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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3611-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AYONI WILLIAMS,

Defendant-Appellant.

Submitted February 15, 2023 - Decided April 17, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 17-08-2129.

Joseph K. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Assistant Deputy Public Defender, of counsel and on the briefs).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Emily M. M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

During jury selection in 2020, defendant objected to the State's use of peremptory challenges, arguing they were being utilized in a discriminatory manner in violation of the United States and New Jersey Constitutions. The trial court overruled the objection without requiring the State to supply reasons for its challenges.

After defendant was convicted, he raised the issue on direct appeal. We remanded for a Gilmore¹ hearing, instructing the State to provide reasons for seven peremptory challenges. At the remand hearing, the State explained its reasons for using peremptory challenges to strike nine jurors.² The court did not rule on the propriety of the challenges.

We again remanded, directing the trial court to make findings as to the constitutionality of the State's exercise of the peremptory challenges. In a thorough written decision, the trial court found the State proffered credible, neutral bases for each challenge and defendant failed to carry his burden to show

¹ State v. Gilmore, 103 N.J. 508 (1986).

² For completeness, the court and counsel agreed to address the nine jurors who were challenged by the State.

the challenges were exercised on constitutionally impermissible grounds. We agree and affirm defendant's conviction and sentence.

I.

The only two issues on appeal are the constitutionality of the State's use of peremptory challenges during jury selection and defendant's contention regarding his sentence. Therefore, a detailed discussion of the facts is not necessary for the disposition of this case.

During jury selection, the State used nine of its peremptory challenges. Defense counsel objected for the first time after the State used its fifth peremptory challenge, asserting the challenges were used on five people of color, four of whom were women. Portions of the transcript are indiscernible but the court's ruling was clear in denying the motion:

[DEFENSE COUNSEL]: Judge, can I just make (indiscernible)?

THE COURT: Yes. Oh, you (indiscernible)?

[DEFENSE COUNSEL]: No, no, no. (Indiscernible).

THE COURT: Oh, I don't find anything at this point in time. I think it's a very diverse group that we have, and I kind of like that. I'm not going to ask any reasons at this point.

[THE STATE]: Very good, Judge.

Defense counsel again objected to the State's peremptory challenges after the eighth challenge. Citing to State v. Batson, 476 U.S. 79 (1986), counsel contended the State was excusing the jurors in a discriminatory manner because seven of them were people of color and seven were women. The State responded that it was prepared to provide reasons for its peremptory challenges. However, the trial court stated it was unnecessary because there was no indication, based on the composition of the jurors currently seated in the jury box and the remaining venire, that the State had impermissibly utilized its challenges.

The following exchange then took place:

THE COURT: I just want to put on the record that you made a [Batson] challenge, [c]ounsel, just a few minutes ago. You—the last two jurors that you struck were Caucasians. You also struck two Hispanics previous[] to that. And the makeup of the jury right now, by my count, is there's nine African-Americans in the jur[y box] and two Hispanics, and the majority of the people in the pool are overwhelmingly minority. So[,] . . . when you make a challenge like that, I find it somewhat disingenuous when the makeup of the current jury [is] as contemplated. There's no challenge on behalf of the State, but I just want the record to be clear with regard to your previous challenge.

[DEFENSE COUNSEL]: May I respond?

THE COURT: Go ahead.

[DEFENSE COUNSEL]: Of course[,] I want to be fair. If the [c]ourt had any questions about the challenges

that the defense has made, I am more than happy to put on the record the reasons for those.

THE COURT: I don't need to at this time.

[DEFENSE COUNSEL]: As for the makeup of the jury, I do not disagree with the [c]ourt, and I don't disagree with the [c]ourt's description of [the] jury pool that is left. What I was responding to is what I saw as a pattern of (indiscernible). Now, because we have a particularly diverse jury pool, Your Honor is correct that the (indiscernible) . . . defense was challenging was the (indiscernible). (Indiscernible).

THE COURT: No.

[DEFENSE COUNSEL]: (Indiscernible).

THE COURT: Counsel . . . how can you have an—I mean, the overwhelming majority as I'm looking at the audience is all minorities. So how could the State possibly gain any advantage by using those challenges when they're going to run out of challenges? They have two left. It makes absolutely no sense in that context, and so clearly[,] they weren't doing it to gain any type of advantage from striking minorities. That's why I find it very disingenuous that it was made. So[,] we're going to move on at this time.

A jury found defendant guilty of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). The court sentenced defendant to eight years in prison with a four-year parole ineligibility period.

II.

We turn to a discussion of each of the nine challenged jurors, the voir dire colloquy, the State's reasons for excusing the jurors as articulated during the first remand hearing, and the court's subsequent ruling in its written opinion following the second remand.³

During the voir dire, the prospective jurors provided general biographical information and their opinions regarding gun control laws, whether the criminal justice system was fair and effective, their feelings about the essential guiding principles of our justice system, and whether they would follow those principles.

The State first exercised a peremptory challenge to excuse Sherry Canzius⁴, a woman of color. Canzius reported that her biological father was a Newark detective with whom she did not have a relationship. She advised that her stepfather, with whom she did have a relationship, was being deported because he had been accused of being a pedophile. Although the accuser had retracted her statements, Canzius' stepfather never had his record expunged and

³ The judge who conducted the first remand hearing and issued the written decision after the second remand was not the judge who presided over the trial. Coincidentally, however, the remand judge had observed the jury selection at issue and had a recollection of the proceedings.

⁴ The jurors' names were spelled several different ways in the transcripts.

Immigrations and Customs Enforcement had started deportation proceedings. When asked about her opinion on gun laws, Canzius replied that "[she] d[id] [not] really know much about them," but "[she] work[s] out of Pennsylvania and . . . see[s] people walking . . . on the side of the road with [guns]" and "[t]hat's kind of, like, a little weird."

During the remand hearing, the State provided the following reasons for challenging Canzius:

she indicated—when asked about gun control she said she didn't know about gun control laws. Then she followed up, and that was—this is a direct quote. . . . [I]t was "a little weird" seeing hunters on the road. Her [step]father was facing deportation for pedophilia, which indicated a possible prejudice against the [S]tate.

The court found that "having a family member as a defendant in a criminal case was sufficient to excuse this juror and has been so held by our courts in a myriad of cases too numerous to list."

Darius Allen, a black male, was the next juror excused. Allen said he thought the laws in New Jersey were "a little too strict at times," but his viewpoint would not prevent him from neutrally judging the facts of the case. Allen said he has been to Virginia where it was much easier to obtain a handgun or "things . . . in that nature." When asked whether his personal feelings would

prevent him from applying the law as instructed, Allen first said he would not be able to apply the law but then corrected himself and said he could.

On remand, the State presented the following proffer:

he said he thought gun control . . . is strict. He seemed to misunderstand . . . a few of the questions several times I noted. He said he wouldn't be able to apply law regardless of his feelings at first, then corrected himself after the fact. . . . [I]n our perspective there was a bias against gun control and it didn't appear that he was listening.

In considering the State's proffer, the court stated: "Given the sole charge here was unlawful possession of a handgun, the prosecutor provided a sufficient neutral, case-specific reason to excuse this juror."

The third juror struck was Lizvette Castro-Ramirez, a Hispanic female. The juror told the court her father was convicted twice of driving while under the influence (DWI) and for domestic violence. He was later deported. When asked whether she believed her father was treated fairly by law enforcement, she thought his inability to afford an attorney affected his ability to get fair treatment. The juror paused before stating she was not biased against the State, law enforcement, or the courts. Regarding gun control, Ms. Castro-Ramirez said she thought the present gun control laws were effective.

The State proffered its reasons for excusing Castro-Ramirez:

[s]he said that the law can't do any more with gun control, it was effective as-is. She indicated that her father was convicted of DWI and domestic violence and was deported, which indicated to us or to me that . . . she might have a bias against the [S]tate and against gun control.

The court found that "this juror . . . had a family member who was convicted of DWI and domestic violence and deported. The prosecutor felt her father's convictions m[ight] bias her against the [S]tate as the entity that prosecuted him. The prosecutor's reason was situation specific to this juror."

The State also struck Ruth Ro, an Asian woman. Ro said she thought gun laws needed to be stricter, but her views would not affect her ability to judge the facts of the case. When asked if the justice system was fair, she revealed she previously sat as a juror in a criminal case. She thought the justice system was fair because in the prior case in which she served as a juror, "the accusation was harsher than what was actually acted upon, and so [the jury] found the defendant not guilty, and I feel like that's the fair way to judge a trial. It's based on the . . . law[,] . . . what's being charged and the evidence that's there and the rule of the law"

The State advised it excused Ro because:

[s]he said the system is fair because she was on another jury, and this is a quote, "accusations were harsher than what was actually acted upon" and su[a] sponte she

indicated that she and her fellow jurors found the defendant not guilty and she followed up by saying "and I think that's the fair way to judge a trial" showing to me a bias against the [S]tate.

The court noted Ro "was not asked but volunteered the information about her past jury service. An expression that the [S]tate had overcharged in her prior experience could reasonably cause the prosecutor to question whether [the juror] would follow the law if she believed this case was overcharged and justified her removal."

The next juror to be excused was Danyelle Smith Ekhaguere, a black woman. She revealed her brother had committed a murder in Newark ten to fifteen years ago, and "served the time." She thought "he got a just penalty." The brother was later convicted of theft and served a year in prison. He was currently incarcerated. Despite the murder and prosecution taking place in Newark, the juror said she could be fair in this case. Ekhaguere thought gun laws were too lenient and the justice system was not always fair, especially to immigrants.

On remand, the State proffered, "[s]he sa[id] the law is not always fair to immigrants. She was a social worker. Her brother was convicted of murder, got out and . . . was then doing time for theft, which would indicate to us a bias against the [S]tate."

The court stated: "While her views on fairness to immigrants and her employment are rather innocuous, having a close family member twice convicted is a reasonable basis to believe there may be some bias against the [S]tate and [to] excuse this juror."

Brandy Yellon, a white woman, was the sixth juror excused by the State with a peremptory challenge. She previously served as a juror in a criminal case and testified as a character witness in a different criminal trial. She was also charged with DWI. She stated her experiences with the law would not affect her ability to be a fair juror. When asked about her feelings on gun control laws, the juror stated it was "all right [sic] to choose to own" a gun.

The State's proffer was:

she thinks it's "all right to choose to own a gun[.]" She had a . . . DWI and testified for a friend in an assault case I believe as a character witness, which we took to mean that she had a bias with regard to . . . firearms laws and also had a bias against the [S]tate.

The court found this "reasoning [was] sufficient for the prosecutor to excuse this juror."

Vivian Drew, a black woman, was the seventh juror struck by the State with a peremptory challenge. She had previously served as a juror many times in criminal trials, one of which was a homicide case. When asked about her

views on gun control laws, the juror said she did not know anything about them. Drew thought the criminal justice system was fair and effective "[t]o a certain extent." She repeated several times that "[e]verybody's innocent until proven guilty."

The State gave the following proffer for the excusal:

[t]his is a quote "doesn't know" beginning and end quote, anything about gun control. [She] [t]hinks the criminal justice system is only fair "to a certain extent" and wouldn't really explain her reasons. I seemed to note also that she . . . was averting her eyes quite a bit when she was speaking. But it was really the fact that she wouldn't explain that. This would indicate to us a bias against the [S]tate and [to use] the colloquial term, she was hiding the ball with regard to gun control, what her real feelings were.

The court said the "prosecutor relied on the lack of explanation as indicating the juror may be hiding 'what her real feelings were.' The prosecutor's uncertainty about the juror's candor is what led him to excuse her." The court found the prosecutor's proffer was reasonable.

The State also excused Lisa Austin, a black woman. She informed the court and counsel that her uncle was a retired Newark transit police officer and her cousin worked in "the jail." Austin's stepfather was arrested for DWI six or seven years earlier, and her boyfriend was an "ex-con." She said her boyfriend

was convicted of gun and drug charges in Essex County ten years earlier and incarcerated for three years.

Austin had "no feelings" regarding gun control laws. She said the justice system was fair "when it's proven."

On remand, the State proffered:

She said "she had no feeling" about gun control, [the] system is fair "when it's proven" and had "no remarks about it[.]" However, under further questioning it came out that her boyfriend had a gun and drug charge against him [ten] years prior to that. That only came out later . . . under further questioning. This was not something that she volunteered initially. So in that case, again, I use the colloquial term she hid the ball on the gun question. . . . I believe that she had a bias against the [S]tate.

The court stated: "[The juror's] noncommittal responses on the major issues in the case and her lack of candor in volunteering that her boyfriend faced a similar charge previously were reasonable considerations in the prosecutor concluding there may be a bias against the [S]tate and excusing the juror."

The State exercised a ninth peremptory challenge to excuse Crystal Clairmont, a black female. She had a friend who was currently facing a gun possession charge and another friend who was killed with a gun. Clairmont said she could be impartial. The juror felt gun control should be "highly enforced."

The State proffered: "She had a family member who was murdered, and then she also had a family member who was facing a gun charge. In this particular instance . . . I felt that she was just too close to the case facts to avoid bias." The court found the reason was sufficient.

The court concluded in its written opinion that the prosecutor gave credible, neutral, and reasoned bases for all of the challenges and defendant failed to prove any presumed group bias. The court stated: "Th[e] evidence rebutted defendant's prima facie offering, and defendant offered the court no additional evidence or argument beyond disagreeing with, discounting, and disbelieving the prosecutor's reasons."

III.

Defendant presented the following points for our consideration in his initial appeal:

POINT I: A REMAND IS NECESSARY FOR THE STATE TO ARTICULATE LEGITIMATE, NONDISCRIMINATORY REASONS FOR EXERCISING SEVEN OF ITS EIGHT PEREMPTORY CHALLENGES TO REMOVE PEOPLE OF COLOR, AND SEVEN OF ITS EIGHT PEREMPTORY CHALLENGES TO REMOVE WOMEN. U.S. Const. [a]mend. XIV; N.J. Const. [a]rt[.] I, [¶¶] 5, 9, and 10.

POINT II: THE EIGHT-YEAR SENTENCE WITH FOUR YEARS OF PAROLE INELIGIBILITY

SHOULD BE REDUCED TO THE LOWEST
LAWFUL SENTENCE UNDER THE GRAVES ACT,
WHICH IS A FIVE-YEAR SENTENCE WITH
[FORTY-TWO] MONTHS OF PAROLE
INELIGIBILITY.

After the first remand, defendant filed a supplemental brief with this court
adding the following points:

POINT ONE: THE STATE'S DISCRIMINATORY
EXERCISE OF PEREMPTORY CHALLENGES
REQUIRES REVERSAL OF THE CONVICTION.
U.S. Const. amend. XIV; N.J. Const. art. I, [¶¶] 5, 9,
and 10.

POINT TWO: IF THIS COURT DETERMINES THAT
THE PRESENT RECORD IS INSUFFICIENT TO
CONCLUDE THAT THE PEREMPTORY
CHALLENGES WERE IMPERMISSIBLY
GROUNDED ON GROUP BIAS, AS WAS THE CASE
IN OSORIO, "GIVEN THE PRECIOUS
CONSTITUTIONAL RIGHTS AT STAKE," THIS
COURT SHOULD "ESCHEW ANY INTERMEDIATE
MEASURES" AND REVERSE THE CONVICTIONS.

A.

Defendant contends the State's proffered reasons for its "obviously
discriminatory" strikes were "not legitimate, case-specific concerns about the
jurors' impartiality or ability to serve." He asserts all of the excused jurors were
"either a woman or a minority; seven were black or Hispanic; and six were both
black or Hispanic and a woman."

We apply an abuse of discretion standard in reviewing a trial court's decision regarding the State's use of its peremptory challenges. State v. Pruitt, 438 N.J. Super. 337, 343 (App. Div. 2014). We extend substantial deference to a court's findings regarding peremptory challenges if it has applied the appropriate analysis set forth in State v. Osorio.⁵ Ibid. "[W]e also owe some deference to [the court's] ability to gauge the credibility of the explanation." Ibid. Therefore, we will uphold the trial court's ruling on whether peremptory challenges were made on a constitutionally impermissible basis unless it is clearly erroneous. State v. Thompson, 224 N.J. 324, 344 (2016).

Prospective jurors typically may be excused from jury service in two ways. State v. Andujar, 247 N.J. 275, 296 (2021). First, either party or the trial court, sua sponte, may excuse a juror "for cause" where it is apparent the prospective juror "would not be fair and impartial, that their beliefs would substantially interfere with their duties, or that they would not follow the court's instruction or their oath." Ibid.; N.J.S.A. 2B:23-11; R. 1:8-3(b). In addition, both parties receive a number of peremptory challenges, which permit removal without providing a reason. Andujar, 247 N.J. at 296; see N.J.S.A. 2B:23-13(c); R. 1:8-3(d).

⁵ 199 N.J. 486 (2009).

The State's ability to exercise peremptory challenges is not absolute. The United States and New Jersey Constitutions prohibit discrimination based on race in the jury selection process. Batson, 476 U.S. at 96; Andujar, 247 N.J. at 297; Gilmore, 103 N.J. at 524-27. "The right to a fair and impartial jury is . . . 'fundamental . . .'" Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 40 (2009). Indeed, "[t]he securing and preservation of an impartial jury goes to the very essence of a fair trial." State v. Papasavvas, 163 N.J. 565, 636 (2000) (quoting State v. Williams, 93 N.J. 39, 60 (1983)).

In Batson, the United States Supreme Court established a three-part test to determine whether an alleged discriminatory peremptory challenge violates the Equal Protection Clause. 476 U.S. at 93-94, 96-98. The first prong of the test requires a defendant to establish "a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Id. at 96. To satisfy this prima facie case, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire[persons] from the petit jury on account of their race." Ibid. In determining whether there is a prima facie case, "court[s]

should consider all relevant circumstances," such as patterns of strikes against black jurors, the questions asked during voir dire, and others. Id. at 96-97.

Once a prima facie case is satisfied, the burden then shifts to the State to provide "a neutral explanation for challenging . . . [the] jurors." Id. at 97. This requirement need not rise to the standard required for an excusal for-cause. Ibid. However, the prosecutor may not rebut the prima facie case by stating that the jurors "would be partial to the defendant because of their shared race," or by simply asserting good faith in the excusal. Id. at 97-98. The prosecutor must "articulate a neutral explanation related to the particular case to be tried." Id. at 98. If the State is able to rebut the prima facie case, the court must then "determine if the defendant has established purposeful discrimination." Ibid.

In Gilmore, our Supreme Court recognized Article I, Paragraphs 5, 9, and 10 of the New Jersey Constitution guarantees "an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex." 103 N.J. at 524; N.J. Const. art. I, ¶¶ 5, 9-10. Thus, defendants are entitled to a trial by jury "drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 524.

The Gilmore Court established a similar analytical framework to that articulated in Batson, and reaffirmed it in Osorio:

Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered, and the burden then shifts to the party exercising the peremptory challenge to prove a race- or ethnicity-neutral basis supporting the peremptory challenge. In gauging whether the party exercising the peremptory challenge has acted constitutionally, the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext. Once that analysis is completed, the third step is triggered, requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.

[199 N.J. at 492-93.]

Notably, Osorio modified step one. Under Gilmore, the defendant had to "show that there is a substantial likelihood that the peremptory challenges . . . were based on assumptions about group bias rather than any indication of situation-specific bias." 103 N.J. at 536. The Osorio Court, declaring the burden for demonstrating a prima facie case is "slight," held that only "sufficient proofs" are required to raise an inference of discrimination. 199 N.J. at 492; see Pruitt,

430 N.J. Super. at 271, 273 (finding trial judge erroneously applied the "substantial likelihood" test instead of the controlling "sufficient proofs" test and ordering a remand).

In considering whether a prima facie case has been established, the court should consider the following factors:

(1) that the prosecutor struck most or all of the members of the identified group from the venire; (2) that the prosecutor used a disproportionate number of his or her peremptories against the group; (3) that the prosecutor failed to ask or propose questions to the challenged jurors; (4) that other than their race, the challenged jurors are as heterogeneous as the community as a whole; and (5) that the challenged jurors, unlike the victims, are the same race as defendant.

[Osorio, 199 N.J. at 504 (quoting State v. Watkins, 114 N.J. 259, 266 (1989)).]

If the party challenging the strike does not make a prima facie case, the analysis ends; but it is "better practice" to allow the State to make a record, especially when it offers to do so. Thompson, 224 N.J. at 347.

If the court determines a prima facie case has been met, "[t]he burden shifts to the prosecution to come forward with evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias." Gilmore, 103 N.J. at 537. To satisfy this burden, "the State must articulate 'clear and reasonably specific' explanations of its 'legitimate reasons'

for exercising each of the peremptory challenges." Ibid. (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 258 (1981)). "Trial judges must be mindful that unexplained 'hunches' and 'gut reactions' 'may be colloquial euphemisms for the very prejudice that constitutes impermissible presumed group bias or invidious discrimination.'" Andujar, 247 N.J. at 301 (quoting Gilmore, 103 N.J. at 539). Further, the reasons provided by the State must be reasonably relevant to the case or the parties and witnesses. State v. Clark, 316 N.J. Super. 462, 469 (App. Div. 1998).

The trial court determines whether the proffered reasons are genuine and reasonable grounds for believing that a situation-specific bias exists that would warrant excusal. Gilmore, 103 N.J. at 538. The court "must make specific findings with respect to the prosecution's proffered reasons for exercising any disputed challenges." Clark, 316 N.J. Super. at 473; Osorio, 199 N.J. at 506.

If the party exercising the peremptory strike satisfies its burden under the second prong of the analysis, then the trial court must weigh the prima facie case against the striking party's rebuttal "to determine whether the [opposing party] has carried the ultimate burden of proving, by a preponderance of the evidence, that the [striking party] exercised its peremptory challenges on constitutionally[] impermissible grounds of presumed group bias." Gilmore, 103 N.J. at 539;

Osorio 199 N.J. at 492-93, 506. Courts should look to "whether the [exercising party] has applied the proffered reasons . . . even-handedly to all prospective jurors"; "the overall pattern of the [exercising party]'s use of its peremptory challenges," examining whether a disproportionate number of peremptory challenges were used on a cognizable group; and "the composition of the jury ultimately selected to try the case."⁶ Osorio, 199 N.J. at 506 (quoting Clark, 316 N.J. Super. at 473-74). "This analysis presumes that a defendant will present information beyond the racial makeup of the excused jurors." Thompson, 224 N.J. at 348.

B.

Against that backdrop, we turn to defendant's contention that the State violated the tenets of Gilmore and Osorio in its use of peremptory challenges requiring a reversal of his convictions. Applying the deferential standard afforded to the trial court's findings, we are satisfied the remand court properly

⁶ While the presence of some members of the cognizable group on the jury panel is not dispositive, it may be "highly probative of the ultimate question [of] whether the . . . proffered nondiscriminatory reasons for exercising peremptory challenges are genuine and reasonable." Osorio, 199 N.J. at 506 (quoting Clark, 316 N.J. Super. at 474).

applied the Osorio analysis in denying defendant's challenge to the State's peremptory challenges.

In a well-reasoned written opinion, the remand court initially considered the first prong of the Osorio framework. Although the judge did not expressly state whether defendant established a prima facie case, he noted that defendant's arguments were based on "numbers alone." Furthermore, he cited the trial judge's observation that the overall jury pool was diverse, a point conceded by defendant during trial. Therefore, in considering the Osorio factors under the first prong, the remand court found defendant could not demonstrate the State excused most or all members of an identified group or that there were a disproportionate number of peremptory challenges exercised against a cognizable group. The court stated, to "round[] out the factors [of Osorio], the challenged jurors appear to have been as heterogeneous as the community as a whole." However, acknowledging that a discriminatory peremptory strike cannot be remedied simply because other members of the cognizable group were seated on the jury, the remand court proceeded to the second step of the analysis.

As required under the second prong of the Gilmore/Osorio analysis, the court considered each of the peremptory challenges, noting the prosecutor's proffer of reasons for each, and then separately analyzed each challenge. The

judge noted that defendant's arguments generally arose from a difference of opinion regarding the interpretation of statements made by the excused jurors.

We are satisfied from our review of the State's proffered reasons for its challenges, in light of the jurors' voir dire responses, that the prosecutor did not rely on hunches, but instead each challenge was related to the case either through a potential bias against the State due to prior interactions with the criminal justice system, either directly or indirectly, or a potential bias related to a viewpoint on gun control.

The court found the prosecutor drew reasonable conclusions based on each excused juror's voir dire responses and that the proffered reasons were reasonably related to the specific circumstances of the case.

In addressing the third prong of the Gilmore/Batson analysis, the remand court found defendant did not contend the State was uneven in using its challenges. Moreover, as defendant conceded during trial, the panel of jurors ultimately selected to sit on the case was diverse. Because defendant did not proffer any argument to contest the State's use of peremptory challenges beyond mere numbers, the court found defendant had not demonstrated that the peremptory strikes were constitutionally impermissible.

As our Supreme Court has made clear, the Gilmore "analysis presumes that a defendant will present information beyond the racial makeup of the excused jurors." Thompson, 224 N.J. at 348. The record here demonstrates the entire venire and composition of the jury at the time of the challenges consisted primarily of people from minority groups.

The remand court found the State offered a sufficient, credible, and neutral explanation for each challenged juror and that defendant failed to prove the challenges were unconstitutionally exercised based on group bias. We see no reason to disturb the trial court's findings.

C.

As stated, following this court's first remand, defendant submitted a supplemental brief, in which he asserted for the first time that the record was insufficient for this court to properly review the peremptory challenge issue because the trial court did not examine or weigh the reasons proffered for the challenges nor did it consider the overall pattern of use of peremptory challenges. In addition, the State did not give its reasons for using the peremptory strikes until October 2021, nearly two years after the January 2020 jury selection.

Because we remanded the case a second time for the trial court to consider the State's proffered reasons for its challenges, defendant's argument no longer warrants discussion. As we have stated, during the second remand, the trial court conducted a thorough Gilmore analysis and made detailed findings regarding each excused juror. We are satisfied there was a sufficient record for our review.

IV.

We turn to defendant's contentions regarding his sentence. He asserts he is entitled to a new sentencing hearing because the three aggravating factors found by the court were all based on his prior criminal record. Defendant also contends his sentence was excessive.

Our review of a sentence is guided by an abuse of discretion standard. State v. Torres, 246 N.J. 246, 272 (2021); State v. Jones, 232 N.J. 308, 318 (2018). We will affirm a sentence 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) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

It is well established that "[a]n appellate court may not substitute its judgment for that of the trial court" when reviewing a sentencing decision. State v. Evers, 175 N.J. 355, 386 (2003) (alteration in original). We are required to affirm a sentence, even if we would have come to a different result, so long as the sentencing court's balancing of aggravating and mitigating factors is supported by competent evidence in the record. State v. Natale, 184 N.J. 458, 489 (2005).

Defendant's record reflected he was previously convicted in North Carolina for conspiracy to commit robbery. He later violated probation. While defendant was awaiting trial on the subject charge of possession of a loaded handgun without a permit to carry, he was charged with third-degree theft and pleaded guilty to that offense.

The judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), six, N.J.S.A. 2C:44-1(a)(6), and nine, N.J.S.A. 2C:44-1(a)(9), applied. He did not find any mitigating factors. The court sentenced defendant to an eight-year prison term with a four-year period of parole ineligibility.

We find the judge properly reviewed the aggravating and mitigating factors and crafted an appropriate sentence within the specified range. Where, within the range of the sentences, the trial court "chooses to sentence a defendant

remains in the sound judgment of the court—subject to reasonableness and the existence of credible evidence in the record to support the court's finding of aggravating and mitigating factors and the court's weighing and balancing of those factors found." State v. Pierce, 188 N.J. 155, 169 (2006).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION