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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2600-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAMIEN EDWARDS,

Defendant-Appellant.

Argued December 19, 2022 – Decided February 7, 2023

Before Judges Whipple, Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 18-09-0740.

Marcia Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Marcia Blum, of counsel and on the brief).

Lila B. Leonard, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Lila B. Leonard, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from a judgment of conviction for passion provocation manslaughter, N.J.S.A. 2C:11-4B(2), and weapons offenses. We affirm the conviction but remand for re-sentencing.

Defendant raises the following issues on appeal.

> POINT I
> N.J.S.A. 52:4B-36.1(B), WHICH ALLOWS PICTURES OF THE DECEDENT TO BE DISPLAYED IN THE COURTROOM DURING THE TRIAL FOR HIS HOMICIDE, VIOLATES DEFENDANT[']S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AND THE DISPLAY IN THIS CASE OF THE DECEDENT'S PICTURE ACCOMPANIED BY THE STATEMENT, "IN LOVING MEMORY JUSTIN 1983-2018," VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.
>
> > A. N.J.S.A. 52:4B-36.1(b) is unconstitutional.
> >
> > B. The display of the decedent's picture accompanied by a written statement violated defendant's right to a fair trial by an impartial jury.
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> POINT II
> THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT WHEN SHE ACCUSED DEFENDANT . . . OF LYING AND HYPOTHESIZED BOTH THAT DEFENDANT

MIGHT HAVE STABBED THE DECEDENT MANY MORE TIMES AND ALSO MIGHT HAVE ATTACKED A SECOND PERSON. (Not Raised Below).

POINT III
DEFENDANT IS ENTITLED TO RESENTENCING BECAUSE THE COURT RELIED ON AGGRAVATING FACTORS THAT ARE UNSUPPORTED AND CONTRADICT THE JURY'S VERDICT, IMPOSED AN UNWARRANTED CONSECUTIVE TERM, AND FAILED TO CONSIDER THE OVERALL FAIRNESS OF THE AGGREGATE SENTENCE OF [TWELVE] YEARS, SIX YEARS AND NINE AND ONE-HALF MONTHS WITHOUT PAROLE.

A. The unfounded aggravating factors.

B. The unsupported and unwarranted consecutive term.

In a pro se supplemental brief, defendant raises these additional arguments:

I.
The trial judge denied a causation jury instruction, pertaining to the murder, passion/provocation, reckless and aggravated manslaughter charge. My trial attorney cited State v. Martin, which states that "[t]he court should have included an instruction that was consistent with the defendant's version. Without that charge, the jury could not properly consider the significance of defendant's version of the facts. So essential to the jury's deliberations was the charge that the failure to provide it clearly possessed the capacity to bring an unjust result." [119 N.J. 2, 17 (1990)

(citation omitted).] Thereby, I conclude that the [c]ourt's decision to deny the causation charge, may have led to an unjust verdict.

II.
The trial judge denied me my right to a fair trial, by disallowing me to answer questions asked by the State. Numerous times my attorney objected to the State's refusal to let me answer a question, yet the trial judge did not act. Though the trial judge reprimanded my attorney for allegedly doing the same, during the testimony of the medical examiner and . . . [James] Pittman. I was forced to ask the [c]ourt on the record, if I could complete my answer. Defendant: "I'm sorry. Could I finish what I was going to say, Your Honor?" The [c]ourt: "I think you did, could you just answer her question." My testimony is of the upmost importance in the eyes of the jurors, and the trial judge's attitude toward me may sway . . . them, or created a negative bias against me.

III.
The trial judge gave a questionable explanation to a question that was asked by the jury regarding a definition on a lesser included charge. My attorney contended that the [c]ourt should not be defining what's not defined for the jury. That it would be grossly inappropriate for the [c]ourt to suggest an answer to the jury's question. Ultimately, it is up to the jurors to make the decision on what the law as explained to them means. I surmise that the interpretation given by the [c]ourt may have led to an unjust result.

IV.
The trial judge criticized the jury and the verdict that they arrived at, and goes on to speculate on their decision in order to impose impertinent aggravating

> factor. The trial judge continuously refers to the incident as a senseless murder, despite the verdict being manslaughter passion/provocation. The trial judge derides the conclusion the jurors came to, despite the fact that they were presented with the same evidence and video footage as the [c]ourt was. The judge being an impartial referee, should be satisfied with the results of a trial irregardless of the outcome. The proprietor of justice is sworn to uphold the fundamental principles of our legal system, and refrain from being swayed by personal reflections on matters. I contend that the [c]ourt's condemnation of the jury's verdict, may have led to an unfair sentencing.
>
> V.
> During sentencing, I believe I was entitled to mitigating factors [three] and [five] under [N.J.S.A.] 2C:44-1(b). Though I am fully aware of the fact that mitigating factors only exist to be considered, I believe I was erroneously deprived of their being mentioned. I acted under strong provocation as evidenced by the jury's verdict of manslaughter passion/provocation. The victim also induced or facilitated the alleged crime, also evidenced by the jury's verdict of manslaughter passion/provocation. I believe these factors should have been mentioned and considered, and the lack thereof, subsequently may have led to an unfair sentencing.

I.

The record tells us this case began at around three o'clock in the morning on May 20, 2018, when defendant was driving, in the rain, back to his home in Totowa after attending a family gathering. His girlfriend sat beside him in the passenger seat; the couple's eight-year-old daughter was asleep in the backseat.

The family pulled onto a central street in Totowa, a few blocks from their house. Defendant wanted to make a stop at the local QuickChek to buy a cigarillo before proceeding home. Before they arrived, however, the family encountered a Toyota Corolla driven by James Pittman. Pittman was on his way to meet a friend, Justin Parker, at the QuickChek.

Before either defendant or Pittman made it to the QuickChek, a verbal altercation ensued between the two drivers. Defendant claimed Pittman was driving erratically, as if he was intoxicated, and cut him off. Defendant pulled up alongside Pittman, rolled his window down, and told him to "learn to drive," accompanied by other insults. Defendant testified Pittman responded by threatening him and his family. Defendant sped up and passed Pittman, before turning into the exit of the QuickChek parking lot. Pittman also turned into the QuickChek lot behind defendant; the verbal exchange had caused him to miss the proper entranceway. Defendant interpreted this to mean Pittman was chasing him. Defendant testified he was concerned for his family's safety.

Both defendant and Pittman parked in the QuickChek lot and got out of their cars. They parked some distance from each other and in different rows. Defendant approached Pittman. The two continued to shout and argue. Pittman's friend, Parker, who had parked in a separate car nearby, came over.

Defendant swung at both Pittman and Parker without hitting anyone, then retreated to his car.

Pittman and Parker approached until they were about twenty feet from defendant's car. Defendant produced a six-inch knife. He sprinted forward; Pittman and Parker backed up and began to run away. Defendant chased them with the knife out as they fled into the store.

Directly inside the QuickChek doors, the floor was wet. Pittman and Parker slipped, falling to the floor. Defendant moved near Parker; while on the ground, he stabbed him in the leg and shoulder. The wounds were fatal. Parker bled out in the two or three minutes following the stabbing.

Defendant immediately left QuickChek after stabbing Parker and walked home. He passed out in his backyard; officers arrived later and arrested him at gunpoint.

A grand jury indicted defendant, charging him with first-degree murder; N.J.S.A. 2C:11-3a(1) and (2); two counts of possession of a knife in violation of N.J.S.A. 2C:39-4(d) and 2C:39-5(d); and resisting arrest under N.J.S.A. 2C:29-2(a). Defendant pleaded not guilty, and the case proceeded to trial. The defense argued that Pittman and Parker were the aggressors, and defendant acted in defense of his family.

In a pretrial ruling, the court granted the State's petition to allow four or five members of the audience to wear four-inch buttons bearing Parker's image and the phrase "In Loving Memory, Justin 1983–2018."

The jury acquitted defendant of murder but found him guilty of the lesser-included offense of passion/provocation manslaughter; N.J.S.A. 2C:11-4(b)(2). It also found him guilty of unlawful weapon possession under 2C:39-4(d) and -5(d). The jury did not find him guilty of resisting arrest.

Defendant was sentenced to eight years for the manslaughter charge, subject to the No Early Release Act, N.J.S.A. 2C:43-72, and four years for the weapons offenses. The judge found aggravating factors one, two, three, and nine outweighed the mitigating factors presented by defendant.

This appeal followed.

II.

Because this appeal presents a constitutional challenge to a statute, a claim of prosecutorial misconduct, and a claim of excessive sentencing, our standards of appellate review for each argument differ significantly.

Whether a statute is constitutional is a question of law to be reviewed on a de novo basis. State v. Hemenway, 239 N.J. 111, 125 (2019).

Prosecutorial misconduct is evaluated more deferentially. The misconduct must be so clearly and unmistakably improper and so egregious in the context of the trial as a whole that it deprived the defendant of a fair trial. State v. Pressley, 232 N.J. 587, 593 (2018). "In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" State v. Williams, 244 N.J. 592, 608 (2021) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). If misconduct rises to this standard, the appropriate remedy is a retrial, even if the overwhelming evidence suggests the defendant is in fact guilty. State v. Smith, 212 N.J. 365, 404 (2012) (citing Frost, 158 N.J. at 87).

Finally, sentencing is evaluated on an abuse of discretion standard. State v. Torres, 246 N.J. 246, 272 (2021). "[A] trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989) (citing State v. Kruse, 105 N.J. 354, 359-60 (1987)). We affirm the sentencing determinations of the 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) (internal quotation marks omitted) (alteration in original).

III.

Defendant first argues his constitutional right to trial by an impartial jury was violated because the court permitted members of the victim's family to wear buttons in the courtroom depicting the deceased's image and the phrase "In Loving Memory, Justin, 1983-2018." The buttons complied with N.J.S.A. 52:4B-36.1(b),[1] which provides:

> A victim's survivor may, during any judicial proceeding involving the defendant, wear a button not exceeding four inches in diameter that contains a picture of the victim, if the court determines that the wearing of such button will not deprive the defendant of his right to a fair trial under the Sixth Amendment of the United States Constitution and Article I of the New Jersey Constitution. Other spectators at such judicial proceedings may also wear similar buttons if the court so determines. If the victim's survivor seeks to wear the button at trial, the victim's survivor shall give notice to the defendant and to the court no less than [thirty] days prior to the final trial date.

[1] This law is part of the "Crime Victim's Bill of Rights" N.J.S.A. 52:4B-34 to -38.

Here, the prosecution correctly followed the procedure prescribed by the statute. The State moved to allow the buttons in a pretrial motion, the parties briefed the issue, and the court heard arguments relating to the buttons. The motion judge allowed the buttons, reasoning that "these are displays of mourning and that they do not prejudice a defendant's right to a fair trial as the symbols generally are small." Instead, the buttons "merely express sadness and they don't communicate to a jury any message regarding the guilt or innocence of the accused." She agreed to closely monitor the gallery for improper conduct, but concluded the buttons themselves would not deprive defendant of his Constitutional rights.

Defendant argues the buttons are inherently and impermissibly prejudicial, amounting to a form of advocacy. He notes the buttons 1) are not subject to the scrutiny as evidence, yet can be viewed by the jury; 2) appeal solely to the jury's emotions and lack any probative value; 3) are continuously displayed by multiple people; and 4) are meant to influence and intimidate the jurors into delivering a verdict desired by an inherently biased partisan group. We address each argument in turn.

In addition to the standard procedural due process guarantees of the Fourteenth Amendment, the Federal Constitution's Sixth Amendment

explicitly guarantees "the right to a speedy and public trial, by an impartial jury of the State . . . ." Article I, paragraph 10 of the New Jersey Constitution contains a nearly identical clause. Our Supreme Court has previously recognized "the right of a defendant to be tried by an impartial jury is of exceptional significance" and "triers of fact must be as nearly impartial as the lot of humanity will admit." State v. Williams, 93 N.J. 39, 60 (1983) (quoting State v. Singletary, 80 N.J. 55, 62 (1979)).

When interpreting the right to an impartial jury, the Supreme Court of the United States has sought to avoid courtroom practices that are "so inherently prejudicial that they deprive the defendant of a fair trial." Carey v. Musladin, 549 U.S. 70, 72 (2006) (citing Estelle v. Williams, 425 U.S. 501, 503-06 (1976)). The Court has held a defendant cannot be compelled to undergo trial while wearing prison clothes, because of the "unacceptable" risk of irrelevant, undue influence on the jury. Estelle, 425 U.S. at 505 (citing Turner v. Louisiana, 379 U.S. 466, 473 (1965)). Forcing a defendant to wear prison clothes during a proceeding directly contradicts the presumption of innocence our legal system affords to criminal defendants and is therefore impermissible. Id. at 504.

The Court has considered Estelle in the context of a California button statute substantively similar to the one before us. Carey, 549 U.S. at 72. Carey was ultimately decided on other grounds,[2] but in concurrence, Justice Souter noted that "one could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations."[3] Id. at 82.

Turning to other jurisdictions: courts have generally held that small buttons which display images of a victim are permissible in most contexts and do not necessitate a new trial on appeal. E.g., Cagle v. State, 6 S.W.3d 801, 803 (Ark. Ct. App. 1999) (defendant failed to demonstrate prejudice as there was no evidence in the record regarding juror's reactions to the buttons); People v. King, 544 N.W.2d 765, 768 (Mich. Ct. App. 1996) ("[w]e are not persuaded by defendant's argument that the wearing of the buttons, which were less than three inches in diameter, was equivalent to communication with the

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[2] Carey held the test for inherent prejudice in Holbrook v. Flynn, 475 U.S. 560, 570 (1986), only applied to State actors and did not extend to the actions of courtroom spectators. 549 U.S. at 76.

[3] Justice Kennedy, mused that due process requires "trials . . . be free from a coercive or intimidating atmosphere," yet stopped short of a full-throated endorsement of an outright button ban. Id. at 80. He did observe that "a new rule, perhaps justified . . . as a preventative measure" might be required. Id. at 81. He also noted the facts of Carey provided "no indication the atmosphere at respondent's trial was one of coercion or intimidation . . . ." Id. at 81.

jury or that they could have influenced the panel."); People v. Nelson, 125 A.D.3d 58, 64 (App. Div. N.Y. 2014) (declining per se rule barring display of victim's image on spectator's clothing was inappropriate and instead leaving determination to trial court); State v. Lord, 165 P.3d 1251, 1256 (Wash. 2007) (reasoning lapel button amounted to a silent showing of sympathy or affiliation in a courtroom and, without more, did not offend constitutional guarantees).

Other jurisdictions have required a new trial only when the buttons go beyond a display of grief and instead communicate a message overtly implicating the issue of defendant's guilt. See Norris v. Risley, 918 F.2d 828 (9th Cir. 1990) (holding the presence of spectators wearing buttons inscribed with the words "Women Against Rape" inside and outside the courtroom at trial was so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial); State v. Franklin, 327 S.E. 449 (W.Va. 1985) (reversing conviction of DUI homicide because "ten to thirty" spectators wearing "MADD"[4] buttons remained in court throughout the trial, seated directly in front of the jury).

Through this lens, we conclude the kind of buttons authorized by the court here amount to nothing more than a display of grief. While the

[4] Mothers Against Drunk Driving.

Constitution guarantees the right to an impartial trial by jury, both the Sixth Amendment and our Constitution also require public trials. In a criminal homicide case, the public necessarily includes the victim's family. A rational juror would expect family to have an interest in a criminal proceeding. To that end, it is likely jurors can identify the victim's family in the audience without the buttons, simply by the emotional demeanor of that group. It is simply unrealistic to contend that a four-inch button worn only by the victim's family, without more, necessarily alters the dynamic of a courtroom in such a way as to deprive all defendants of a fair proceeding. Scenarios where a button could have an undue influence certainly exist, but are not present here.

As a matter of constitutionality, N.J.S.A. 52:4B-36.1(b) leaves the decision to admit buttons within trial judges' discretion. Buttons are only permitted "if the court determines that the wearing of such button will not deprive the defendant of his right to a fair trial under the Sixth Amendment of the United States Constitution and Article I of the New Jersey Constitution." Therefore, on our review, the question becomes not whether the law itself is impermissible, but rather, whether the trial judge's discretion was appropriate.

Here, we conclude it was. The buttons are a display of grief. They conformed to the statutory size requirement and were only worn by four or five

members of Parker's family. The jury was cautioned by the court "to weigh the evidence calmly and without passion, prejudice or sympathy." There is no indication they failed in this task when they acquitted defendant of murder, or that they even noticed the buttons at all.

Defendant also argues that even if the statute is constitutional, its application to his case still amounts to error, because the buttons contained a written message—"in loving memory"—that lies outside the bounds of the statute, which only contemplates an image. As a newly minted argument not raised at the trial level, any error must meet the "plain error" standard to be reversed. R. 2:10-2. "In the context of a jury trial, the possibility must be sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. G.E.P., 243 N.J. 362, 389-90 (2020) (internal quotation marks omitted).

Defendant argues that the phrase "in loving memory" is expressive speech that portrays the decedent as the innocent victim of the defendant. He analogizes to the impermissible phrases found in Norris, 918 F.2d at 831 ("Women Against Rape"); Franklin, 327 S.E.2d at 455 ("MADD"); and Long v. State, 151 So.3d 498, 502 (Fla. Dist. Ct. App. 2014) ("Bikers Against Child Abuse").

This argument ignores the distinguishing factor that drives the reasoning behind those cases. Each one of those phrases is a slogan, which carries an obvious implication the defendant is in fact a rapist, a drunk driver, or a pedophile. The phrase "In Loving Memory, Justin, 1983-2018," carries no such connotation. It is easily understood as a neutral expression of mourning. Additionally, contrary to defendant's assertion, the phrase does not suggest Parker's "innocence"—just that his family cared about him, and when he was born, and when he died.

It is true the button statute does not explicitly condone any written messages. However, while a more inflammatory slogan would likely require reversal, the button as is does not amount to plain error sufficient to raise a reasonable doubt that the jury arrived at a verdict it would not have otherwise reached. G.E.P., 243 N.J. at 389.

IV.

Defendant next argues the prosecutor committed reversable misconduct by making various claims in her closing argument. Defendant asserts that 1) the prosecutor improperly implied that certain aspects of defendant's testimony were contradicted by other evidence or were otherwise unbelievable; and 2) the prosecutor impermissibly hypothesized defendant would have continued

the attack on Parker if a police officer had not been present within the store. Both issues are raised for the first time on appeal, and therefore we review for plain error. See also State v. Clark, 251 N.J. 266, 290 (2022) ("[i]f defense counsel fails to object contemporaneously to the prosecutor's comments, the reviewing court may infer that counsel did not consider the remarks to be inappropriate.") (internal quotation marks omitted).

After playing the surveillance footage for the jury to review, the prosecutor posited: "It's unbelievable that the defendant and [his girlfriend] didn't see this police car [in the parking lot.]" Defendant asserts this statement is reversible error because the prosecutor is, in effect, asserting that defendant is lying.

A prosecutor's repeated accusation a defendant is a liar can constitute reversible error. State v. Supreme Life, 473 N.J. Super. 165, 176 (App. Div. 2022); see also State v. Pennington, 119 N.J. 547, 576-77 (1990) (holding that it is improper for a prosecutor to use derogatory epithets to describe a defendant). "[A] prosecutor is not permitted to cast unjustified aspersions on defense counsel or the defense." State v. Acker, 265 N.J. Super. 351, 356 (App. Div. 1993) (internal quotation marks omitted).

However, a "prosecutor may attempt to persuade the jury that a witness is not credible and in doing so, 'may point out discrepancies in a witness's testimony or a witness's interests in presenting a particular version of events.'" Supreme Life, 473 N.J. Super. at 174 (quoting State v. Johnson, 287 N.J. Super. 247, 267 (App. Div. 1996)).

Here, context shows the prosecutor was not nakedly calling the defendant or defense witnesses epithets, she was suggesting the jury evaluate certain portions of their testimony in light of other evidence. This is permissible. Johnson, 287 N.J. Super. at 267.

The prosecutor also stated in summation: "I think that [defendant] probably would have continued the attack except for Officer Akins." Additionally, as part of a larger argument that defendant intended to kill Parker, not merely wound him, the prosecutor argued: "He hit him in the leg, and he hit him in the shoulder . . . . [H]e probably would have cut him more if Officer Akins hadn't come around." The prosecutor also hypothesized that, had the police not been present, defendant "would have attacked [Pittman] too."

