SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4235-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN WARD,

Defendant-Appellant.

Submitted September 28, 2017 – Decided April 4, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 13-10-1301.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Narline Casimir, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a bifurcated jury trial on a nine-count indictment, defendant was convicted of third-degree aggravated assault with a

deadly weapon, N.J.S.A. 2C:12-1(b)(2), (count one);[1] two counts of fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4), (counts two and three); two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a), (counts four and five); two counts of second- degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a), (counts seven and eight); and second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b)(1), (count nine).[2] Defendant was sentenced to three consecutive ten-year prison terms, each with a five-year period of parole ineligibility. The convictions stemmed from a violent attack in which defendant lured his estranged wife and her friend to his house under false pretenses and threatened them at gunpoint. Prior to the attack, defendant had followed his estranged wife on four different occasions, which conduct was admitted under N.J.R.E. 404(b).

Defendant now appeals from his convictions and sentence, raising the following arguments for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN ADMITTING, WITHOUT A LIMITING INSTRUCTION, EVIDENCE OF PRIOR BAD ACTS COMMITTED BY [DEFENDANT], ALTHOUGH THAT

[1] Defendant was found guilty of third-degree aggravated assault with a deadly weapon as a lesser-included offense of first-degree attempted murder. N.J.S.A. 2C:11-3, 2C:5-1.

[2] The State dismissed count six of the indictment prior to trial.

EVIDENCE HAD NO PERMISSIBLE PURPOSE. THE PREJUDICE THAT RESULTED FROM THIS ERROR REQUIRES REVERSAL.

A. THE OTHER-CONDUCT EVIDENCE WAS NOT ADMISSIBLE TO PROVE MOTIVE.

B. THE OTHER-CONDUCT EVIDENCE WAS NOT ADMISSIBLE TO REBUT A DEFENSE OF PASSION PROVOCATION.

C. THE TRIAL COURT'S ERROR WAS COMPOUNDED BY ITS FAILURE TO PROVIDE THE JURY WITH AN INSTRUCTION LIMITING ITS USE OF THAT OTHER-CONDUCT EVIDENCE.

D. THE ERRONEOUS INTRODUCTION OF THE OTHER-CONDUCT EVIDENCE, WITHOUT ANY LIMITING INSTRUCTION, COMBINED WITH THE ALLEGED VICTIM'S IMPROPERLY ADMITTED TESTIMONY THAT SHE FEARED [DEFENDANT] WOULD HURT HER FAMILY, REQUIRES REVERSAL.

POINT II[3]

THE MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE IMPOSITION OF THREE CONSECUTIVE MAXIMUM TERMS, RESULTING IN AN AGGREGATE SENTENCE OF [THIRTY] YEARS IN PRISON WITH A [FIFTEEN]-YEAR PAROLE DISQUALIFIER, WAS BASED ON A MISAPPLICATION OF THE SENTENCING FACTORS AND CONSTITUTED AN ABUSE OF DISCRETION. MOREOVER, IN LIGHT OF THE REMOTENESS OF [DEFENDANT'S] PRIOR CRIMINAL OFFENSES (FOUR THIRD-DEGREE DRUG CRIMES COMMITTED BETWEEN 1983 AND 1996) AND HIS STEADY EMPLOYMENT (FROM 1998 TO THE DAY HE WAS ARRESTED FOR THE INSTANT OFFENSES), THE IMPOSITION OF SUCH AN EXTRAORDINARY SENTENCE WAS GROSSLY UNFAIR.

[3] We have condensed point II for clarity.

After considering the arguments presented in light of the record and applicable law, we affirm.

I.

We glean the following facts from the trial record. Defendant and his wife, Mrs. Dollson, separated in February 2013. After the separation, Dollson went to live with her mother, and defendant remained at the couple's marital residence. Dollson testified that between their February 2013 separation and May 17, 2013, defendant followed her on at least four occasions.

According to Dollson, the first incident occurred when Dollson discovered defendant was parked three houses away from her mother's house, on the opposite side of the street. The second incident occurred while Dollson was delivering water to a friend. While her friend's son was unloading the water from her car, defendant drove up "out of [nowhere], . . . tapped [her] car, jumped out [of] the car, [and] started screaming and yelling." The third incident occurred when Dollson was leaving the gym and saw defendant's truck outside. The fourth incident occurred when Dollson was driving with her brother in the car, and defendant, who was driving past her in the opposite direction, "turned [his car] around in the middle of the street and proceeded to follow [her]." Once defendant realized that it was her brother in the car with her, "he turned around, [and] went another way."

Dollson testified that although the incidents made her fearful, she never called the police or obtained a restraining order because she did not want "him to hurt [her] family." During cross-examination, Dollson admitted that in a subsequent police interview, she denied having a history of domestic violence with defendant. She also admitted that during their separation, she would "still go to the house everyday" in order "to pick up [her] mail" or "get clothes," and would "sit and watch television with [defendant] sometimes."

Turning to the May 17, 2013 incident, Dollson testified that on that date, around 5:00 or 6:00 p.m., she was in a car with her long-time friend, Ms. Wilkins, when she noticed defendant and his friend following them in a truck. When defendant and his companion realized Dollson had seen them, they turned onto another street. Later that evening, defendant called Dollson several times and sent her a text message at 9:34 p.m. claiming "[s]omeone had broken into [their marital residence] and stole[n] the TV and the safe while he was at Walmart." The report prompted Dollson and Wilkins to drive to the marital residence.

Upon their arrival, Dollson questioned defendant about the burglary. Defendant responded that nothing had happened, and he was "just playing." Dollson threatened to call the police "to let [defendant] know that he shouldn't be playing" because "this [was]

serious," and left the house with Wilkins. After leaving, Dollson received another call from defendant, asking her to come back. When they returned to the house, Dollson and Wilkins followed defendant to the bedroom ostensibly for him to show them what had been stolen. Once they realized defendant had again lied about the burglary, Dollson and Wilkins prepared to leave.

However, while Dollson was in the hallway heading out, defendant hit her in the head with a gun. A struggle ensued, during which defendant held Dollson in a headlock while Wilkins tried to pull him away. Dollson testified that during the struggle, defendant pointed the gun at her head while repeatedly "pulling the gun back and forth" in an attempt to rack it. Wilkins testified that defendant was "fiddling with the top of the gun" and "had his hand on the trigger," as if "he was trying to shoot it." Eventually, Dollson "knocked the gun" to the floor, escaped defendant's grasp, and ran to the back door.

Once Dollson escaped, defendant turned the gun on Wilkins and threatened to kill her. Dollson returned to the living room and pleaded for Wilkins to leave. Wilkins in turn pleaded with defendant not to shoot her because of her children. Eventually, Wilkins ran out of the house unharmed and called the police on her

cell phone.[4] Inside, defendant continued to "pull[] back the gun," while Dollson screamed for help, yelling that someone was "trying to kill" her. Although defendant told Dollson "the gun was on safety," she tried to open the front door to flee once she saw the police lights. By the time she opened the door, defendant "had the gun to [her] head[] again," and his arm around her upper body.

When the police arrived, the officers observed defendant holding the gun to Dollson's head through the open front door. Defendant closed the door, retreated to the rear of the house with Dollson, and seconds later, emerged alone and unarmed from a side door of the house. When the officers ordered defendant "to drop the gun," Dollson out the back door "into the arms of [a] police officer." The officers immediately placed defendant under arrest, and Dollson was transported to the hospital where she was treated for a cut on her finger.

After arresting defendant, the officers searched the house for additional suspects or victims but found none. As they began to exit the house, they observed a handgun under a toaster oven on the kitchen counter. Upon closer examination, the gun "appeared to be in a state of malfunction. The slide was open[,] and there appeared to be a bullet jammed in the chamber of the gun." The

[4] Wilkins' 9-1-1 call to the police was played for the jury.

officers seized the gun and secured it by clearing the jam and removing the five remaining .25 caliber rounds in the magazine. The officers also recovered a .25 caliber round from defendant's pocket during a search incident to his arrest.

The State and defendant each produced a firearms expert at trial. The State's expert described the handgun recovered at the scene as "a semi-automatic . . . single action" pistol that "was indeed operable and capable of being discharged." On the other hand, the defense expert opined that the handgun would have been "inoperable" in the condition in which it was recovered because the slide "was seized back" or "binded in that position by something."

After the State rested its case, defendant produced a character witness to testify on his behalf. Defendant also moved for a judgment of acquittal as to counts one, seven, and eight pursuant to Rule 3:18-1. The trial judge denied defendant's motion and submitted the case to the jury, resulting in the guilty verdict. After appropriate mergers, the judge sentenced defendant to a ten-year term of imprisonment with a five-year period of parole ineligibility on each of the three weapons offenses, to run consecutively to each other. This appeal followed.

II.

Defendant's first point on appeal raises three separate arguments. First, defendant argues the court erred by admitting Dollson's testimony about him following her, spying on her, and intimidating her family under N.J.R.E. 404(b). Second, defendant argues the court erred by failing to give the jury limiting instructions on the permissible use of the N.J.R.E. 404(b) evidence. Third, defendant argues the judge compounded these errors by allowing Dollson to testify that she never called the police because she was afraid defendant would hurt her family, thereby portraying defendant "as a jealous, controlling, and violent man." We consider each of these arguments in turn.

During a January 8, 2016 pre-trial hearing, the State moved to introduce evidence of defendant's prior bad acts under N.J.R.E. 404(b). Specifically, the State sought to introduce Dollson's testimony about the incidents that occurred between February 2013 and May 17, 2013, as evidence of defendant's motive and opportunity. After hearing Dollson's testimony, which was consistent with her trial testimony but far more detailed,[5] the

[5] For example, at the pre-trial hearing, Dollson described defendant as "los[ing] it" after he "bumped" her car because "his mind [was] just so messed up that he always . . . [thought] that [she] was doing something, from the day that [they] got married." She testified that afterwards, defendant followed her as she drove

judge granted the State's motion, finding the evidence "relevant and probative" to explain defendant's motive and intent, as well as "to mitigate [defendant's] culpability or responsibility for the actions alleged."

We accord great deference to a trial court's ruling on the admissibility of evidence under N.J.R.E. 404(b). State v. Barden, 195 N.J. 375, 390 (2008). Under N.J.R.E. 404(b), evidence of "other crimes, wrongs, or acts" is inadmissible as evidence of a person's bad character or criminal predisposition; however, such evidence is admissible to prove "motive, opportunity, [or] intent . . . when such matters are relevant to a material issue in dispute." See State v. Stevens, 115 N.J. 289, 300-01 (1989).

In State v. Cofield, 127 N.J. 328 (1992), our Supreme Court established a four-part test to determine whether to admit evidence of prior bad acts under N.J.R.E. 404(b). In order to justify admission, the evidence must (1) "be admissible as relevant to a material issue"; (2) "be similar in kind and reasonably close in time to the offense charged"; (3) "be clear and convincing"

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to their marital residence, where an argument ensued. Later that same day, when Dollson was at the gym with her family, defendant caused a scene by getting "in [her] mother's face" and "[her] brother's face," while the "entire gym was watching." Dollson testified that despite being "scared for [her] life," she never reported these incidents to the police because she was afraid defendant would hurt her family, and she wanted to "keep peace" and "keep [defendant] away from [her] family."

evidence of the other crime or bad act; and (4) have probative value that is not "outweighed by its apparent prejudice." Cofield, 127 N.J. at 338. We only disturb a trial court's ruling "where there is a 'clear error of judgment' . . . 'with respect to [the Cofield] balancing test.'" State v. Marrero, 148 N.J. 469, 483 (1997) (quoting State v. DiFrisco, 137 N.J. 434, 496-97 (1994)).

Here, the court properly analyzed the Cofield factors before admitting evidence of defendant following Dollson and confronting her family. As to the first Cofield factor, the judge characterized the prior incidents as "borderline bad acts" and found them relevant to "defendant's motive and intent," as well as "to mitigate [his] culpability." The judge reasoned:

> [T]hey provide a [framework] for understanding the dynamics involved between the defendant and the victim, their relationship leading up to the event . . . . [T]hey could be used, depending [on] how fashioned by the State or defense, to explain the threats or the violence . . . alleged to have been utilized, by the defendant on the date in question[]. It could be utilized by the defense to paint his involvement in the incident as emotional responses based on jealousy, an element of their interaction and relationship. It could be utilized to address why the victim tolerated these priors as simply elements of her relationship with the defendant. She testified that she did so here in an effort to appease the defendant and to protect others from what she claimed to be his ability to lose it . . . .
>
> . . . .

> These prior incidents judged from the defense perspective are clearly relevant to mitigate [defendant's] culpability . . . . [I]ncidents such as these are clearly relevant and admissible to show a victim's state of mind as it affects her credibility and the pattern of the relationship.

"In criminal prosecutions, New Jersey courts generally admit a wider range of evidence when the motive or intent of the accused is material," as it is here, and "[o]ther-conduct evidence [has] been found probative of intent and motive." State v. Covell, 157 N.J. 554, 565 (1999).

"The second prong of the Cofield test is understood as 'limited to cases that replicate the circumstances in Cofield.'" State v. Rose, 206 N.J. 141, 160 (2011) (quoting State v. Williams, 190 N.J. 114, 131 (2007)). Nevertheless, the judge determined that "[a]ll of these [incidents] occurred within [the] four[-]month time period" preceding the charged crimes. "Our courts have found the 'reasonably close in time' aspect to be satisfied where there were longer periods of time between the prior act and the present charge." State v. Castagna, 400 N.J. Super. 164, 179 (App. Div. 2008); see, e.g., State v. Krivacska, 341 N.J. Super. 1, 41 (App. Div. 2001) (sexual assaults about two years apart were "reasonably proximate in time"). Furthermore, "when motive is the object of the proffered evidence, similarity

is not a requirement for admissibility." Castagna, 400 N.J. Super. at 179.

As to the third Cofield factor, the judge found Dollson's testimony credible. The judge acknowledged that there were "no records, photos [or] videos documenting these incidents," and that Dollson's admission that she returned to the marital residence on a regular basis "raise[d] a question that if she was, in fact, afraid of the defendant why did she . . . go back there in the first place." Nevertheless, the judge determined that "love and emotions . . . make people do strange things, so that doesn't make them any less credible." Rather, the judge found that Dollson "testified in a manner which . . . was clear and concise. She remained as calm as she could while being asked to recall . . . a difficult past." The judge also noted that "she seemed truthful . . . responding to questions . . . whether they [were] from the State or cross examination," and her demeanor "[c]learly indicat[ed] that she was uncomfortable being [there] and certainly uncomfortable having to testify in open court with regards to these very, very private and personal matters."

Our review of the judge's findings in this regard "is limited to confirming only that 'those findings are supported by sufficient credible evidence in the record.'" State v. Hreha, 217 N.J. 368, 382 (2014) (quoting State v. Elders, 192 N.J. 224, 243 (2007)).

Here, we are satisfied that the judge's findings are amply supported by the record.

As to the fourth Cofield factor, the judge found the evidence's potential for prejudice did not outweigh its probative value. Finding that the potential for prejudice was minimal, the judge pointed out that "there could be a different motive ascribed to these incidents," as brought out by defense counsel on cross-examination. According to the judge, the evidence could support a passion/provocation defense and mitigate defendant's culpability from an attempted "murder down to something less . . . if not altogether a finding of not guilty of these charges." However, the judge directed the State and its witnesses to refrain from using the terms "stalking" and "domestic violence,"[6] as they are "legal term[s]" that are "very loaded" and "very prejudicial."

We are satisfied that the judge's determination does not constitute a "clear error of judgment." See Marrero, 148 N.J. at 484. "The mere possibility that evidence could be prejudicial does not justify its exclusion," and "certain types of evidence, including evidence of motive or intent, 'require a very strong showing of prejudice to justify exclusion.'" State v. Long, 173

[6] We note that Dollson's denial of a history of domestic violence between her and defendant prior to the May 17, 2013 incident was in response to a question asked during cross-examination.

N.J. 138, 164 (2002) (first quoting State v. Morton, 155 N.J. 383, 453-54 (1998); then quoting State v. Koskovich, 168 N.J. 448, 486 (2001)). Such a showing was not apparent here.

For the first time on appeal, defendant contends the judge erred by failing to instruct the jury on the limited use of N.J.R.E. 404(b) evidence. Defendant argues that his acts of "following and/or spying on Dollson [gave] rise to the inference that [he] is ill-tempered and has a propensity for jealousy and harassment." According to defendant, without the limiting instruction, the jury could not have known it could only consider the incidents as evidence of motive or of a passion/provocation defense to mitigate his actions. The State counters that the absence of a limiting instruction was invited error. Quoting State v. Yough, 208 N.J. 385, 400-01 (2011), the State argues that "[d]efense counsel's failure to request the limiting instruction . . . 'suggests that [he] believed that he had constrained the . . . narrative to his advantage or that any possible error "was actually of no moment."'"

If the court admits evidence of other crimes or bad acts under N.J.R.E. 404(b), it "must provide a limiting instruction that 'inform[s] the jury of the purposes for which it may, and for which it may not, consider the evidence of defendant's uncharged misconduct, both when the evidence is first presented and again

as part of the final jury charge.'" State v. Garrison, 228 N.J. 182, 200 (2017) (alteration in original) (quoting Rose, 206 N.J. at 161). Here, we agree that the judge's failure to provide a limiting instruction after the evidence was presented and as part of the final jury charge was error.

However, the inquiry does not end there. We must next consider whether the error constitutes plain error or, as argued by the State, whether defendant, in fact, invited the error. When a defendant fails to object at trial, we review for plain error, and "disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). The error must have been "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. McGuire, 419 N.J. Super. 88, 106-07 (App. Div. 2011) (quoting State v. Taffaro, 195 N.J. 442, 454 (2008)). "In addition, any finding of plain error depends on an evaluation of the overall strength of the State's case." State v. Chapland, 187 N.J. 275, 289 (2006).

Under the invited error doctrine, mistakes at trial "induced, encouraged[,] . . . acquiesced in[,] or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. Corsaro, 107 N.J. 339, 345 (1987) (quoting State v. Harper, 128

N.J. Super. 270, 277 (App. Div. 1974)). In other words, if a party has "invited" the error, he is barred from raising an objection for the first time on appeal. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010). The doctrine acknowledges the common-sense notion that a "disappointed litigant" cannot argue on appeal that a prior ruling was erroneous "when that party urged the lower court to adopt the proposition now alleged to be error." Id. at 340 (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996)).

The invited error doctrine is designed to prevent defendants from manipulating the system; thus, it only applies when "a defendant in some way has led the court into error." State v. Jenkins, 178 N.J. 347, 359 (2004). If, on the other hand, "there is no evidence that the court in any way relied on a defendant's position," the doctrine does not apply. Ibid. However, even if a party has "invited" an error, courts will not bar defendants from raising an issue on appeal if "the particular error . . . cut mortally into the substantive rights of the defendant." Corsaro, 107 N.J. at 345 (alteration in original) (quoting Harper, 128 N.J. Super. at 277).

Here, the judge contemplated a limiting instruction on two different occasions, but decided against it each time. On both occasions, defense counsel failed to object, despite having the

opportunity to do so. First, during Dollson's trial testimony, the judge commented that he "was prepared to give a 404(b) charge" but no longer found it necessary because "the way [the] testimony [was] coming out," he could not "even characterize [the evidence] as a prior bad act," and referred to the incidents as "simply interactions." According to the judge, the N.J.R.E. 404(b) hearing was necessary "in case [the evidence] came out as bad as [the State] [had] proffer[ed] it, but it didn't." The judge explained that he thought the testimony would be more damning, thereby providing "a basis to characterize it as a bad act, but [he] didn't see it." Defense counsel agreed and responded that he did not "see it either."

Then, during the charge conference, the judge again discussed giving a limiting instruction but decided against it, explaining, "it would be prejudicial . . . to . . . defendant, because nobody characterized what he did as a bad act." The judge also noted "there could be some mitigating value to [the evidence]," depending on how the defense "phrase[d] [its] position." Defense counsel again failed to object. In fact, over the State's objection but with defense counsel's consent, the judge included an "attempted passion provocation manslaughter charge" based on the four prior incidents "brought out by [the State] on direct." The judge reasoned that the prior interactions showed "[t]here was an

emotional context behind [defendant's] actions" from which "the jurors could reasonably infer" that he "couldn't deal with the loss of . . . Dollson and this marriage," and that "he was acting on his emotions."

During summations, defense counsel argued defendant "loved [Dollson] and . . . didn't intend to harm her." Defendant was only trying to "scare [Dollson] back into his arms," but "it failed terribly." Defense counsel pointed out that Dollson "never called the police," not "even when [defendant] supposedly struck the rear of [her] car." He also noted it is "not illegal to follow your wife through the neighborhood." In fact, defense counsel claimed it is "not even a bad act if [you are] losing somebody, if [you are] drifting apart, nothing wrong about following them."

Under the particular and idiosyncratic facts of this case, we conclude defendant invited the error. Defense counsel agreed with the judge that the evidence presented at trial was not as damaging to defendant as the parties had anticipated. Furthermore, defense counsel used the prior acts and Dollson's past failure to call the police to defendant's advantage by characterizing the May 17, 2013 incident as merely the latest in a string of failed attempts to reconcile with his estranged wife, rather than an attempt to hurt her. Indeed, the defense was partially successful

because the jury acquitted defendant of the most serious charge in the indictment, first-degree attempted murder.

The doctrine of invited error is implicated when, as here, "'a defendant in some way has led the court into error,' while pursuing a tactical advantage that does not work as planned." State v. Williams, 219 N.J. 89, 100 (2014) (quoting State v. A.R., 213 N.J. 542, 561-62 (2013)). Defense counsel may well have believed that a N.J.R.E. 404(b) limiting instruction would undermine the defense's theory by casting the prior acts in a more menacing light than Dollson's trial testimony had, and made a strategic decision not to request the charge.

Because the prior acts were "nonviolent and not at all similar to the [charged offenses], the fact that a limiting instruction was not given does not require a reversal" of defendant's convictions. State v. Loftin, 146 N.J. 295, 394-95 (1996). Thus, in the circumstances of this case, we discern neither a fundamental injustice that would warrant relaxing the invited error doctrine, nor plain error clearly capable of producing an unjust result.

Likewise, given the overwhelming evidence of defendant's guilt, including the contemporaneous 9-1-1 tape recording, police officers' observations of defendant holding a gun to Dollson's head, and the recovery of the handgun in defendant's kitchen, we conclude that any error resulting from the judge allowing Dollson

to testify that she feared defendant would harm her family was harmless. "[E]ven though an alleged error was brought to the trial judge's attention, it will not be grounds for reversal if it was 'harmless error.'" State v. J.R., 227 N.J. 393, 417 (2017) (quoting State v. Macon, 57 N.J. 325, 337-38 (1971)). "Convictions after a fair trial, based on strong evidence proving guilt beyond a reasonable doubt, should not be reversed because of a technical or evidentiary error that cannot have truly prejudiced the defendant or affected the end result." State v. W.B., 205 N.J. 588, 614 (2011). "Indeed, in light of the mass of evidence supporting his guilt, we are confident that no injustice occurred in defendant's trial." State v. Gore, 205 N.J. 363, 383 (2011).

III.

Turning to defendant's challenge to his sentence, defendant argues the judge improperly applied aggravating factor six, N.J.S.A. 2C:44-1(a)(6), gave excessive weight to aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), and did not properly consider the mitigating factors. Specifically, defendant claims the court erred by failing to consider that he: (1) had not committed a crime for fifteen years before the instant offenses, (2) had been steadily employed for fifteen years, (3) had never been convicted of a violent crime, (4) did not have a history of physical violence, and (5) committed the instant offenses during an

emotional period in his life. Defendant also argues the judge erroneously imposed consecutive sentences because the offenses were too closely related to one another to warrant consecutive sentences, and defendant did not have a predominantly independent objective to terrorize Wilkins.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). "The reviewing court must not substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). Instead, we will

> affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [Ibid. (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

"[T]he decision to impose consecutive or concurrent sentences rests in the first instance with the trial court." Miller, 205 N.J. at 130; see also N.J.S.A. 2C:44-5(a). In making that determination, the trial court must consider the factors set forth by our Supreme Court in State v. Yarbough, 100 N.J. 627 (1985). Specifically, the trial court must consider whether:

> (a) [T]he crimes and their objectives were predominantly independent of each other;

> (b) the crimes involved separate acts of violence or threats of violence;
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> (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.
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> [Id. at 644.]

Not all Yarbough factors need be present, and "a sentencing court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences." State v. Carey, 168 N.J. 413, 427-28 (2001). Apt to this matter, our Supreme Court has held that "crimes involving multiple victims represent an especially suitable circumstance for the imposition of consecutive sentences because the 'total impact of singular offenses against different victims will generally exceed the total impact on a single individual who is victimized multiple times.'" State v. Molina, 168 N.J. 436, 442 (2001) (quoting Carey, 168 N.J. at 428). Accordingly, "the multiple-victims factor is entitled to great weight." Ibid. (quoting Carey, 168 N.J. at 429).

Here, the judge appropriately pointed out several important considerations bearing on his sentencing analysis and his

conclusion that aggravating factors three, six, and nine applied. N.J.S.A. 2C:44-1(a)(3), (6), (9). The judge found aggravating factors three and six based on defendant's lengthy "criminal history that began in 1978," and resulted in two disorderly persons convictions and four indictable convictions, each of which "resulted in a period of incarceration" and involved either drug possession or drug distribution charges. The judge gave "great weight" to aggravating factor six and noted that, despite defendant's prior convictions and incarcerations for serious offenses, he continued to re-offend.

The judge also found aggravating factor nine, giving "great weight to the specific deterrent aspect of this factor" as it relates to defendant. While acknowledging that defendant's conduct was motivated by his obsession with Dollson, the judge was skeptical as to "whether or not this [was] the end of the relationship" or "something that [was] simply being put on hold until []defendant [was] paroled . . . and out on the streets again." If the latter, defendant would continue to pose a risk to Dollson, who told the judge she would be "constantly looking over her shoulder," wondering if defendant was "going to come after her." As to general deterrence, the judge believed that a maximum sentence was warranted to send a message, and noted that "it's bad enough to have a weapon in your possession for an

unlawful purpose," but "it makes it even worse when you actually act out on that purpose." Regarding mitigating factors, the judge acknowledged that defendant remained crime free for "approximately a decade." Nonetheless, the judge rejected defendant's arguments in mitigation, found no mitigating factors, and determined that the aggravating factors outweighed the non-existent mitigating factors.

Regarding concurrent or consecutive sentences, guided by Yarbough, the judge, found consecutive sentences appropriate because, although the crimes occurred "in the same course of conduct," they "were primarily independent of each other." The judge stated "the jury's verdict indicated that . . . defendant's conduct . . . [could] be characterized as separate acts of violence involving two separate victims who each were subjected to violence and terror." The judge noted that Dollson, "the primary focus of []defendant's attention during these incidents, . . . remain[s] damaged emotionally." Relying on Carey, 168 N.J. at 429, the judge reasoned that the fact that there were multiple victims was "entitled to great weight and should ordinarily result in the imposition of at least two consecutive terms when . . . serious bodily injuries have been threatened . . . on multiple victims by the defendant."

The judge noted that the "jamming" of the handgun should not

> mitigate in favor of the defendant when he intended to use it in the manner testified to by both victims . . . and the fact [that] the defendant pulled the trigger of a loaded gun [against] his ex-wife and the fact that the defendant pointed a loaded gun at . . . Wilkins to keep her at bay from rescuing . . . Dollson from the defendant, that has to be considered by the [c]ourt as raising the level of the seriousness of the significance of the crimes for which he's been found guilty of, at least with regards to the purpose and possessing the weapon unlawfully.
>
> . . . .
>
> While he acted out on his intent against the victims, [the court's] belief was that he should not benefit from a concurrent sentence because essentially there would be no free crimes . . . .

Defendant's sentence is within the statutory range, albeit the maximum, see N.J.S.A. 2C:43-6(a)(2), and it incorporated periods of parole ineligibility mandated by statute. See N.J.S.A. 2C:39-7(b)(1); N.J.S.A. 2C:43-6(c).[7] In State v. Cassady, 198 N.J. 165, 180 (2009), our Supreme Court reaffirmed that "adherence to the [Criminal Justice] Code's sentencing scheme triggers limited appellate review." Indeed, if there is such adherence by a trial court, "its discretion should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010). Here, we

[7] In an August 2013 amendment to N.J.S.A. 2C:43-6(c), the mandatory minimum term for possession of a firearm for an unlawful purpose increased from three years to forty-two months. Defendant's offenses predated the amendment.

are satisfied the judge made findings of fact concerning aggravating and mitigating factors based on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines enunciated in the Code, including the imposition of consecutive sentences and periods of parole ineligibility. Accordingly, we discern no basis to second-guess the sentence.

Affirmed.