

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2641-17**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY SIMS, JR.,

Defendant-Appellant.

Submitted October 19, 2020 – Decided January 4, 2021
Motions to correct the record and for reconsideration granted
Resubmitted February 4, 2021 – Decided February 4, 2021
Remanded by the Supreme Court March 16, 2022
Resubmitted April 6, 2022 – Decided April 18, 2022

Before Judges Rothstadt, Mayer and Susswein.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Indictment No. 14-08-
1335.

Joseph E. Krakora, Public Defender, attorney for
appellant (Robert Carter Pierce, Designated Counsel,
on the briefs).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Maura K. Tully,
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

This matter returns to us on remand from the New Jersey Supreme Court after it reversed our determination that defendant was entitled to a new trial because defendant's statement to police should have been suppressed and defendant's victim's pretrial testimony was improperly admitted into evidence. On remand, the Court directed us to address defendant's two remaining issues on appeal that we did not previously decide: alleged prosecutorial misconduct, which defendant raised for the first time on appeal, and that defendant received an excessive sentence. See State v. Sims (Sims II), __ N.J. __, __ (2022) (slip op. at 2-3).

We affirm as we conclude that defendant's contentions as to these two issues are without merit.

I.

The facts leading to defendant's arrest and conviction are well known to the parties and summarized in our and the Supreme Court's opinions. See id. at __ (slip op. at 4-13); State v. Sims (Sims I), 466 N.J. Super. 346, 356-62 (App.

Div. 2021), rev'd, ___ N.J. ___ (2022). For our purposes, we need not repeat those facts here.

II.

We begin with defendant's argument, for the first time on appeal, that the prosecutor made a comment in summation that denied him a fair trial. Defendant contends that it was improper for the trial court to permit the prosecutor to state to the jury during summation: "You can hold [defendant] accountable for taking that community, that neighborhood, and turning it into his own personal crime scene. And you can do that by returning the only verdict that is consistent with and demanded by the evidence . . . [a]nd that is a verdict of guilty." Defendant claims this statement was a "thinly veiled attempt to inflame the jury to a 'call to arms' to stop shootings" in the area. We disagree.

Prosecutors are given "considerable leeway" in summarizing their case to the jury. State v. Smith, 167 N.J. 158, 177 (2001). "Indeed, prosecutors . . . are expected to make vigorous and forceful" arguments. State v. Frost, 158 N.J. 76, 82 (1999). However, "[t]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." State v. Ramseur, 106 N.J. 123, 320 (1987). To that end, prosecutors may not "make inaccurate legal or factual assertions" and must "confine their comments to evidence revealed during the

trial and reasonable inferences" that can be drawn from the evidence. Smith, 167 N.J. at 178.

"Generally, if counsel did not object, the remarks will not be deemed prejudicial." State v. Josephs, 174 N.J. 44, 124 (2002). An exception exists if the remarks resulted in plain error, or error clearly capable of producing an unjust result. R. 2:10-2.

The Court in Smith explained that to rise to the level of plain or reversible error and to

warrant a new trial[,] the prosecutor's conduct must have been "'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999). In determining whether a prosecutor's actions were sufficiently egregious to warrant the reversal of a conviction, a reviewing court should take into account: (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.

[Smith, 167 N.J. at 181-82.]

Applying those guiding principles, we conclude there was no plain error committed by the trial court not striking, without objection, the prosecutor's remarks as the comment was not "so egregious that it deprived the defendant of

a fair trial." Id. at 181 (quoting Frost, 158 N.J. at 83). While a prosecutor "may not make comments that a jury must 'send a message' to the community and to the defendant," State v. Hawk, 327 N.J. Super. 276, 283 (App. Div. 2000) (quoting State v. Rose, 112 N.J. 454, 523 (1988)), the prosecutor's comment in this case did not do that. We conclude the comment here was based on the evidence that defendant made the neighborhood his own crime scene by shooting the victim in his grandmother's driveway, and simply urged the jury to hold defendant accountable for his actions by returning a guilty verdict.

Thus, the prosecutor's remarks were not "clearly and unmistakably improper, and [did not] substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." Timmendequas, 161 N.J. at 575 (internal quotation marks omitted). While the prosecutor approached the line of propriety by urging the jury to hold defendant accountable for "turning [the neighborhood] into his own personal crime scene," since defendant was not charged with terrorizing the neighborhood, and the comment may have inflamed the jury, Smith, 167 N.J. at 178 (prosecutors should confine their comments to accurate legal or factual assertions and reasonable inferences that can be drawn from the evidence), here, even if the trial court erred by its admission, it was not plain error in light of the overwhelming other evidence of

defendant's guilt. The prosecutor's statement alone was not clearly capable of producing an unjust result in this case.

III.

Having concluded that defendant's first contention did not warrant a new trial, we turn to his claim that his aggregate sentence of fifty years, subject to a parole disqualifier under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, was excessive. We again disagree.

A.

As we explained in our earlier opinion, in 2014,

[a] grand jury . . . returned an indictment charging defendant with the attempted murder of the victim with a firearm, N.J.S.A. 2C:5-1, N.J.S.A. 2C:11-3, N.J.S.A. 2C:43-6(c) (count one); the unlawful possession of a weapon by a person having been previously convicted of attempted manslaughter, N.J.S.A. 2C:39-5(b) and N.J.S.A. 2C:39-5(f) (count two); the possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count three); and committing the offense of certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1) (count four).

[Sims I, 466 N.J. Super. at 359.]

After his conviction on all counts, at his sentencing, before setting defendant's prison term, the trial court granted the State's motion for sentencing defendant under the Grave's Act, N.J.S.A. 2C:43-6(c), to an extended term for

the attempted murder conviction because defendant had committed the attempted murder with a firearm and had a prior conviction for the same crime also while using a firearm. That prior offense occurred approximately sixteen years ago when defendant was eighteen years old. At that time, he had pleaded guilty to attempted manslaughter of two men and had received a prison term of seven years with a NERA parole bar.

The court then considered the sentencing factors. It found aggravating factor one, N.J.S.A. 2C:44-1(a)(1) ("nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner"), based on its conclusion that defendant had "planned, prepared for, and patiently executed a carefully designed plan to wait until the victim" was "helplessly . . . confined within the driver side, behind the wheel of his two-door motor vehicle, unable to seek cover, unable to exit or escape." After "waiting patiently for the victim to be in that vulnerable position, he methodically . . . and systematically discharged a barrage of [fifteen] shots with [ten] to [twelve] shots striking the victim, leaving him in grave condition." The court underscored that this occurred in a "small residential neighborhood" "within close proximity of neighbors, their homes, their children playing on the street" in late afternoon.

The court also found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) ("risk that the defendant will commit another offense"), and nine, N.J.S.A. 2C:44-1(a)(9) ("need for deterring the defendant and others from violating the law"), underscoring that this shooting occurred when neighbors and children were outside. The crime "instilled incredible levels of fear and anxiety in those who were witnesses" and residents of the small community. The court said: "There is absolutely a need to deter that type of conduct from occurring."

The court also found aggravating factor six, N.J.S.A. 2C:44-1(a)(6) ("extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted"), based on defendant's prior conviction for attempted manslaughter. The court found no mitigating factors under N.J.S.A. 2C:44-1(b).

The court then imposed a term of fifty years' imprisonment for the attempted murder subject to an eighty-five percent NERA parole bar and concurrent terms of ten years imprisonment with five-year parole bars on the remaining two convictions.

B.

On appeal, defendant argues that the trial court erred by double-counting aggravating factor one and improperly punished him for the "enormous break"

he received when sentenced to seven years imprisonment on the prior attempted manslaughter. We find no merit to this contention.

Our review of a sentence is limited. We review a sentence imposed by the trial court under an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). In doing so, we consider whether: "(1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were . . . 'based upon competent credible evidence in the record'; [and] (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) (third alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

In weighing the aggravating and mitigating factors, a trial court must conduct a qualitative, not quantitative, analysis. State v. Kruse, 105 N.J. 354, 363 (1987); State v. Boyer, 221 N.J. Super. 387, 404 (App. Div. 1987) (explaining that a sentencing court must go beyond enumerating factors). The court must also state the reasons for the sentence, including its findings on the aggravating and mitigating factors. N.J.S.A. 2C:43-2(e); R. 3:21-4(h). A sentence should not be disturbed on appeal unless the facts and law show "such a clear error of judgment that it shocks the judicial conscience." Roth, 95 N.J. at 364.

In sentencing a defendant, a court may not "double-count" a fact that established an element of the offense as a basis to support an aggravating or mitigating factor. State v. Fuentes, 217 N.J. 57, 74-75 (2014); State v. Kromphold, 162 N.J. 345, 353 (2000). However, the court may consider conduct beyond what is required to commit the crime without offending the rule against double-counting. Fuentes, 217 N.J. at 75.

Contrary to defendant's contention before us, we conclude that the trial court did not double-count when it applied aggravating factor one. Here, in support of aggravating factor one, the court relied on conduct in excess of what is necessary to establish attempted murder; namely, defendant had meticulously planned his victim's shooting in a small residential neighborhood, terrorizing adults and children, some of whom were outside enjoying the day when defendant opened fire. In doing so, the court did not abuse its discretion nor did it violate our sentencing guidelines.

Defendant's other claim that the court improperly relied on the sentence he received for his prior attempted manslaughter as a basis for this sentence is not supported by the record. The court only relied on that sentence for imposition of sentence in the extended term under N.J.S.A. 2C:23-6(c), and in

support of its finding of aggravating factor six. We have no cause to disturb defendant's sentence based on this contention.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION