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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1330-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPHER THOMPSON,

Defendant-Appellant.

____

Argued April 18, 2023 – Decided May 5, 2023

Before Judges Geiger, Fisher and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 19-01-0097 and 19-07-1121.

Zachary G. Markarian, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Zachary G. Markarian, of counsel and on the briefs).

Steven K. Cuttonaro, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Steven K. Cuttonaro, of counsel and on the brief).

PER CURIAM

Defendant was charged with murdering Larenz O'Garro, and attempting to murder Tyrese O'Garro, as well as other offenses, arising out of events that occurred on October 26, 2018, in New Brunswick. The State asserted, and offered evidence at trial, that Tyrese O'Garro and Eric Inman had engaged in a physical altercation that left both injured. Tyrese went to his brother Larenz's home for treatment of his injuries; the brothers returned to the scene and, before long, Tyrese encountered and punched Inman, knocking him out cold. In response, defendant drew a gun and chased the O'Garro brothers, firing his weapon at least ten times. Larenz was hit twice in the back and later died of his injuries; Tyrese was not struck. Defendant fled but was later arrested in Georgia.

At the conclusion of a nine-day trial, defendant was convicted of: first-degree murder, N.J.S.A. 2C:11-3(a)(1); first-degree attempted murder, N.J.S.A. 2C:11-3(a)(1); N.J.S.A. 2C:5-1(a)(1); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and third-degree hindering, N.J.S.A. 2C:29-3(b)(1). He was acquitted of fourth-degree evidence tampering, N.J.S.A. 2C:28-6(1). Trial immediately followed on a separate indictment, which charged defendant with second-degree being a certain person not lawfully

entitled to be in possession of a weapon, N.J.S.A. 2C:39-7(b)(1). Defendant was convicted of that charge as well. The judge sentenced defendant to an aggregate forty-eight-year prison term by imposing consecutive terms for the murder of Larenz (thirty years, subject to an eighty-five-percent period of parole ineligibility), the attempted murder of Tyrese (eight years subject to an eighty-five-percent period of parole ineligibility), and the certain persons conviction obtained at the second trial (ten years, subject to a five-year period of parole ineligibility).

In appealing, defendant argues that: (1) the judge erred "in admitting highly prejudicial unauthenticated videos taken from the Instagram of a non-witness [that] had minimal probative value"; (2) his right to a fair trial "was violated by the admission of pervasive and highly prejudicial hearsay statements made by non-witnesses during jail calls"; (3) the judge mistakenly admitted "two witnesses' prior statements implicating [him that] were unreliable due to detectives' lengthy and unrecorded 'pre-interviews' with the witnesses"; (4) the judge failed to charge "the lesser-included-offenses of aggravated manslaughter and reckless manslaughter"; (5) the prosecution failed to prove defendant "attempted to murder Tyrese O'Garro, and the . . . instructions on this count failed to direct the jury that [defendant] could not be convicted unless he had

the purpose to kill Tyrese O'Garro specifically"; (6) the cumulative effect of these errors denied him a fair trial; and (7) the judge imposed an excessive sentence by imposing consecutive terms "for simultaneous conduct without applying relevant Yarbough[1] factors and [by] failing to apply relevant mitigating factors."

We reject all defendant's arguments except for one aspect of his seventh point. In that regard, we conclude that a remand concerning the judge's imposition of consecutive terms and for the further consideration of the fairness of the overall sentence is warranted.

I

The day after the shooting, a detective investigated the Instagram account of Najee Croom, who had been in the area at the time of the shooting. The detective found videos posted to Instagram Live, a service which only maintains videos for twenty-four hours before deletion. He viewed several and then used a separate program called "insta-stories" to download the videos onto a compact disc. The Instagram videos purported to place defendant at the location of the murder and with individuals involved in the earlier fracas on the day of the murder.

[1] State v. Yarbough, 100 N.J. 627, 643-44 (1985).

Defendant argues that these Instagram videos were not authenticated and lacked probative value. We disagree.

First, as a general matter, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901. This doesn't require "absolute certainty or conclusive proof." State v. Mays, 321 N.J. Super. 619, 628 (App. Div. 1999). The proponent of the evidence is required to make only "a prima facie showing of authenticity" and, once that showing is made, the item becomes admissible, leaving for the jury "the ultimate question of authenticity of the evidence."

This approach is similar when authentication of a videotape or a photograph is questioned. State v. Loftin, 287 N.J. Super. 76, 98 (App. Div. 1996). The proponent of the item "must establish that the videotape is an accurate reproduction of that which it purports to represent and the reproduction is of the scene at the time the incident took place." Ibid. The photographer or videographer need not testify "because the ultimate object of an authentication is to establish its accuracy or correctness." State v. Wilson, 135 N.J. 3, 14 (1994). Thus, "any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it." Ibid.

The Instagram videos offered by the prosecution were found the day after the murder and were played during the detective's testimony without audio. Due to his familiarity with the area depicted from having patrolled it as an officer for fifteen years, the detective was able to testify that the first video was taken "[i]nside the Robeson Village, [] housing community." From this same familiarity, the detective was properly permitted to testify that the second Instagram video was taken "specifically, in the area of Sample Road/Gatling Court[,] [because] … [the] dumpsters are in the video." In addition, Tyrese and Akilah Green identified themselves in the video and Tyrese stated that the video was from the night of the murder. Viewed separately or collectively, the testimony of the detective, Tyrese, and Green sufficiently authenticated the videos.

Second, we also agree with the prosecution that the videos provided relevant evidence and that the judge was entitled to conclude – in engaging in the balancing test enunciated in N.J.R.E. 403, that the probative value of these videos was not "significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the" issues. State v. Thompson, 59 N.J. 396, 421 (1971). In such instances, it is not enough for the opposing party to show

that the evidence could be prejudicial; "[d]amaging evidence usually is very prejudicial but the question here is whether the risk of undue prejudice was too high." State v. Morton, 155 N.J. 383, 453–54 (1998); see also State v. Swint, 328 N.J. Super. 236, 253 (App. Div. 2000) (recognizing that "the mere possibility that evidence could be prejudicial does not justify its exclusion").

A trial judge's decision to admit or exclude evidence is "entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment." State v. Marrero, 148 N.J. 469, 484 (1997). When a trial court weighs the probative value of evidence against its prejudicial effect pursuant to N.J.R.E. 403, its ruling should be overturned only if it constitutes "a clear error of judgment." State v. Koedatich, 112 N.J. 225, 313 (1988). The decision of a trial judge "must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

We find no abuse of discretion. The Instagram videos were relevant because they provided the location of defendant and others believed to be involved and place defendant at the location of the murder on the day it occurred. There was no undue overriding prejudice caused by their admission.

II

In his second point, defendant claims the judge erred by permitting the admission of evidence of telephone calls. We find no error.

In the first call, on October 31, 2018, Darryl Underwood, a jail inmate, contacted his cousin, Javar Nail, during which they referred to an individual, whom the State alleges is defendant, absconding to Georgia because he was wanted for murder. A few minutes later, Underwood called Croom. They discussed the deletion of text messages and then dialed in another person whom the prosecution claims was defendant because of the reference to "Dub," defendant's nickname. During this conversation, the participants observed that "Dub [was] wanted for murder" and Underwood suggested giving him a place to stay outside New Jersey. In one call, Underwood gave a call participant, whom the prosecution again claimed was defendant, his cousin's number and said that "if you want to come on down [to Georgia], you can come on down[.]" Underwood later called Croom again and said that "he" had landed in Georgia at about 2:00 a.m. Another individual – again the State claimed this was defendant – conferenced into the call once more to discuss details about his stay in Georgia. And, in fact, two weeks later, defendant was arrested in Lithonia, Georgia.

Defendant argues on appeal that these discussions constituted inadmissible hearsay. But defendant did not make that argument at trial or in response to an in limine motion. Instead, on the latter occasion, defense counsel expressed an intention to argue that defendant did not participate in the calls but had no objection to the admission of the content of the calls:

> [DEFENSE COUNSEL]: . . . [A]s far as the [] jail calls [are concerned], while I don't oppose the State utilizing them, I believe it as far as, you known, how they're saying this is . . . Mr. Thompson. That's all subject to cross-examination.
>
> THE COURT: You mean during the trial.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: But as far as them using [the jail calls,] I have no objection.

At trial, defense counsel continued to argue that defendant did not participate in the calls and, because the prosecution conceded that "there's no one to make the voice identification" of defendant as a participant during any of the calls, the trial judge directed that defendant's name should be removed from the transcript of those calls.

In recognizing that his argument is subject to <u>Rule</u> 2:10-2 because of the position taken before and during trial, defendant nevertheless claims that

"[g]iven the weaknesses" of the prosecution's case, "the erroneous admission of the jail calls at trial was clearly capable of causing an unjust result and compels reversal." Although it is true that there is no direct evidence that defendant participated in the phone calls, the jury could certainly have inferred from the content of the calls and the reference to the murder for which Dub was wanted, the discussion about getting him to Georgia, and the fact defendant was soon after arrested in Georgia, that the unnamed participant was defendant.

Even though none of the phone-call participants testified, the use of the statements made during the calls was not excludable under the hearsay rule. The calls met with the requirements of the co-conspirator hearsay exception, N.J.R.E. 803(b)(5), because the evidence supported a finding that there was a conspiracy to hinder apprehension, were made during the course of the conspiracy, and a defendant's relationship to the conspiracy, State v. James, 346 N.J. Super. 441, 457 (App. Div. 2002). It does not matter that defendant was not charged with such a conspiracy. See State v. Clausell, 121 N.J. 298, 336-37 (1990); State v. Carbone, 10 N.J. 329, 338-39 (1952); State v. Baluch, 341 N.J. Super. 141, 183-84 (App. Div. 2001).

We are satisfied that statements made during the phone calls were admissible, find no error in the judge's failure to sua sponte bar their admission,

and therefore, need not consider whether their admission was plain or harmless error.

III

In his third point, defendant asserts that the "only evidence that anyone had seen [defendant] fire the gun came from two individuals: Joalis Roldan and Akilah Green." Defendant also asserts that this evidence did not come from the witness stand but from audio statements Roldan and Green gave police that were admitted as prior inconsistent statements. N.J.R.E. 803(a)(1)(A). Defendant contends that these prior statements should not have been admitted because they were coerced and because of "the incomplete nature of the audio recordings, which only began after the detectives had already engaged in a lengthy conversation with the witnesses." We find no abuse of discretion in the judge's admission of these statements.

The record reveals that the day after the shooting, police interviewed Roldan and Green. The earlier part of the interviews were not taped because police did not view them as suspects. Once both individuals identified defendant as the shooter, they agreed to be audio recorded. They both refused to be video recorded. The statements they gave that were audio recorded identified defendant as the man who shot at the O'Garro brothers.

Both witnesses were called to testify at trial, and both testified inconsistently with their prior statements. Roldan contended during the Gross[2] hearing that followed, that police coerced her and told her what to say. Green, who was Inman's fiancé, did not claim at her Gross hearing that she was coerced. A detective testified for the prosecution at each of these hearings.

After hearing the testimony of Roldan and a police detective, and in applying the factors set forth in Gross, the trial judge found, among other things, that: Roldan was not under duress or coerced although she was "scared . . . and afraid to be videotaped"; she came to the police station to provide information voluntarily and was never in custody; she neither incriminated nor exculpated herself; and the interrogation did not exceed the level of police simply asking an eyewitness for information. The judge also found that police could not have fed Roldan information as to what to say because police did not then suspect that defendant was the shooter. And, while it is undisputed that there was an interview prior to the recorded version, the prosecutor offered into evidence the entirety of the recorded version, without editing or redaction.

The judge also made adequate findings in admitting Green's prior inconsistent statement. He found that: Green was neither "under arrest or a

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[2] State v. Gross, 121 N.J. 1 (1990).

target of an investigation"; she arrived for her statement voluntarily and with family members; there was no indication she was under duress; her responses during the recorded interview were "responsive and direct"; she neither incriminated nor sought to exculpate herself; the questioning was not accusatory but was merely in the nature of "the questioning of an eyewitness"; she was not told what to say; and the entire recording was played.

We find no abuse of discretion in the judge's rulings on the admission of the recordings of the statements given by both Roldan and Green as inconsistent statements under N.J.R.E. 801(a)(1)(A). The judge's findings are supported by sufficient evidence and are entitled to our deference. See State v. Elders, 192 N.J. 224, 244 (2007).

IV

In his fourth point, defendant contends that, despite the absence of a request, the trial judge should have instructed the jury on the offenses of aggravated manslaughter and reckless manslaughter as lesser-included offenses of murder. Defendant argues that the "chaotic atmosphere in which the shooting occurred, including the fact that most of the shots fired did not strike anyone and that only two bullets hit [Larenz] . . ., clearly indicated that the jury could find the shooter either acted recklessly or intending to cause harm, but with a

purpose short of causing death or serious bodily injury resulting in death." For these reasons, defendant claims that the judge was obligated – despite defense counsel's failure to request – to so instruct the jury, citing State v. Jenkins, 178 N.J. 347, 361 (2004), and other similar authorities.

We disagree. In instructing a jury on lesser-included offenses without a request from one of the parties, the judge is not obligated to "scour the statutes," State v. Sloane, 111 N.J. 293, 302 (1988), or "meticulously sift through the entire record . . . to see if some combination of facts and inferences might rationally sustain" a lesser offense, State v. Choice, 98 N.J. 295, 299 (1985). The evidence supporting the lesser charge must "'jump[] off the page' to trigger a trial court's duty to sua sponte instruct a jury on that charge." State v. Alexander, 233 N.J. 132, 143 (2018) (quoting State v. Denofa, 187 N.J. 24, 42 (2006)).

This test was not met here. Defendant fired his weapon at least ten times. And he did not fire into a crowd but aimed at the O'Garro brothers. The fact that only two shots hit his targets, or that the overall circumstances may have appeared to a bystander as chaotic, does not suggest either recklessness or indifference to the consequences of his conduct. The evidence supported only a finding that defendant deliberately aimed at the O'Garro brothers and therefore

supported only the charge given and not the lesser-included offenses that defendant never sought at instruction on until after he was found guilty of the murder of Larenz and the attempted murder of Tyrese.

V

Defendant next argues that (a) the prosecution failed to prove that he attempted to murder Tyrese and (b) the jury instructions failed to advise the jury that he could not have been convicted of attempted murder unless he had the purpose to kill Tyrese. We find insufficient merit in these arguments to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

We add only as to the first that Tyrese testified that after firing his weapon at Larenz, defendant turned toward and went after him:

> Q. Could you see somebody running . . . after you?
>
> A. Yes.
>
> Q. Could you see a gun?
>
> A. No.
>
> Q. . . . [D]id you see that person go behind Larenz at all?
>
> A. Um, yeah, but like from a distance though. . . .
>
> . . . .

> Q. Did that person turn at any point and face a different direction?
>
> A. Word, started running after me.
>
> Q. . . . And did . . . you continue to hear gunshots at that point?
>
> . . . .
>
> A. Yes, I did.
>
> Q. Okay. [D]id they sound closer, further, if you . . . remember?
>
> A. It just sounded like whistles.

It may be true, considering the threat to his wellbeing, that Tyrese was unable to say whether "the gunshots were aimed" at him, but the testimony he gave and the inferences to be drawn from that testimony strongly suggest that after shooting at Larenz, defendant turned and fired his weapon at Tyrese.

We also reject defendant's argument that the jury was not properly instructed on the attempted murder charge. Defendant's argument seems based largely, if not entirely, on the fact that at times during the jury charge the judge referred to "the victim" rather than to Tyrese and, thereby, allowed the jury to convicted defendant of the attempted murder of Tyrese based on the evidence offered to support the murder of Larenz. We disagree.

Although it is true that the word "victim" was used at times during the charge – and it is always the better practice, when there are multiple victims, for a judge to be precise about "the victim" by name, the charge also referred to Tyrese as the "victim" of the attempted murder charge. For example, at one point, the judge instructed the jury that the indictment charged defendant "with the crime of . . . attempted murder" in that he "did purposely or knowingly attempt to cause the death of Tyrese O'Garro or did purposely or knowingly attempt to inflict serious bodily injury upon Tyrese O'Garro that would result in Tyrese O'Garro's death." The jury verdict sheet also specifically referred to only Larenz as the alleged victim in the murder charge and Tyrese as the alleged victim in the attempted murder charge.

VI

In his sixth point, defendant argues that "the cumulative effect of the aforementioned errors denied [defendant] a fair trial."

To be sure, it is well established that "even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018). But, as outlined in the prior sections of this opinion, we have found no

error in any of the matters asserted in this appeal. And, so, we find no merit in defendant's sixth point.

VII

In his last point, defendant contends that he received an excessive sentence, arguing more specifically that the judge erred in failing to explain (a) his "refusal to find two relevant mitigating [factors]," and (b) his "application of each Yarbough factor" when running consecutive prison terms on three convictions: murder, attempted murder, and certain persons.

We find insufficient merit in defendant's argument about the rejected mitigating factors to warrant further discussion in a written opinion. R. 2:11-3(e)(2). We add only the following few comments.

We start by noting that defendant does not argue that the judge should not have applied aggravating factors three, six, and nine, N.J.S.A. 2C:44-1(a)(3), (6), (9), but instead argues only that the judge did not explain his rejection of the two mitigating factors urged by the defense: "substantial grounds" justified or excused his conduct, N.J.S.A. 2C:44-1(b)(4), and the victim's conduct induced his actions, N.J.S.A. 2C:44-1(b)(5). While it may be true that the judge's discussion of these matters was not exhaustive, the record clearly revealed that the fight that is the event that defendant argues would support his

conduct that followed, had ended and that the circumstances simply do not justify firing the ten or so shots fired by defendant at the backs of the fleeing O'Garro brothers. In short, the completed fist fight did not substantially justify the murder and attempted murder that followed.

We do, however, remand for further findings from the judge as to the application of the Yarbough factors to the decision to impose consecutive terms. Although the judge cited the Yarbough factors in his oral decision, he did not explain how those factors applied in his decision except to observe that there were different victims. To be sure, there were victims as to the three convictions for which defendant was given consecutive prison terms: Larenz was the murder victim, Tyrese was the victim of the attempted murder conviction, and society was the victim in the certain persons conviction. But the judge did not explain why any of the other Yarbough factors supported consecutive terms except to compare the time that elapsed between these convictions and defendant's unrelated 2010 attempted murder conviction. Yarbough required the judge's comparison of the events and circumstances underlying the three consecutive terms imposed, and not an unrelated eight-year-old conviction. We, thus, remand so that the judge may make findings on the Yarbough factors as they relate to the consecutive terms imposed here and an evaluation of "the fairness

of the overall sentence." State v. Torres, 246 N.J. 246, 268 (2021) (quoting State v. Miller, 108 N.J. 112, 122 (1987)). In so ruling, we neither offer nor intimate any view about whether consecutive terms were properly imposed or the fairness of the overall sentence.

Affirmed in all respects, except the matter is remanded for further findings about the sentence imposed. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION