

**NOT FOR PUBLICATION WITHOUT THE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-1205-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY CARDONA, a/k/a LARRY
CORDONA,

Defendant-Appellant.

Submitted January 23, 2017 – Decided May 11, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No.
11-09-0940.

Joseph E. Krakora, Public Defender, attorney
for appellant (Theresa Y. Kyles, Assistant
Deputy Public Defender, of counsel and on the
brief).

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Milton S. Leibowitz,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Larry Cardona appeals from a judgment of conviction for three second-degree crimes: two weapons offenses and aggravated assault. For those crimes, a judge sentenced defendant to an aggregate sixteen-year prison term with eleven and one-half years of parole ineligibility. On appeal, defendant argues:

POINT I

THE WARRANTLESS SEARCH OF CARDONA'S BEDROOM, WHICH WAS NOT SHOWN TO HAVE BEEN BASED ON A VALID CONSENT TO SEARCH, VIOLATED MR. CARDONA'S RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES. THE INTERESTS OF JUSTICE REQUIRE THAT THIS COURT REVIEW THE RECORD ANEW AND ORDER THAT THE FRUITS OF THE UNCONSTITUTIONAL SEARCH SHOULD HAVE BEEN SUPPRESSED.

POINT II

THE COURT ERRED IN ADMITTING THE PRIOR STATEMENTS OF ROBIN NUNEZ AND PAULINO JUAREZ INTO EVIDENCE AS THE STATE FAILED TO SATISFY THE STANDARDS OF STATE V. GROSS. U.S. CONST., AMENDS. VI, XIV; N.J. CONST., ART. 1, PAR. 10.

POINT III

THIS MATTER MUST BE REMANDED FOR RE-SENTENCING BECAUSE CONSECUTIVE SENTENCES ARE UNWARRANTED IN THIS MATTER, AND THE TERM OF YEARS IMPOSED FOR AGGRAVATED ASSAULT IS EXCESSIVE DUE TO THE IMPROPER FINDING OF AGGRAVATING FACTOR ONE.

For the reasons that follow, we affirm.

In September 2011, a Union County grand jury charged defendant in an indictment with first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (count one); second-degree aggravated

assault, N.J.S.A. 2C:12-1(b)(1) (count two); second-degree unlawful possession of a weapon, a handgun, N.J.S.A. 2C:39-5(b) (count three); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four). Following the indictment, the State and defendant filed pre-trial motions.

Defendant moved to suppress a box of bullets, gang memorabilia, and other evidence police seized when they searched his bedroom, in his mother's home, with her written consent. The court denied defendant's motion.

The State moved to admit evidence of defendant's gang activity and to allow an expert to testify about various aspects of gang activity. After conducting motion hearings, the court determined evidence of defendant's gang activity was admissible under N.J.R.E. 404(b), but denied the State's application to present expert testimony on the subject unless issues arose during trial that needed explanation.¹

At the conclusion of defendant's trial, the jury acquitted him of first-degree attempted murder, but convicted him of the remaining counts. At sentencing, the court merged count four, possession of a weapon for an unlawful purpose, with count two,

¹ During the trial, the court permitted the State to present expert testimony on gang activity to the jury. The court's decisions on the State's motion concerning gang activity and the expert have not been appealed.

aggravated assault; and sentenced defendant on count two to a ten-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On count three, unlawful possession of a weapon, the court imposed a consecutive six-year prison term with thirty-six months of parole ineligibility. This appeal followed.

We first recount the testimony the parties presented at the hearing on defendant's suppression motion. Elizabeth Police Department Detective Amilcar Colon testified that on April 23, 2011, police arrested defendant and charged him with the victim's attempted murder. Although the victim had been shot, law enforcement authorities had not recovered the gun. Aware that defendant resided with his mother at her Elizabeth home, Detective Colon and four or five other officers drove there that night and met with her.

The detective spoke Spanish somewhat fluently and had no difficulty communicating in Spanish on a day-to-day basis. He spoke in Spanish when communicating with defendant's mother. According to Detective Colon, he had "not one bit" of difficulty understanding defendant's mother throughout their entire interaction. She appeared to be lucid and sober, and had no difficulty understanding him.

Defendant's mother answered Detective Colon's knock at her door. He and the other officers entered an enclosed porch area

to explain the situation. Detective Colon testified that, at first, the situation was "kind of confusing" for defendant's mother "because she [did not] know what was going on," but after he explained the events her son was involved in, their relationship became more helpful and cordial.

Detective Colon authenticated a Spanish consent-to-search form that he and defendant's mother signed at 11:10 p.m. The court admitted the form into evidence. The detective testified that he discussed the form with defendant's mother before she signed it. He handed the consent form to her and explained, in Spanish, what the consent form was. He "explained to her that it was a permission to search [and] that she had every right to refuse, if she wanted to." He also afforded her the chance to read the document, which she appeared to do. She expressed no confusion; rather, she discussed how her son had been a problem lately, "'hanging out, smoking, doing whatever.'"

Detective Colon told defendant's mother the officers wanted to search defendant's room. According to Detective Colon, defendant's mother seemed fine and appeared to understand him when he told her she had the right to refuse to consent. No one threatened her or made any promises to her before she signed the form.

Defendant's mother and Detective Colon moved to the kitchen, where she signed the form. Other officers were either in the kitchen or on the first floor at the time. Detective Colon testified explicitly that none of the officers went upstairs before defendant's mother signed the form.

After defendant's mother signed the consent-to-search form, officers from the night squad went to the room and searched it. The officers found and seized the following items: a box containing fifty-seven .45 caliber Winchester bullets; a yellow and black bandana; a yellow do-rag with a partial gang manifesto; three envelopes addressed to defendant, sent by an individual who was incarcerated; a legal notice from the Union County Probation Department; a State of New Jersey Health Benefits identification card; a health insurance card; and a Public Defender reimbursement form.

Defendant's mother, using an interpreter to testify on behalf of her son, offered a different account of the events leading up to the search of her son's room.² According to her, during the evening of April 23, 2011, she received a call from the Elizabeth Police Department. The caller said the police needed to search her house. She replied, "yes, of course. You may come."

² Defendant's mother testified before Detective Colon. Defendant consented to her testifying first.

Approximately an hour later, Detective Colon and other law enforcement officers arrived at the home and knocked on the front door. Defendant's mother opened the door and Detective Colon and the other officers stepped inside. They asked to search her son's bedroom for a gun.

According to defendant's mother, the police asked her to sign a permit authorizing them to search the house. Officers were already in her son's bedroom when she was first shown the form. She testified she then led the officers to her son's bedroom, but before they began their search, Detective Colon informed her of her right to refuse.

According to the consent form, defendant's mother authorized law enforcement to conduct "a complete search of [her] entire house[.]" However, she said she was "nervous" and did not "really read [the form] well." She said police did not thoroughly explain the form before she signed it. While defendant's mother acknowledged in the form that she had the right to refuse the search, she nevertheless consented without feeling forced to do so.

After considering the testimony of Detective Colon and defendant's mother, the trial court denied defendant's suppression motion. The court noted some inconsistencies between the two witnesses' accounts and resolved them in favor of the detective's

testimony. The court found that Detective Colon explained the consent form to defendant's mother. The court concluded defendant's mother knowingly and voluntarily consented to the search after being told she had the right to refuse.

The case proceeded to trial. The State presented evidence that on the night of April 11, 2011, the victim, a member of the "Rollin 60s Crips" (60s) street gang, and a friend with no gang affiliation, went to a gas station in Elizabeth to pick up a "Dutch," or "blunt." While at the gas station, they encountered members of the rival Latin Kings (Kings) gang. The victim, then twenty years old, had known the Kings gang members, including defendant, since he was eleven or twelve.

Shortly after the encounter with the Kings gang members, the victim and his friend walked away from the gas station. At trial, the victim claimed he and his friend walked in a different direction from that taken by the Kings gang members. As the victim and his friend walked away, someone shot the victim. The victim testified the shot came from a passing car, and defendant was nowhere around.

At the hospital in the days following the shooting, the victim gave police a statement inconsistent with that of his trial testimony. According to his statement, the victim "had some beef" with defendant, who was looking to fight the victim. As the victim

prepared to fight, defendant "walked in front of [him] . . . turned around[,] and shot [him]." The victim was positive defendant was the shooter and identified a photograph of defendant. Although defendant fired the gun once, the victim instinctively tried to block the shot with his hand. He was wounded in the hand and in the groin. The victim then ran back to the gas station with his friend while the others fled the scene.

As previously noted, the victim refused to implicate defendant at trial. The victim denied having any memory of his sworn, audio-recorded statement to the police, claiming he was heavily sedated in his hospital bed when he allegedly gave the statement.

Asserting the victim's trial testimony was contrary to his previous sworn statement, the prosecutor moved under N.J.R.E. 803(a)(1) and State v. Gross, 121 N.J. 1 (1990), to admit the prior statement. The court conducted a hearing under N.J.R.E. 104 to determine the reliability of the statement. The victim and an officer testified.

The victim claimed he could not remember anything about the statement, including signing it. Elizabeth Police Department Detective Vincent Napoli, who obtained the statement from the victim, testified he did not exhibit any difficulties in providing the statement nor did he show any signs of drug or alcohol

influence. Detective Napoli noted the victim was not in custody or under arrest when he gave the statement. In addition, the night before the detective took the statement, the victim told the detective who was responsible for the shooting. The detective explained that despite giving the statement, the victim was "very scared" and reluctant to provide details because of the involvement of the Latin Kings.

After considering the testimony, the court found the State had established the statement's reliability by a preponderance of the credible evidence. Specifically, the court stated:

[the statement] is a sound recording. The circumstances under which it was given . . . establishe[] not only that [the victim] was lucid and not under any undue coercion at the time, but . . . also . . . that what he [is] saying now, his lack of recollection is feigned. I'm satisfied that the circumstances under [which] it was given . . . evidence[] its reliability. I'm also satisfied that it's inconsistent with his testimony, and I will allow the State to confront the witness with this statement.

In front of the jury, the prosecutor impeached the victim with his prior sworn statement.

To bolster its case against defendant, the State called the victim's friend to testify. However, as with the victim, the friend denied recalling the particulars of the shooting. The friend acknowledged he was "really uncomfortable" testifying at

trial as he continued to deny any recollection of the incident. He also claimed he did not recall giving two statements to law enforcement officers.

The State moved to admit the friend's video-taped statement, recorded April 19, 2011, under N.J.R.E. 803(a)(1).³ In that statement, the friend told Detective Napoli that as he, the victim, defendant, and another person walked away from the gas station together, the victim told defendant, "I know y'all going to jump me." Although defendant replied, "ain't nobody going to jump you," defendant pointed and fired a gun at the victim.

The court conducted another N.J.R.E. 104 hearing. The friend claimed he feared arrest had he not told law enforcement what they wanted to hear. In contrast, Detective Napoli testified he did not tell the friend what to say in his statement and that the friend did not appear to be under the influence of any substances. Detective Napoli emphasized he did not threaten or coerce the friend during their interview.

³ The friend also provided a video-taped statement to Detective Napoli on April 12, 2011. In his April 12th statement, the friend denied being present during the shooting and made no mention of defendant. Detective Napoli returned for an additional interview on April 19, 2011, because the April 12th statement was inconsistent with the statement the victim had made to officers while hospitalized. Defendant does not challenge the admissibility of the friend's April 12th statement.

The court admitted the statement, satisfied that it "was given under circumstances evidencing its reliability." The court based this finding in part on the fact that the statement was video-recorded. In addition, the court explained:

I am also satisfied that [the friend] is feigning a lack of recognition, and the jury is entitled to hear what he said at a prior time. He's, in effect, putting up a bridge, preventing the prosecutor from having him recount those previous events. . . . I make that finding of feigned lack of recollection based upon his demeanor for one. He's just monotonous. Unlike [the victim] who had the same feigned lack of recollection, but where [the victim] had that light smile in his background, like, yeah, I know we all know that I'm just faking, and he was almost cute about it.

[The friend] is just monotonous. He denies knowing or remembering anything. It's clear to me he's not being truthful when he says that, and I think a jury is entitled to hear what he previously said and evaluate the reliability.

The State then played the friend's recorded statement to the jury.

The State presented other evidence, including a shell casing found at the scene and the items the police seized from defendant's bedroom. A medical witness, qualified as an expert in trauma surgery, testified that when the victim arrived at the hospital, his blood pressure was very low and he exhibited signs of shock from blood loss. The doctor testified the victim was "rapidly approaching death" based on his condition. According to the

doctor, the victim was shot "in the right groin . . . where [the] leg attaches to the rest of [the body]." As part of that wound, the doctor noted the victim sustained an injury to his "common femoral artery."

Defendant did not testify. As previously noted, the jury convicted defendant of two weapons offenses and aggravated assault.

In the first argument defendant raises on appeal, he challenges the trial court's denial of his suppression motion. Specifically, he argues "the State failed to show that [defendant's mother] gave voluntary consent, aware of her right to refuse." Defendant further argues that "[e]ven if she did otherwise ultimately give a knowing consent, the search was unconstitutional because it was under way before she was fully advised of her rights and before she signed the consent-to-search form." Lastly, defendant asserts his mother's "language barrier was . . . a frustration for her," and "[i]t was fully evident at the hearing that she was frightened and confused by the police officers who telephoned her and then arrived, in force, at her home."

Defendant's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Her arguments are based on the implicit proposition that the trial court should have accepted her testimony as credible. To the extent Detective

Colon's testimony contradicted that of defendant's mother, the court found the detective's testimony credible. Our standard of review requires deference to trial court's findings of fact, including its credibility determinations. See State v. Scriven, 226 N.J. 20, 32 (2016). That is particularly so as "to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). Thus, if our review satisfies us the trial court's findings could reasonably have been reached on sufficient, credible evidence present in the record, our task is complete and we should not disturb the result. Id. at 162. Such is the case here.

Defendant's second argument – the trial court erred by admitting the prior statements the victim and his friend gave to law enforcement officers – is equally unavailing. Defendant contends "[t]he 'physical and mental condition' of [the victim], the 'nature of [his] interrogation,' and his 'motive to fabricate' weighed against finding his statement reliable and admitting it." Defendant further contends the victim's friend "thought he would be in trouble if his story did not conform to [the victim's]." Thus, defendant believes the friend "had . . . obvious motives to fabricate, first in order to avoid the threatened 'consequences,'

and secondly to assist his good friend by corroborating his account of events."

Once again, defendant's arguments overlook the trial court's credibility determinations and our standard of review. The arguments are, essentially, disagreements with the weight the trial court gave to the testimony presented at the N.J.R.E. 104 hearings. Like his arguments concerning his mother's consent, defendant's arguments concerning the admission of the victim's and his friend's prior statements are largely based on the implicit premise that the court should have found credible the victim's and friend's claimed lack of memory and, in the friend's case, the alleged coercion. Ample evidence in the record supported the trial court's determination. Defendant's arguments to the contrary are without sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

In his final argument, defendant contends the trial court's imposition of consecutive sentences was unwarranted and the custodial term imposed on the aggravated assault offense is excessive. We disagree.

The role of an appellate court in reviewing a sentence is to determine:

(1) whether the exercise of discretion by the sentencing court was based upon findings of fact grounded in competent, reasonably

credible evidence; (2) whether the sentencing court applied the correct legal principles in exercising its discretion; and (3) whether the application of the facts to the law was such a clear error of judgment that it shocks the conscience.

[State v. Megargel, 143 N.J. 484, 493 (1996) (citation omitted).]

When adhering to this standard of review, appellate courts afford considerable deference to the decision of a sentencing court provided that "the trial judge follows the Code and the basic precepts that channel sentencing discretion." State v. Case, 220 N.J. 49, 65 (2014).

Defendant first challenges the trial court's imposition of consecutive sentences. The decision to impose consecutive sentences under N.J.S.A. 2C:44-5(a) "requires analysis of specifically enumerated factors" set forth under State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L.Ed. 2d 308 (1986). State v. Randolph, 210 N.J. 330, 352-53 (2012). "When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal." State v. Miller, 205 N.J. 109, 129 (2011). However, when a sentencing court fails to explain its decision to impose consecutive sentences, a remand is generally required for the judge to provide an explanation on the record. Ibid.

In challenging the consecutive nature of his sentence, defendant relies on State v. Copling, 326 N.J. Super. 417 (App. Div. 1999), certif. denied, 164 N.J. 189 (2000) for the proposition that the court should not have identified society as a separate victim of his unlawful possession of a handgun conviction. In that case, the defendant challenged his consecutive sentences for murder and unlawful possession of a weapon, receiving concurrent sentences for his remaining offenses. Id. at 440-41. There, the trial judge imposed consecutive sentences on these two offenses because:

the 'objectives and purposes' of the crimes for weapons possession and murder are different, and the victims as well were different. Whereas the victim of the murder and manslaughter charges were K.C. and Malik, the true victim of unlawful possession of a handgun is society as a whole.

[Id. at 441.]

We rejected the trial judge's rationale that the "objectives and purposes" and victims of these two offenses were different, and reversed the defendant's consecutive sentences. Id. at 441-42. Specifically, we found the goal of the unlawful possession statute "is to protect others from being killed by those who own weapons," similar to the objectives of the murder statute, which protects the public from unlawful killing. Id. at 441. Additionally, the

court noted "the victims sought to be protected by the two statutes are the same." Id. at 441-42.

In the case now before us, the court explained that consecutive sentences were appropriate because "these were separate offenses that were committed at separate times with separate victims." Specifically, the court noted "no one handed . . . [defendant] the gun at the exact time of the shooting. It's clear, based upon his possession of ammunition, . . . that he had the gun before. It's a containing offense . . . [that] was complete[] at the time he was in the gas station[.]" Although the court did state that society was a separate victim in this case, unlike Copling, the trial court here gave other reasons for imposing consecutive sentences. That defendant committed separate offenses, and that there can be no free crimes in a system for which the punishment shall fit the crime, are relevant Yarbough factors that support the imposition of consecutive sentences. Supra, 100 N.J. at 643-44.

Defendant also argues the trial court improperly speculated as to whether defendant continuously possessed the handgun prior to and after the shooting. That is not so. There is competent, credible evidence in the record to support the trial court's finding that defendant unlawfully possessed the handgun prior to the shooting. None of the State's witnesses testified defendant

was handed the gun at the time of the shooting, and a search of defendant's room uncovered a box of bullets of the same caliber as the shell casing found on the curb near the gas station.

Lastly, defendant argues the court erred by finding aggravating factor one, N.J.S.A. 2C:44-1(a)(1), the nature and circumstances of the offense, including whether it was committed in an especially heinous, cruel, or depraved manner. Defendant contends his conduct does not amount to such ruthless or callous behavior required to sustain a finding of this aggravating factor.

"[T]he finding, weighing, and balancing of aggravating and mitigating factors involves marshaling information to assess the severity of sentence to be imposed for the crime that the defendant committed." Randolph, 210 N.J. at 349. When the finding of such factors are "supported by competent, credible evidence in the record, and properly balanced, [appellate courts] must affirm the sentence and not second-guess the sentencing court[.]" Case, supra, 220 N.J. at 65 (citing State v. Natale, 184 N.J. 458, 365 (2005)).

Under aggravating factor one, "the sentencing court reviews the severity of the defendant's crime, the single most important factor in the sentencing process, assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." State v. Lawless, 214 N.J. 594, 609 (2013)


(citations omitted). In that analysis, "courts applying aggravating factor one focus on the gravity of the defendant's conduct, considering both its impact on its immediate victim and the overall circumstances surrounding the criminal event." Id. at 609-10.

Here, the sentencing court found aggravating factor one because there was "a certain heinous, cold demeanor . . . displayed by the defendant, where [the victim] is walked off to potentially be executed. There's a coldness of purpose in . . . his words." Significantly, however, the court emphasized that it did not give aggravating factor one "an undue amount of weight" or "an unbearable amount of weight," because doing otherwise would double count the factor given that the infliction of serious bodily injury was an element of aggravated assault. In view of these statements, together with the court's finding other aggravating factors – the risk of reoffense, elements of organized criminal activity, defendant's prior criminal record, and the need to deter – and the absence of mitigating factors, we conclude the court's analysis of aggravating factor one does not require resentencing.

For the foregoing reasons, we affirm defendant's convictions and sentence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION