

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1817-12T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OMAR BRIDGES,

Defendant-Appellant.

---

Submitted April 9, 2014 – Decided July 2, 2014

Before Judges Waugh and Nugent.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment Nos.  
05-11-2686 and 05-11-2687.

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

Carolyn A. Murray, Acting Essex County  
Prosecutor, attorney for respondent (Stephen  
A. Pogany, Special Deputy Attorney General/  
Acting Assistant Prosecutor, of counsel and  
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Omar Bridges is serving an aggregate forty-year  
prison term for attempted murder, three weapons offenses, and a

theft offense, crimes with which he was charged after he and others stole a Jaguar, engaged in a shoot-out with occupants of a black Subaru, and shot a police officer during an ensuing chase. A jury found defendant guilty of those crimes at his second trial, his convictions at his first trial having been reversed on appeal. In this appeal, defendant contends that the judgment of conviction entered after his second trial should be reversed for the following reasons, which he raises in his initial brief:

POINT I

THE COURT ERRED IN DENYING A WADE HEARING BECAUSE PATINHO'S IDENTIFICATION OF DEFENDANT AS THE SHOOTER AT THE FIRST TRIAL WAS TANTAMOUNT TO A HIGHLY SUGGESTIVE SHOW-UP PROCEDURE, CREATING A SUBSTANTIAL LIKELIHOOD THAT THE IDENTIFICATION AT THE SECOND TRIAL WAS NOT BASED ON PATINHO'S "PEEK" OF THE SHOOTER AT THE SCENE OF THE CRIME, BUT RATHER, THE IDENTIFICATION OF DEFENDANT AT THE FIRST TRIAL.

POINT II

THE SENTENCING COURT'S TRUNCATED, PERFUNCTORY YARBOUGH ANALYSIS DOES NOT SUPPORT A CONSECUTIVE SENTENCE FOR POSSESSION OF AN ASSAULT FIREARM.

In a pro se supplemental brief, defendant adds this argument:

POINT ONE

THE PROSECUTOR COMMITTED MISCONDUCT BY ELICITING TESTIMONY THE TRIAL COURT RULED

INADMISSIBLE BECAUSE ITS PREJUDICE  
OUTWEIGHED ITS PROBATIVE VALUE, THEREBY  
DEPRIVING DEFENDANT OF HIS RIGHT TO A FAIR  
TRIAL; COUPLED WITH THE TRIAL COURT'S  
FAILURE TO PROVIDE ANY GUIDANCE TO THE JURY  
TO DISREGARD THE TESTIMONY COMPOUNDED THE  
ISSUE, THEREFORE, THE DEFENDANT'S CONVICTION  
SHOULD BE REVERSED.

Having considered defendant's arguments in light of the record and controlling law, we reject them and affirm the judgment of conviction.

I.

An Essex County grand jury charged defendant and two co-conspirators in a thirteen-count indictment with three counts of first-degree attempted murder, N.J.S.A. 2C:11-3 and N.J.S.A. 2C:5-1 (counts one - Newark Police Officer Eduardo Patinho, three - Newark Police Officer Kimberly Gasavage, and twelve - unknown occupants of a black Subaru); three counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts two - Officer Patinho, four - Officer Gasavage, and thirteen - unknown occupants of a black Subaru); third-degree unlawful possession of a weapon, a handgun, N.J.S.A. 2C:39-5(b) (count five); second-degree possession of a weapon, a handgun, for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count six); second-degree unlawful possession of an assault firearm, N.J.S.A. 2C:39-5(f) (count seven); third-degree receiving stolen property, N.J.S.A. 2C:20-7 (count nine); second-degree eluding, N.J.S.A. 2C:29-2(b) (count

ten); and first-degree conspiracy to attempt to murder the occupants of a black Subaru, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3 (count eleven).

In the same indictment, the grand jury charged a co-defendant with third-degree theft of movable property with a value of more than \$500, N.J.S.A. 2C:20-3(a) (count eight), for stealing a Jaguar. In a separate indictment, the grand jury charged defendant with second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b).

A jury convicted defendant at his first trial of all counts of the first indictment except three, eight, eleven, twelve, and thirteen; and of the sole count of the second indictment. We reversed defendant's convictions and sentence on direct appeal. State v. Bridges, No. A-0806-07 (App. Div. September 8, 2010). The jury at defendant's retrial found him guilty of counts one (attempted murder of Officer Patinho), two (aggravated assault of Officer Patinho), five (unlawful possession of a weapon), six (possession of a weapon for an unlawful purpose), seven (unlawful possession of an assault weapon), and nine (receiving stolen property). The jury also found defendant guilty of the sole count in the second indictment, certain persons not to have weapons.

At sentencing, the court merged counts two and six with count one and sentenced defendant on count one to a twenty-year custodial term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2; on count five to a consecutive five-year custodial term; on count seven to a consecutive five-year term with two and one-half years of parole ineligibility; on count nine to a concurrent five-year custodial term; and on the sole count of the second indictment, to a consecutive ten-year custodial term with five years of parole ineligibility. The court also imposed appropriate penalties and assessments. Defendant is thus required to serve an aggregate custodial term of forty years with twenty-four and one-half years of parole ineligibility.

## II.

The State developed the following proofs at defendant's retrial. Uniformed Newark Police Officers Eduardo Patinho and Kimberly Gasavage were patrolling in a marked police car at 3:45 a.m. on October 9, 2004, when they encountered a shootout at the intersection of Boyden and Orange Streets. The officers saw a Jaguar facing westbound in the eastbound lane of Orange Street, and a black Subaru facing southbound on Boyden Street. The rear seat passengers on the driver's side of each vehicle were shooting at each other. According to Officer Patinho's testimony, he could see the weapon the Jaguar's rear-seat

passenger was firing. "It looked like a little mini submachine gun, silver."

Officer Gasavage, who was seated in the patrol car's front passenger seat, radioed dispatch. Officer Patinho activated the car's sirens and lights. The occupants of the Jaguar and Subaru fled in the cars, the Jaguar west on Orange Street, the Subaru south on Boyden. The officers pursued the Jaguar.

The pursuit lasted approximately two minutes, the Jaguar at times reaching speeds of ninety to one hundred miles per hour, the police car following at a distance of approximately a car length. When the Jaguar crossed a set of railroad tracks it became airborne and sustained damage upon landing, its transmission fluid leaking over Orange Street. The car lost power, turned on North Sixth Street, and stopped just before the intersection of North Sixth Street and Seventh Avenue.

Officer Patinho stopped the patrol car approximately ten feet from the Jaguar and turned on the patrol car's spotlight, which illuminated the left side of the Jaguar. The officer then got out of the patrol car, service weapon drawn, and repeatedly yelled to the Jaguar's rear passenger, "let me see your hands." The passenger shot Officer Patinho through his left shoulder. After shooting the officer, the passenger "[stuck] his head out the window" and the officer "[got] a clear shot at him, looking

at him." Officer Patinho fired five rounds at "the individual behind the driver's side of the Jaguar" before the passenger shot him in the jaw and "blew everything out."

Officer Gasavage also "returned fire." She fired, specifically, at the rear driver's side of the Jaguar.

The driver and front seat passenger of the Jaguar fled on foot. Officer Patinho testified that they fled before the shooting started, though on cross-examination he conceded that at the previous trial he testified that the driver and front passenger fled after he fired his five rounds. In any event, after Officer Gasavage went to the aid of Officer Patinho, the shooter fled as well.

Officer Gasavage testified that she could not identify any of the Jaguar's occupants, though she only saw the rear-seat passenger with a weapon, and she only fired at the rear-seat passenger. Officer Patinho testified that the rear seat passenger was the sole occupant to fire at him; that the target of his return fire was the rear seat passenger; and that he could identify the rear seat passenger. During his testimony, he identified defendant as the person who shot him.

According to Officer Patinho, after defendant shot him through the shoulder, he peeked out of the rear window. When defendant peeked out, the officer was standing approximately ten

feet away and got a good look at defendant's face, which was illuminated by the spotlight from the patrol car. That was the only time Officer Patinho was able to see defendant's face during the entire episode. Although defendant peeked out the window for only approximately one second, and though that one-second glimpse was "the entire basis of [the officer's] identification [of defendant]," Officer Patinho testified that he sees defendant's face in his mind's eye every day.

The State also presented the testimony of co-defendant Alfonse Ollie. When Ollie was arrested in 2004 following the shooting, he told police that he was the driver of the stolen Jaguar. During his subsequent guilty plea to the charge of eluding police, he again admitted that he was driving the Jaguar. At the first trial, he testified against defendant and identified defendant as the shooter. He also admitted that he was the driver when he spoke to an investigator for defendant's attorney a month before the retrial. Yet, when he testified during the retrial, he claimed that he was the rear seat passenger who shot Officer Patinho with a TEC 9, that Rasheem Woods was driving, and that defendant was one of the passengers who fled after the Jaguar came to a stop.

For nearly two days, the prosecutor examined Ollie and impeached him with his prior statements. According to the



impeachment evidence, Ollie, defendant, and two others stole the Jaguar; the shootout at Orange and Boyden Streets involved rival gang members; and defendant, who had the TEC 9, sat in the rear seat of the Jaguar and shot Officer Patinho.

The State also established through Ollie that his cellular phone, which was propelled from his lap when the Jaguar hit the train tracks, was found between the driver's seat and the car's front door. Although Ollie claimed to have been in the rear seat behind the driver when the shooting started, he admitted that only defendant was shot.

After learning that defendant was shot, Ollie sought out a friend, a nursing assistant, and asked if she could remove the bullet. Ollie took her medical bag, went to where defendant was staying, and told defendant to remove the bullet himself. Defendant eventually went to a hospital in Pennsylvania to have the bullet wound in his abdomen treated.

The TEC 9, a pair of gloves, and defendant's cellular phone were found in adjacent yards, approximately twelve feet apart. The yards were between the scene of the shooting and the Garden Spires housing complex where defendant went after the shooting and telephoned a cab.

Later that morning, at eleven o'clock, defendant appeared at the emergency room of Easton Hospital in Pennsylvania with a

gunshot wound of the lower abdomen. He identified himself as Sharif Johnson. He told the attending nurse that he had been shot at a club in Easton. When told he would need surgery, defendant asked the attending nurse to bandage his wound and let him leave the hospital. Nevertheless, defendant underwent surgery. Hospital personnel notified local police who fingerprinted defendant, learned his true identity, and subsequently transmitted the information to New Jersey police, who by then had issued a fugitive warrant.

Defendant presented the testimony of two witnesses, Rasheem Woods and Brett Hutchinson. According to Woods, he went to a bar called Mercedes & Mink on October 8, 2004, where he met Ollie, defendant, and a man named Nitti shortly before midnight. The four left the bar around one o'clock or one thirty on the morning of the ninth in a car that Ollie said he had stolen. When they stopped at Baxter Terrace to drop off defendant, Ollie and some "guys" who may have been from an "affiliated gang" became involved in an altercation. Ollie "whipped the gun that he had out and he started shooting at the guys." As Woods and the others fled in the car, a police car on Orange Street started to chase them. In trying to elude the police, Woods tried to turn off Orange Street, but because he was going too

fast, the Jaguar collided with a van. As Woods turned on North Sixth Street, the car began losing power. Woods fled on foot.

Woods testified that defendant was in the front passenger seat and Ollie was in the rear seat with the gun. At some point Woods saw Ollie using defendant's cell phone.

On cross-examination, Woods claimed that when he pled guilty to riding in a stolen car, he lied to the judge when he said Ollie was driving the car, and defendant had the gun and shot a cop. He claimed he lied at his plea hearing to get a favorable deal.

Brett Hutchinson, a forensic scientist with the New Jersey State Police, testified that DNA testing revealed defendant was not the source of the DNA taken from the blood on the passenger seat of the stolen Jaguar; nor was defendant the source of the DNA sample taken from a jacket that was also found in the vicinity of the shooting. The gloves recovered near the TEC 9 did not contain enough of a DNA sample to obtain a profile.

Based on the evidence presented by the State and defendant, the jury returned the verdict that we have previously recounted.

### III.

Defendant first argues that the court erred when it denied his request for a Wade hearing. Following jury selection for the retrial, but before opening statements, defendant moved to

suppress Officer Patinho's identification of him at the first trial and requested a Wade hearing. Defendant argued that because "the first and only identification ever made by Officer Patinho took place in this court room on the witness stand at the first trial . . . the in-court identification made during the first trial . . . is now really an out-of-court [identification]." Defendant requested "a hearing . . . to determine the scope of [Officer Patinho's] knowledge to determine how much exposure to the investigation he had between the time he made his first observations and when the identification was made." Defendant further argued that suppression of the previous in-court identification would "implicate issues of whether or not [the officer] should be allowed to make any in-court identification, because . . . it would be tainted by the prior identification."

The court rejected defendant's motion, agreeing with the State's position that nothing would be presented at a hearing that had not been brought out during cross-examination of the officer at the first trial. The court noted that the transcript of the first trial was available, and defendant could use that to impeach the officer's identification of him. The court commented that nothing had tainted Officer Patinho's previous in-court identification of defendant.

Defendant repeats on appeal the arguments he made to the trial court. While recognizing the "unique factual scenario because Patinho's first identification . . . occurred at trial," defendant nevertheless asserts that he "has established a highly suggestive identification, the functional equivalent of an egregiously suggested showup." We reject defendant's argument in view of what we perceive to be significant differences between pre-trial identification procedures and identifications that take place at trial.

We begin by noting, as did defendant, the unique circumstances of this case: the victim of a shooting was first asked at trial, more than two years after the event, if he could identify the perpetrator. The United States Supreme Court's decisions concerning pretrial identifications do not support defendant's argument in these unique circumstances.

In Wade, the Supreme Court addressed the question of "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel." United States v. Wade, 388 U.S. 218, 219-20, 87 S. Ct. 1926, 1928, 18 L. Ed. 2d 1149, 1153 (1967). In holding that a post-indictment lineup is a critical

stage of a criminal proceeding at which the accused is entitled to counsel's assistance, the Court explained, "[i]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." Id. at 235, 87 S. Ct. at 1936, 18 L. Ed. 2d at 1162 (emphasis added). The court further explained:

Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eye-witness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness -- "that's the man."

[Id. at 235-236, 87 S. Ct. at 1937, 18 L. Ed. 2d 1162.]

The same day the Supreme Court decided Wade, it "recognized [a] ground of attack upon a conviction independent of any right to counsel claim." Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199, 1206 (1967). The court held that an identification procedure conducted by police that is "so

unnecessarily suggestive and conducive to irreparable mistaken identification" violates the Due Process Clause of the Fourteenth Amendment. Ibid.

The Court subsequently held that the Due Process Clause of the Fourteenth Amendment does not compel the exclusion, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that is both suggestive and unnecessary. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977). Concluding that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations," id. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154, the Court reiterated the approach it had developed in Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), that courts must undertake a two-part analysis. A court must first decide whether the identification procedure was impermissively suggestive. If so, the court must then determine whether the impermissively suggestive procedure resulted in a very substantial likelihood of irreparable misidentification. Manson, supra, 432 U.S. at 107, 97 S. Ct. at 2249, 53 L. Ed. 2d at 149-50.

The Supreme Court has declined to extend its "due process check on the admission of eyewitness identification" to "cases

in which the suggestive circumstances were not arranged by law enforcement officers." Perry v. New Hampshire, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 716, 720-21, 181 L. Ed. 2d 694, 702-03 (2012).

The Court explained:

Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

[Id. at \_\_\_, 132 S. Ct. at 721, 181 L. Ed. 2d at 703.]

Our State Supreme Court, on the other hand, has taken a broader approach to the issue of pre-trial identifications. In State v. Henderson, 208 N.J. 208 (2011), the Court modified the Manson analysis. The Henderson court concluded that system variables, that is, factors within the control of the criminal justice system, as well as estimator variables, that is, factors beyond the control of the criminal justice system, "can affect and dilute memory and lead to misidentifications." Id. at 218. In view of that conclusion, the court revised the legal



framework for determining whether a pre-trial identification is admissible at trial.

Under the revised framework, "to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification." Id. at 288. Such evidence, "in general, must be tied to a system – and not an estimator – variable." Id. at 288-89. If defendant carries that burden, "the State must then offer proof to show that the proffered eyewitness identification is reliable – accounting for system and estimator variables[.]" Id. at 289. "[T]he ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Ibid. To prove a very substantial likelihood of irreparable misidentification, "a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables." Ibid. If the evidence is not suppressed, the trial court must "provide appropriate, tailored jury instructions[.]" Ibid.

The Court extended a defendant's right to a hearing to suggestive conduct by private actors in State v. Chen, 208 N.J. 307 (2011). There, the Court recognized that "conduct by private actors, as well as government officials, can undermine the reliability of eyewitness identifications and inflate

witness confidence." Id. at 310-11. Exercising its "traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors," the Court held that

even without any police action, when a defendant presents evidence that an identification was made under highly suggestive circumstances that could lead to a mistaken identification, trial judges should conduct a preliminary hearing, upon request, to determine the admissibility of the identification evidence.

[Id. at 311].

Here, defendant argues that the principles underlying Henderson and Chen apply with equal force to an in-court identification that takes place at trial. We disagree.

To be sure, in-court identifications involve many of the same factors as one-on-one showups, which are inherently suggestive, see State v. Herrera, 187 N.J. 493, 504 (2006), and, when conducted more than two hours after an event, are of doubtful reliability and present a heightened risk of misidentification, see Henderson, supra, 208 N.J. at 261. After all, a defendant is seated at a specific location in the courtroom designated for defendants, and witnesses invariably know that "the defendant" is being tried for the very crime or crimes about which the witnesses are testifying. Moreover, a State's witness who is asked to identify a defendant at trial

will likely understand the State believes it can prove the defendant's guilt.

These factors were all present at defendant's first trial. Officer Patinho did not know his perpetrator before the night of the shooting; observed him only for a single second when the perpetrator was firing an automatic weapon in an attempt to kill him; and identified defendant for the first time more than two years after the event when defendant was seated next to his attorney at counsel table. Officer Patinho acknowledged during cross-examination that, before identifying defendant at the first trial, he never told the lead detectives that he had seen the person who shot him. He also acknowledged that, before the first trial, he had reviewed police reports concerning the shooting; and that detectives had told him Alphonse Ollie claimed defendant shot him.

Despite such similarities between showups and in-court identifications that occur at trial, we reject defendant's contention that the principles the Court pronounced in Henderson and Chen apply to in-court identifications at trial. In the first place, Henderson and Chen did not address in-court identifications. The Court was concerned with suggestive pre-trial identification procedures.

In addition, significant safeguards are in place to protect against a conviction based on a mistaken identification made for the first time at trial.

Before trial, through discovery, counsel can identify key witnesses when identification of a defendant is at issue, investigate the circumstances under which eyewitnesses have identified a defendant, prepare to attack the credibility of such witnesses, and, if appropriate, request a lineup. Our Supreme Court has previously held that a trial court is authorized to order a pretrial lineup when identification is a substantial material issue, there is a degree of doubt concerning the identification, and there is a reasonable likelihood that a lineup would be of some probative value. State ex rel. W.C., 85 N.J. 218, 226 (1981).

Those considerations, especially in view of Henderson and Chen, would appear to require that a court grant a lineup upon a defendant's request in a case such as this, where a victim had only a one-second opportunity to observe a perpetrator during a crime, more than two years had elapsed since the perpetrator committed the crime, and the witness had not identified the perpetrator in any other pretrial proceeding.

At trial, the "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness

testimony of questionable reliability" include "the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments." Perry, supra, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 728, 181 L. Ed. 2d at 711. Additional safeguards at trial include jury instructions on eyewitness identification and the requirement that the State prove beyond a reasonable doubt that a defendant is guilty. When identification is at issue, trial courts must now instruct the jury on how to consider and analyze the trustworthiness of eyewitness identifications, and must give enhanced instructions "about the various factors that may affect the reliability of an identification in a particular case." Henderson, supra, 208 N.J. at 296.

Numerous safeguards available to a defendant after an indictment and the appointment or retention of counsel significantly distinguish pre-indictment showups from in-court identifications at trial. For that reason, we decline to extend exclusionary principles governing pre-trial identification procedures to in-court identifications at trial.

IV.

Defendant next contends that "the sentencing court's truncated, perfunctory Yarbough analysis does not support a consecutive sentence for possession of an assault firearm." We agree that the court failed to clearly explain its reason for imposing a consecutive sentence on defendant's conviction for possession of an assault firearm. Accordingly, we reverse the sentence as to that charge only, and remand for resentencing and a proper explanation.

When determining whether to impose concurrent or consecutive sentences for multiple offenses, the court should consider the following criteria:

(1) there can be no free crimes in a system for which the punishment shall fit the crime;

(2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

(3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) 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;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors; [and,]

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense . . .

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

A trial court must state its reasons for imposing consecutive sentences. When it fails to do so, "ordinarily a remand should be required for resentencing." State v. Carey, 168 N.J. 413, 424 (2001).

The sentencing transcript reflects some degree of confusion as to the sentences to be imposed on the three weapons offenses: count five, unlawful possession of a weapon, a handgun, count six, possession of a weapon for an unlawful purpose, and count

---

<sup>1</sup> Yarbough lists six criteria. The last criteria, limiting the aggregate sentence to the sum of longest terms that could be imposed for the two most serious offenses, is no longer a valid consideration. See N.J.S.A. 2C:44-5(a) ("There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses.").

seven, unlawful possession of a weapon, an assault firearm. When the court initially addressed the issue of merger of the weapons offenses, it stated its belief that count five, unlawful possession of a weapon, a handgun, should merge into count six, possession of a firearm for an unlawful purpose. That statement was inaccurate. See State v. Basit, 378 N.J. Super. 125, 128 (App. Div. 2005) (noting that the trial judge erroneously merged convictions on third-degree unlawful possession of a weapon and second-degree possession of a weapon for an unlawful purpose). When counsel for the State and defendant responded that count six should merge with count one, attempted murder, the court replied: "count five can merge into count six, count six to merge into count one."

Notwithstanding its comments, the court initially sentenced defendant on count five to a five-year custodial term that "shall run concurrent with count one." After further discussion, the court stated that defendant's sentence on count five "shall be consecutive to count one."

Lastly, the court imposed a five-year custodial term with two and one-half years of parole ineligibility on count seven, to run consecutive with count one.

In explaining its sentencing decision "[w]ith respect to the counts that the [c]ourt is running consecutively," the court



explained that "clearly the reasoning for the criteria in general in Yarbough is that there are no free crimes and the punishment shall fit the crime. I believe here that clearly is the case."

The court then explained that "[p]ossession of a weapon is a separate and distinct crime and there would be no free crimes. The possession of the weapon was a crime in and of itself and the possession of the weapon – it's independent of each other and the attempted murder is a crime of violence."

Lastly, the court explained that the prosecutor "hit the nail on the head" when commenting that the "legislature has decided no person should possess an assault firearm. There is no permit for it and it's, per se, a violation of the law." The court then commented that "[t]he crimes and their objectives are independent of each other," though it did not explain which crimes and which objectives it was talking about.

We agree that the court's comments inadequately explained its reasons for imposing consecutive sentences on counts five and seven. The trial record demonstrates that both "possession offenses were based on defendant's possession of the same gun." The two crimes were not predominantly independent of each other, did not involve separate acts, and were not committed at different times or separate places. Yarbough, supra, 100 N.J.

at 643-44 (guideline (3)(a)-(c)). And it is not at all clear that the court intended its statement that there can be no free crimes to apply to counts five and seven.

Because the court did not adequately explain its reasons for running the sentence on count seven consecutive to the sentence on count five, we remand for the court to reconsider the sentence on count seven only; and, to provide an adequate explanation, including a discussion of the Yarbough guidelines, in the event that it decides the sentence on count seven should run consecutively to the sentences on counts one and five.


v.

In his pro se brief, defendant alleges the prosecutor committed misconduct by eliciting testimony the trial court had ruled inadmissible. Defendant's argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Accordingly, we affirm defendant's convictions in their entirety, and affirm his sentence on each count with the sole exception of count seven, which we remand for reconsideration and, if necessary, an adequate explanation of why it should run consecutive to the sentences imposed on counts one and five.

Affirmed in part, reversed in part, and remanded. 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