

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE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-3211-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TRYSTAL LOZADA,

Defendant-Appellant.

Submitted June 1, 2023 – Decided June 12, 2023

Before Judges Mayer and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-03-0137.

Lazzaro Law Firm, PC, attorneys for appellant (James Kilduff, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In this appeal, we consider the sentence imposed on defendant Trystal Lozada, who, among others, was charged with sexually abusing a coworker late one evening. Defendant presents no issues about the trial or the jury's verdict; she argues only that the aggregate sentence was excessive and the imposition of consecutive prison terms was, among other things, based on a faulty analysis of the factors contained in State v. Yarbough, 100 N.J. 627 (1985). We agree consecutive terms were inappropriate here.

I

Defendant was a dancer at a gentlemen's club in Passaic. She, another female dancer, and the male owners and managers of the club were charged with numerous crimes for their roles in the sexual abuse of a third dancer, S.J. (hereafter "Sara," a fictitious name), in the early morning hours of November 5, 2012. The first trial resulted in a hung jury. At the second trial's conclusion in December 2019, the jury found defendant guilty of ten offenses, including first-degree crimes for defendant's role as either an active participant in the abuse or as an accomplice in the crimes of others. After appropriate mergers, the judge imposed three ten-year prison terms subject to the No Early Release Act. Two of those ten-year terms were ordered to run consecutively, while the third was ordered to run concurrently to the others.

Because of the importance of the consecutive/concurrent determination to this appeal, we consider the evidence adduced at trial and the way the convictions were grouped by the trial judge for sentencing purposes. Defendant argues consecutive terms were inappropriate because all the events of that evening constituted a continuous episode, while the State argues, as the judge held, that defendant should be punished separately – through the imposition of consecutive terms – for her own aggravated assault, on the one hand, and her involvement as an accomplice, on the other. For a better understanding of these contentions, we start by describing the three phases of criminal conduct that formed the basis for the indictment and the State's case-in-chief.

The evidence revealed that in the early morning of November 5, 2012, Sara, defendant, and other coworkers remained after hours to celebrate the birthday of Brian Guzman, one of the club's owners. The first phase of the abuse occurred when, during the celebration, Sara accepted a drink from Fernando Vaquero, one of the club's managers, and immediately began to feel numb and very dizzy, a feeling different from normal intoxication. Another dancer, Arlene (a fictitious name), observed that Sara was incoherent and unable to support her own weight.

Sara ended up on top of the bar in this numb and dizzy state, and the party's other attendees, including defendant, began sexually abusing her. Defendant removed Sara's pants, and Miguel de la Cruz performed oral sex on Sara; he also inserted a bottle into her vagina while Michael Ramirez held her legs open. At one point, Sara said "no" and called out to defendant, who initially told the men to stop before saying, "she keeps opening her legs. She likes it." While the men continued to touch Sara and penetrate her with bottles, defendant and Arlene smacked Sara's buttocks.

Soon after, de la Cruz carried Sara to a nearby, secluded champagne room and attempted to have intercourse with her. The second phase of the abuse commenced when Sara left the champagne room and fell down onto a couch in the lap dance area near the bar. Ramirez approached Sara and began fondling her breasts and genital area. Defendant came over, sat on the couch with Sara, and joined Ramirez in fondling Sara's breasts; defendant also digitally penetrated Sara while Ramirez performed oral sex on Sara.

The third phase took place in an upstairs apartment, where Guzman brought Sara into a bedroom and raped her. Sara briefly regained consciousness, pushed Guzman off her, and attempted to leave. Ramirez attempted to calm Sara,

only to then take her into another bedroom and perform oral sex on her as she again lost consciousness.

The jury found defendant guilty of ten offenses, all of which occurred during the first and second phases. The parties agree the jury did not convict her of anything that occurred in what we have referred to as the third phase.

Specifically, the jury convicted defendant of three first-degree offenses:

- aggravated sexual assault, aided or abetted by one or more other persons and with the use of physical force or coercion, N.J.S.A. 2C:14-2(a)(5);
- aggravated sexual assault where the victim is one whom the actor knew or should have known was helpless or incapacitated, N.J.S.A. 2C:14-2(a)(7);
- accomplice liability, aggravated assault where the victim is one whom the actor knew or should have known was helpless or incapacitated, N.J.S.A. 2C:14-2(a)(7).

The jury also convicted defendant of seven offenses of lesser degrees:

- two counts of sexual assault through the use of physical force or coercion but the victim does not sustain severe personal injury, N.J.S.A. 2C:14-2(c)(1), one count of which was based on defendant being an accomplice;
- three counts of aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a), one count of which was based on defendant being an accomplice; and

- two counts of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b), one count of which was based on defendant being an accomplice.

The judge merged the convictions of lesser degrees into the first-degree convictions for sentencing purposes¹; neither party argues these merger decisions were erroneous.

After considering the aggravating and mitigating factors found applicable,² the judge imposed ten-year prison terms on each of the three first-degree convictions. No one argues the imposition of ten-year prison terms was inappropriate or an abuse of discretion.

¹ The convictions were merged into three categories under each of the three first-degree convictions. The first category merged the first-degree aggravated sexual assault, aided or abetted by others and with the use of physical force or coercion, with one count of aggravated criminal sexual contact, the count of sexual assault through the use of physical force or coercion but the victim does not sustain severe personal injury, and one count of criminal sexual contact. The second category merged the conviction of first-degree aggravated sexual assault while the victim was physically helpless or incapacitated with one count of criminal sexual contact. The third category merged the accomplice liability offenses.

² The judge found and weighed aggravating factors one, two, three, and nine, N.J.S.A. 2C:44-1(a)(1), (2), (3), and (9), with mitigating factors seven, eleven, and fourteen, N.J.S.A. 2C:44-1(b)(7), (11), and (14), and concluded that the former "outweigh[ed]" the latter.

The judge then considered whether the three ten-year prison terms should run concurrently or consecutively, ultimately concluding that the ten-year term imposed on the first-degree conviction for aggravated sexual assault while Sara was helpless or incapacitated should run consecutively to the term imposed on the first-degree conviction based on accomplice liability.

II

In appealing the judgment of conviction, defendant argues:

I. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES . . . BECAUSE THE SEXUAL ASSAULT CHARGED UNDER ALL COUNTS WAS PART OF ONE ONGOING CRIMINAL EPISODE, REQUIRING CONCURRENT SENTENCES TO COMPLY WITH PRINCIPLES OF DOUBLE JEOPARDY, MERGER, AND MULTIPLICITY.

II. THE CONSECUTIVE SENTENCES IMPOSED . . . WERE EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED.

In considering defendant's first argument and the State's responses to it, and after close examination of the record and the judge's sentencing determinations, we are satisfied the Yarbough test was misapplied and that the judge erred in imposing consecutive prison terms. As a result, we need not reach defendant's second point.

III

A

As a general matter, sentencing judges "are given wide discretion so long as the sentence imposed is within the statutory framework." State v. Dalziel, 182 N.J. 494, 500 (2005). That discretion, however, is not unlimited; a judge's findings must be anchored to and driven by competent and reasonably credible evidence, and the judge must correctly apply appropriate legal principles. And, in general, we modify sentences only when there has been a clear error of judgment that shocks the judicial conscience. State v. Roth, 95 N.J. 334, 364 (1984).

When the imposition of consecutive terms is challenged, we must ensure that the principles set forth in Yarbough, 100 N.J. at 643-44, as later clarified by State v. Zuber, 227 N.J. 422, 449 (2017), were correctly applied. Yarbough recognizes that "there can be no free crimes in a system for which the punishment shall fit the crime." 100 N.J. at 643. To ensure compliance with that central theme, a judge must separately state the reasons for consecutive terms in the sentencing decision, and, in reaching a conclusion, the judge must consider whether:

[(1)] the crimes and their objectives were
predominantly independent of each other, [(2)] the

crimes involved separate acts of violence or threats of violence, [(3)] 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, [(4)] any of the crimes involve multiple victims, [and (5)] the convictions for which the sentences are to be imposed are numerous.

[Id. at 644.]

The Supreme Court has also instructed that "[t]here should be no double counting of aggravating factors," and that "successive terms for the same offense should not ordinarily be equal to the punishment for the first offense." Zuber, 227 N.J. at 449 (citing Yarbough, 100 N.J. at 644).³

B

In asserting that the trial judge erred in her application of the principles described in Yarbough and Zuber, defendant chiefly argues that her convictions – whether based on her being a principal actor or only an accomplice – were all part of "a single period of aberrant behavior." Yarbough, 100 N.J. at 644. Consecutive sentencing for this collection of offenses, defendant claims,

³ Yarbough also held that "[t]here should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms . . . that could be imposed for the two most serious offenses," Zuber, 227 N.J. at 449 (citing Yarbough, 100 N.J. at 644), but the Legislature later enacted a law that declared "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses," N.J.S.A. 2C:44-5(a).

violates the rules against merger, double jeopardy, and multiplicity, all of which stand for the proposition that a criminal defendant cannot receive multiple punishments for a singular offense. See, e.g., State v. Miller, 237 N.J. 15, 32-33 (2019); State v. Diaz, 144 N.J. 628, 637 (1996); State v. Dillihay, 127 N.J. 42, 46-47 (1992); State v. Davis, 68 N.J. 69, 77 (1975).

We find no constitutional infirmity in the sentence imposed, but we do agree the Yarbough factors were misapplied and, in fact, preclude the imposition of consecutive terms here. That is, we agree with defendant's argument that her multi-phased and multi-faceted assault of Sara should have been viewed, for sentencing purposes, as a singular criminal episode. Defendant correctly argues that the first two phases of abusive acts she and her codefendants performed on Sara – whether on the bar or on a nearby couch – all began and ended within a short time span of approximately thirty minutes.⁴ There is also merit in her contention that the bar and the couch are in close physical proximity, less than fifteen feet apart. Defendant argues that, under Davis, for example, she and her co-defendants were just "integral part[s] of a larger scheme or episode" to sexually assault Sara, and that the evidence supportive of each count in

⁴ The specific times for these events was related through Arlene's testimony.

connection with this scheme greatly overlapped. 68 N.J. at 81.⁵ In response, the State argues that the consecutive terms punish different crimes, one for defendant's direct actions and the other for acting as an accomplice.

The judge's decision mixed the way the parties conceptualized the convictions. The judge considered the fact that the assaultive conduct occurred in different locations and at different times⁶ in concluding those factors supported consecutive terms but then imposed consecutive terms because one group of offenses related to defendant's conduct as a principal actor and the other related to her conduct as an accomplice, even though all the conduct, however couched in legal terms, was occurring simultaneously and being done to the

⁵ The jury acquitted defendant of engaging in any criminal offense arising from the third phase of abuse that occurred in the upstairs apartment, yet the judge erroneously made references to the third phase in explaining why consecutive terms were imposed. Those events should have played no role in the sentencing decision. See State v. Melvin, 248 N.J. 321, 326 (2021).

⁶ One particular error in the judge's decision is her determination that the conduct for which defendant was convicted took place over the course of hours. For example, the judge said at this stage of her decision, that "[t]his abuse last[ed] anywhere from . . . hours, 8 hours at least, [during which Sara] was tortured." In reaching that conclusion, however, the judge incorporated the third phase – the assault that occurred in the upstairs apartment – for which defendant was not convicted. Defendant was convicted only of conduct occurring in the first two phases and not for whatever occurred hours later.

same victim.⁷ So, while the judge expressed her findings on the factors delineated in Yarbough about time, place and number of victims, the prison terms that were ordered to run consecutively were based on different theories of criminal liability, rather than different crimes occurring at different places, at different times, and on different victims. In short, what the judge said in applying the Yarbough factors is disconnected from what was ordered.

To be sure, what the judge expressed in her oral decision about time, place and number of victims represented the correct approach. But, even if it could be said that the judge's findings about those concepts was reflected in the terms that were ordered to run consecutively, we would still reject the conclusion reached. That is, we agree with defendant that the imposition of consecutive terms in sentencing defendant is inconsistent with the letter and spirit of Yarbough.

The first Yarbough factor favors consecutive terms when "the crimes and their objectives were predominantly independent of each other," 100 N.J. at 644, whereas, for the most part, the objectives here – to abuse or degrade Sara for the gratification of defendant and her coworkers – were the same. Moreover, if, as

⁷ That is, the convictions based on accomplice liability were based on events that occurred on both the bar and the couch, as did the events that supported the other convictions. In that sense, there is no separation at all – either physically or in time – between the crimes that underlie the convictions for which consecutive terms were imposed.

the judge stated, and as we have described, the first phase, which occurred on the bar, was independent of the second phase, which occurred almost immediately after on the couch, the counts of the indictment on which defendant was convicted did not draw a distinction between those two phases and allowed defendant to be convicted on those counts regardless of whether her offense was committed on the bar or on the couch or both. So, we have no way of knowing whether the jury viewed the two phases as "predominantly independent of each other." Moreover, there is no reason to demarcate between the bar and couch phases any more than it would be sensible to demarcate, for Yarbough purposes, between each touching during the bar phase and each touching during the couch phase.

In considering the second factor, it is arguable that, as a theoretical matter, what occurred constituted "separate acts" just as – again – each touching may be considered a separate act. Only this conceptual interpretation buttresses a finding that defendant engaged in separate acts.

The third factor requires consideration of whether the crimes were committed "at different times or separate places" and occurred "so closely in time and place as to indicate a single period of aberrant behavior." Id. at 644. In considering the "separate places" aspect, the record reveals the first two phases

occurred in places approximately fifteen feet apart.⁸ In attempting to suggest greater physical separation, the judge mistakenly considered what occurred in the upstairs apartment; again, defendant was not convicted of any aspect of the assault that occurred there, so consideration of the third phase was inappropriate. See Melvin, 248 N.J. at 326. Once removing the third phase of the assault from the analysis, it becomes readily apparent that this aspect of the third factor does not support the imposition of consecutive terms.

The same can be said for the "different times" aspect of the third Yarbough factor. The bar and couch phases were memorialized in a videotape. That videotape, which is slightly longer than an hour, encompasses both phases. It demonstrates that the assault at the bar begins in the video's twenty-second minute and lasted approximately twenty-two minutes. The couch phase started in the video's fifty-fourth minute and lasted approximately two minutes. This evidence demonstrates there was little time separating the two phases for which defendant was convicted and this aspect of the third factor also fails to support the imposition of consecutive terms.

⁸ In fact, the record reveals that the champagne room was fifteen feet from the bar; the couch on which the second phase occurred was closer to the bar than the champagne room.

Of great importance in considering the fourth factor – that the crimes did not involve "multiple victims" – is the indisputable fact that Sara was the only victim, so we do not have the situation, found in most cases in which consecutive terms are imposed, of multiple victims, even when injured by a single act. Indeed, in cases where crimes occur at basically the same place and time, or through a single act, the Supreme Court has recognized the importance of the multiplicity of victims as a justifiable basis for consecutive terms. See, e.g., State v. Liepe, 239 N.J. 359, 374 (2019); State v. Carey, 168 N.J. 413, 428 (2001). Here, however, there is only one victim, a fact that also inures against the imposition of consecutive terms.

The fifth factor – "the convictions for which the sentences are to be imposed are numerous" – is in this context repetitious of the second factor; there may be numerous convictions and technically separate acts but, in considering this factor in conjunction with the other factors, it cannot be fairly concluded that concurrent terms would allow defendant a free crime because there was one victim and "a single period of aberrant behavior," Yarbough, 100 N.J. at 644, that occurred in essentially the same place and time.⁹

⁹ While Yarbough recognizes numerosity of convictions as a factor to be considered, there is scant case law explaining how this factor should be

The judge further erred by considering facts irrelevant to a Yarbough analysis. In explaining why she was imposing consecutive terms, the judge emphasized, in expressing her Yarbough findings, the heinousness of the offenses.¹⁰ That finding, however accurate it may be, has relevance only to the judge's aggravating/mitigating findings, which bear only on the fixing of the prison terms for the three convictions, and not on whether any of those terms ought to be served consecutively rather than concurrently. In invoking the nature of the offenses at this stage of the sentencing decision, the judge transgressed Yarbough's direction that there "be no double counting of aggravating factors." 100 N.J. at 643-44.

understood in a case like this. Here, for example, as we have noted, defendant was convicted of ten offenses, but, after appropriate mergers, the judge recognized defendant should only be sentenced to three prison terms. Does this Yarbough factor mean that the offenses that merged should be counted for purposes of determining the propriety of consecutive terms? In short, in applying this factor, should a court consider that defendant committed ten convictions or only three? Although our existing jurisprudence provides no clear answer to that question, it seems too facile to simply add all the convictions rather than, after applying appropriate merger principles, recognize that defendant was to be punished for three convictions.

¹⁰ For instance, the judge remarked that "any sexual assault is heinous. But so many times and in horrible ways. Its heinous nature is simply overwhelming."

C

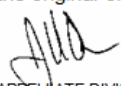
To summarize, the judge employed an irrelevant consideration (the heinousness of the offenses), and gave insufficient weight to those Yarbough factors that require a consideration that the crimes committed in the first and second phases were separated only by a brief period of time (approximately thirty minutes) and distance (about fifteen feet), and to the number of victims (one). We conclude that the circumstances preclude imposition of consecutive prison terms in this case.

IV

We, thus, reverse that part of the judge's sentencing decision that required the service of two of the prison terms consecutively. The record precludes the imposition of consecutive terms here. For that reason, we need not consider defendant's second argument that the overall sentence was excessive.

The matter is remanded for further proceedings in conformity 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