant's argument is meritless, as previously explained, because defense counsel consented to the amendment of count thirty-three of the indictment to N.J.S.A. 2C:39-4.1(a). The anti-merger provision in subsection (d) does not preclude merger with a conspiracy conviction because N.J.S.A. 2C:5-2(a) is not one of the offenses referred to in N.J.S.A. 2C:39-4.1. We find the court did not err by not merging count thirty-three into count two.

VI.

Defendant argues the trial judge erred in sentencing him to three consecutive terms, specifically on counts thirty-three and

thirty-five, possession of a weapon for an unlawful purpose, as they should be served concurrently because they were not independent crimes, but rather, occurred at the same time and place. Because the trial judge failed to provide her findings on the record as to why she sentenced defendant to three consecutive terms, we remand.

"[Our] review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We consider whether the trial court has made findings of fact grounded in reasonably credible evidence, whether the factfinder applied correct legal principles in exercising discretion, and whether application of the facts to law has resulted in a clear error of judgment and to sentences that "shock the judicial conscience." State v. Roth, 95 N.J. 334, 363-65 (1984). We review a trial judge's findings as to aggravating and mitigating factors to determine whether the factors are based on competent, credible evidence in the record. Id. at 364. "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); see R. 3:21-4(g).

Pursuant to N.J.S.A. 2C:44-5(a), when a defendant receives multiple sentences of imprisonment "for more than one offense, . . . such multiple sentences shall run concurrently or

consecutively as the court determines at the time of sentence." N.J.S.A. 2C:44-5(a) does not state when consecutive or concurrent sentences are appropriate. The Supreme Court in State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), set forth the following guidelines:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominately independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors;

> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]

What was guideline six was superseded by a 1993 amendment to N.J.S.A. 2C:44-5(a), which provides that there "shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

The Yarbough guidelines leave a "fair degree of discretion in the sentencing courts." State v. Carey, 168 N.J. 413, 427 (2001). "[A] sentencing court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences," id. at 427-28, but the court must state its reasons for imposing consecutive sentences, and when a court fails to do so, remand is needed in order for the court to place its reasoning on the record, State v. Miller, 205 N.J. 109, 129 (2011). Here, the only reasoning provided by the court was that N.J.S.A. 2C:39-4.1(d) required the sentence on count thirty-three to be served consecutive to count two.[3] Because the distribution of CDS is among the chapter 35 offenses required to run consecutively

[3] Defendant again attempts to argue he was never charged with N.J.S.A. 2C:39-4.1(a), however, as mentioned twice previously, defense counsel consented to the State amending count thirty-three of the indictment to replace N.J.S.A. 2C:39-4(a)(2) with N.J.S.A. 2C:39-4.1(a).

pursuant to N.J.S.A. 2C:39-4.1(d), the court correctly found count two and count thirty-three were to run consecutively.

As to count thirty-five and count thirty-three, the court provided no reasons for why those two counts were to run consecutively. Count thirty-five, N.J.S.A. 2C:39-4A, is not within the enumerated offenses in N.J.S.A. 2C:39-4.1(d), which requires the two counts to run consecutively. Because the record does not explain why the court ran the two counts consecutively, we remand for resentencing.

At sentencing, the court noted the shooting left defendant blind, but stated, "I don't sentence people based upon who they are in front of me today, I consider who they are in front of me today, but I need to sentence based on crimes." The court found mitigating factors seven, defendant led a law-abiding life, and eight, defendant's conduct was unlikely to reoccur, as well as aggravating factor nine, the need for deterrence. The court found aggravating factor nine outweighed the mitigating factors "because . . . it is a qualitative, not a quantitative, under the circumstances, and the charge and the nature of the offense, I do find that the aggravating factor outweighs the mitigating [factors]." The court did not explain its basis for reaching that conclusion.

A sentencing court may find aggravating and mitigating factors that appear internally inconsistent, but the court must support the findings with a "reasoned explanation" "grounded in competent, credible evidence in the record." Case, supra, 220 N.J. at 67. Specifically, as to a finding of aggravating factor nine and mitigating factor eight, it must "specifically explain[]" why the court found the need to deter defendant outweighed whether defendant's conduct was unlikely to reoccur based upon the circumstances. See State v. Fuentes, 217 N.J. 57, 63 (2014).

The trial court also failed to consider the two parts of aggravating factor nine, the general and specific need to deter. A sentencing court must qualitatively analyze the risk of both general and specific deterrence in relation to the particular defendant. Id. at 78. The trial court did not discuss any reason for finding aggravating factor nine besides "there is always a need to deter [defendant] and others from violating the law." That we must always deter people from violating the law is not enough of analysis to satisfy a sentencing court's obligation to provide a reasoned explanation for why an aggravating factor applies.

Affirmed as to defendant's conviction and sentence except as to counts thirty-three and thirty-five, where we vacate and remand for resentencing for the trial judge to explain the basis for imposing consecutive sentences. We also remand for the trial

court to correct the judgment of conviction to recite the statute under which defendant was convicted on count thirty-three. We do not retain jurisdiction.