Defendant now argues these statements are impermissible theorizing on offenses he did not actually commit. A prosecutor is "obliged to confine

summation remarks to the evidence in the case and only those reasonable inferences that may be drawn from that evidence." State v. McNeil-Thomas, 238 N.J. 256, 283 (2019) (LaVecchia, J., dissenting). "Although the prosecutor is free to discuss . . . inferential evidence . . . [she] cannot press an argument that is untrue — that is contradicted by an objective video recording . . . ." State v. Garcia, 245 N.J. 412, 435 (2021).

However, a prosecutor's remarks are generally harmless to the extent they constitute a response to a defendant's argument. State v. C.H., 264 N.J. Super. 112, 135 (App. Div. 1993). "[O]nly when the prosecutor's conduct in summation so substantially prejudice[s] the defendant's fundamental right to have the jury fairly evaluate the merits of his defense must a court reverse a conviction and grant a new trial." Garcia, 245 N.J at 436 (internal quotation marks omitted).

The prosecutor should have refrained from posing these hypotheticals to the jury. See id., at 435. Nevertheless, the error does not rise to the level required for reversal. Misconduct must "raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Bankston, 63 N.J. 263, 273 (1973). Here, the jury acquitted defendant of murder. The inference that the prosecutor asked the jury to draw via these

hypotheticals is that defendant had a murderous intent when he attacked Parker. The jury explicitly declined to adopt that viewpoint. Any error is demonstrably harmless.

V.

Defendant submits his sentencing was improper for three reasons. First, he argues the court impermissibly used factual support which contradicts the jury's acquittal of the murder charge in order to justify the application of aggravating factors one[5] and three[6] under N.J.S.A. 2C:44-1(a). Second, he claims the court erred in ordering a consecutive sentence on the "possession of a weapon for an unlawful purpose" charge, because that crime should have merged and run concurrently with the manslaughter sentence. Third, he contends he was entitled to mitigating factors three[7] and five,[8] which the court did not consider.

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[5] "The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner." N.J.S.A. 2C:44-1(a)(1).

[6] "The risk that the defendant will commit another offense." N.J.S.A. 2C:44-1(a)(3).

[7] "The defendant acted under a strong provocation." N.J.S.A. 2C:44-1(b)(3).

[8] "The victim of the defendant's conduct induced or facilitated its commission." N.J.S.A. 2C:44-1(b)(5).

"[A] trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989). The standard of proof for the finding of a mitigating or aggravating factor is therefore lower than the standard required for a criminal conviction. Simultaneously, however, "the findings of juries cannot be nullified through lower-standard fact findings at sentencing." State v. Melvin, 248 N.J. 321, 352 (2021).

Melvin concerned a defendant who was acquitted of first-degree murder but was convicted of second-degree unlawful possession of a weapon. Id. at 349. "In other words, the jury determined that Melvin had a gun but acquitted him of all charges that involved using the gun—or even having the purpose to use it unlawfully." Id. at 350. The trial court applied aggravating factor six (the seriousness of offenses) and sentenced him to sixteen years in prison. Id. at 330.

Our Supreme Court concluded this outcome violated the New Jersey Constitution's guarantee of "Fundamental Fairness" by effectively depriving

the defendant of his due process right to a trial by jury. Id. at 347, 352; see also N.J. Const. art. I ¶9.

Here, defendant was acquitted of murder and convicted of passion/provocation manslaughter, N.J.S.A. 2C:11-4(b)(2). That crime is defined as "homicide which would otherwise be murder [if] committed in the heat of passion resulting from a reasonable provocation." Ibid. The Melvin Court did not directly address the issue of how this new doctrine would apply to the concept of lesser-included offenses, such as passion/provocation manslaughter under N.J.S.A. 2C:11-4(b)(2).

The sentencing judge undertook a lengthy consideration of aggravating factor one, "the nature and circumstances of the offense." N.J.S.A. 2C:44-1(a)(1). She reasoned:

> [It] has to be something more than just carrying out the murder itself. There has to be some sort of extra effort or depravity that's attached to it. For example when you kill somebody, if you burn the body. . . desecrate it in some fashion . . . I'm just using examples, eat it, things of that nature, that just seems above and beyond that which is necessary to commit the crime itself . . . .
>
> What I grappled with most was what appeared to be the senseless nature of what happened here. And I think that senselessness is something that is considered under aggravating factor one.

> What I would note is, I understand that in most cases when you have a murder, for the most part, almost every murder is considered to be senseless, but in this case it's different, it goes above and beyond what anyone would commonly believe to be a senseless murder, in the sense that in presiding over the trial, and being fully aware of the evidence, the testimony, the video footage here, it's clear to the court that this is something that did not need to happen by any stretch of the imagination here. What I would note is that the court, despite the finding of the jury, . . . I'm not sure why they came to the conclusion that they came to but there is – presumably it's that they did not find that the State proved or failed to show that it wasn't in the heat of passion because looking at it, it does not appear that there was sufficient provocation to kill somebody. The provocation here appears to be slight at best.
>
> [(Emphasis added).]

Melvin requires us to reverse the trial judge's application of aggravating factor one. The jury cannot find that there was adequate provocation to downgrade the offense to manslaughter, only for the sentencing judge to openly call the crime a murder and apply an aggravating factor on the basis that provocation was, in her view, insufficient. Doing so deprives the defendant of his jury trial right under the fundamental fairness clause of our state's constitution. Melvin, 248 N.J. at 347, 352. On remand, however, the court is not foreclosed from finding aggravating factor one applicable for any other pertinent reason beyond the fact that there was not adequate provocation.

As to aggravating factor three—"the risk that the defendant will commit another offense"—the trial court reasoned the defendant's juvenile record,[9] coupled with his "lack of judgment," justified the application of the factor. She stated:

> It appears that for whatever reason he somehow believed that his family was in mortal danger when he committed this act, although [it] appears it's clear that there were multiple times the defendant could have walked away and safely taken care of his family. . . .
>
> So often times you're going to get into situations where people don't exchange kind words to each other or grace or mercy to each other. And the situation arises is that that's going to happen with regard to [defendant] once he's released from custody and the question is, how is he going to perceive that threat or those words? So there appears to be some sort of volatility on the part of [defendant] when he doesn't like what is being said. And, again, the escalation in this case occurred based on the evidence itself. [Defendant] admitted that he started the argument, he ran up to Mr. Pittman's car, he went back to his vehicle to get the knife so I don't want to reuse the same facts but that is the court's concern, is the judgment used by [defendant] in this situation.
>
> [(emphasis added).]

This reasoning presents another Melvin problem. If the court is stating defendant has a predisposition to violence, or a quick tempter in general, that

[9] Defendant's juvenile record contained some simple assaults.

is an acceptable basis for imposing a factor, but it cannot use the facts of this case as support for that proposition after the jury has already decided the provocation here was adequate. Melvin, 248 N.J. at 347, 352.

Finally, in addition to manslaughter, defendant was convicted of two counts of possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4(d): "Any person who has in his possession any weapon . . . with a purpose to use it unlawfully against the person . . . of another is guilty of a crime of the third degree." These two counts corresponded to Parker and Pittman, respectively. The sentencing court determined, while the underlying action of chasing Parker and Pittman with the knife was "the same," doing so resulted in two victims, and therefore, consecutive sentencing was appropriate for the weapons charge which related to Pittman. Parker's merged with the manslaughter.

Defendant argues the court erred because some guidelines set out in State v. Yarbough, cut against imposing a consecutive sentence in his case. 100 N.J. 627, 634 (1985). We disagree.

We review a sentencing court's decision for abuse of discretion, so long as the sentencing judge explains their rationale. State v. Liepe, 239 N.J. 359, 378-79 (2019); Yarbough, 100 N.J. at 643. Furthermore, the analysis under

Yarbough is a qualitative, not quantitative, one. State v. Carey, 168 N.J. 413, 427 (2001).

The judge here did not abuse her discretion. "[C]rimes involving multiple victims represent an especially suitable circumstance for the imposition of consecutive sentences because the total impact of singular offenses against different victims will generally exceed the total impact on a single individual who is victimized multiple times." State v. Molina, 168 N.J. 436, 442 (2001) (internal quotation marks omitted).

To the extent we have not addressed defendant's other arguments, we are satisfied they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(2).

Affirmed in part, remanded in-part for re-sentencing consistent with this opinion. 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