SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0920-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CADE S. CORDWELL, a/k/a
KING CADE CORDWELL

Defendant-Appellant.

Argued May 15, 2023 – Decided June 23, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 18-05-0498.

Brian P. Keenan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Brian P. Keenan, of counsel and on the briefs).

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

Defendant Cade Cordwell appeals from his October 21, 2020 judgment of conviction after a jury trial. We affirm in part, reverse and vacate in part, and remand for resentencing.

Defendant raises the following issues on appeal:

> POINT I: OVER DEFENSE OBJECTION, THE TRIAL COURT ERRED IN ANSWERING WITHOUT CONTEXT, THE JURY'S FACTUAL QUESTION ABOUT WHETHER OFFICER GALLO SAW THE GUN THAT [DEFENDANT] WAS CHARGED WITH POSSESSING, INCORRECTLY TELLING THE JURY THAT HE AND LAWYERS AGREED THAT THIS WAS THE ANSWER.
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> POINT II: THE TRIAL COURT DEPRIVED [DEFENDANT] OF HIS RIGHT TO A FAIR TRIAL BY UNNECESSARILY KEEPING HIM SHACKLED AND SURROUNDED BY FIVE POLICE OFFICERS DURING JURY SELECTION AND THE MAJORITY OF THE TRIAL.
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> POINT III: THE JURY'S LEGALLY IMPERMISSIBLE INCONSISTENT VERDICT AS WELL AS THE VERDICT SHEET INDICATING THAT ANY DRUG CRIME WAS SUFFICIENT TO CONVICT REQUIRE REVERSAL ON COUNT [NINE].
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> POINT IV: THE SENTENCING COURT'S MULTIPLE ERRORS IN WEIGHING AGGRAVATING AND MITIGATING FACTORS, AND IN IMPOSING THREE CONSECUTIVE

SENTENCES RESULTED IN A MANIFESTLY EXCESSIVE EIGHTEEN-YEAR SENTENCE.

The record informs our decision. At around 5:00 p.m. on March 17, 2018, Jahoni Aarons[1] and defendant crossed the George Washington Bridge on their way from New York City to Schenectady, New York. Aarons was driving a white Chevrolet Impala. About two miles after crossing, they passed Officer Anthony Gallo of the Englewood Police Department. As Aarons and defendant went by, the officer noticed defendant—situated in the front passenger seat—was not wearing his seatbelt.

Officer Gallo pulled onto the highway, gave pursuit, and ordered Aarons to pull off at the next exit. Aarons complied, and the two cars pulled to a relatively quiet residential street. Officer Gallo exited his vehicle to conduct a traffic stop. As he approached the Impala and asked Aarons for his identification, Officer Gallo noticed the odor of marijuana.

Officer Gallo was soon joined by a fellow officer, Maciej Mlynaryk. While Officer Gallo asked Aarons to exit his vehicle as he continued to talk to him, Officer Mlynaryk remained with defendant, standing outside the passenger door. Through the open window, Officer Mlynaryk could also smell marijuana.

[1] Aarons was tried separately and is not subject to this appeal.

Outside the vehicle, near the curb, Officer Gallo and Aarons had a conversation which lasted for several minutes.

Officer Mlynaryk testified he observed defendant's demeanor change while Officer Gallo was speaking with Aarons. His breathing became more labored, his chest began to rise and fall, and he rose in his seat in order to observe the situation outside the vehicle through the rearview mirror. Officer Mlynaryk also observed defendant's "left hand and right hand drift toward [his] front left pocket." Officer Mlynaryk instructed defendant to keep his hands visible.

Officer Gallo performed a pat-down and searched Aarons' person. In Aarons' left jacket pocket, Officer Gallo felt a plastic bag filled with powder. Officer Gallo asked Aarons what the bag contained, because he was concerned about handling fentanyl with his bare hands. In response to this question, Aarons began to run, but tripped over the curb. Officer Gallo tackled him.

Seeing this, Officer Mlynaryk radioed for backup, then turned back to defendant. He testified defendant had shifted his left hip up off the seat, moving both his hands toward the front left pocket of his jeans. He saw what he believed was the outline of a handgun through the fabric of defendant's pants. Officer Mlynaryk shouted "don't fuckin' reach."

According to Officer Mlynaryk, defendant continued to reach into his pocket to retrieve the gun. Officer Mlynaryk shouted again, then opened the passenger door and tried to grab defendant's hands to prevent him from obtaining the weapon. Defendant shifted himself over to the driver's seat. The two men fought for control of the defendant's hands.

Officer Mlynaryk's upper body was inside the car, but his feet remained outside of the vehicle. He had poor leverage; defendant repeatedly struck him in the face and chest while Officer Mlynaryk repeated his commands to stop reaching for the weapon. As the struggle continued, defendant grabbed the gear shifter with a free hand and put the car into drive. Defendant then pressed the gas with his left foot and the car pulled out into active traffic.

Officer Mlynaryk testified, as the car began to move, defendant continued trying to access his left pocket. Officer Mlynaryk drew his weapon and threatened to shoot defendant. The vehicle struck the curb, came to a stop, and another officer opened the driver's door. After a continued struggle, the police used pepper spray and subdued defendant. Officers found a Glock handgun in defendant's pocket; its serial numbers had been scratched off. It was recovered from the scene and entered into evidence with a corresponding chain of custody.

Notably, Officer Gallo testified he saw Officer Mlynaryk limp away from the car with a Glock handgun in his hand.

Officers searched the vehicle and found no contraband beyond what was discovered on Aarons' person: a plastic bag containing vegetation (purported marijuana); a plastic bag containing approximately seven ounces of cocaine, later identified by an expert; and a glass jar containing unidentified white powder.

Aarons and defendant were charged and indicted together on six counts: third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); first-degree possession of five ounces or more of cocaine with the intent to distribute, N.J.S.A. 2C:36-5(a)(1) and 2C:35-5(b)(1) (count two); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(b) (count four); second-degree possession of a weapon without a permit, N.J.S.A. 2C:39-5(b) (count eight); second-degree possession of a handgun while in the course of committing, attempting to commit, or conspiring to commit a drug crime, N.J.S.A. 2C:39-4.1(a) (count nine), and fourth-degree possession of a defaced firearm, N.J.S.A. 2C:39-3(d) (count ten).

Defendant was charged individually with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count five); third-degree causing bodily injury

to Officer Mlynaryk in the performance of his duties, N.J.S.A. 2C:12-1(b)(5)(a) (count six); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3) (count seven); second-degree possession of a handgun with the purpose to use it unlawfully against the person of another; N.J.S.A. 2C:39-4(a)(1) (count eleven); and fourth-degree possession or control of a handgun having previously been convicted of a crime, N.J.S.A. 2C:39-7(a) (count thirteen).

The matter was tried on November 21, 2019. Officers Gallo and Mlynaryk testified, along with a lab expert who identified the white powder as cocaine. Another officer, Detective Anna Bedoya, took photographs of the crime scene and handled much of the evidence in this case. She testified that the gun contained a loaded magazine. The gun was not reported stolen, but its registered owner lived in Mississippi.

Defendant testified on his own behalf and presented no other witnesses. His testimony before the jury was markedly different from the officers. According to defendant, Officer Mlynaryk asked him for identification as they waited. Defendant had his phone in his right pocket, his identification and $1,737 in his left pocket. He retrieved his identification from his left pocket and passed it to Officer Mlynaryk. When Aarons got out of the car, defendant was concerned because he believed there was no traffic violation. Officer Mlynaryk

was blocking his view of the side-view mirror so he could not see what was happening with Officer Gallo and Aarons at the back of the car. Defendant started to worry, so he flipped the visor mirror down to see what was happening behind him. At one point when defendant looked back, he saw Aarons with his hands up, then saw him run. At that point, Officer Mlynaryk looked over at the two men, turned back at defendant, and then proceeded to reach for his right hip where his service pistol was holstered. As soon as defendant saw Officer Mlynaryk's hand on the weapon, he wanted to get out of the car. Because Officer Mlynaryk was at the passenger door, he began moving to his left, towards the driver's seat. Officer Mlynaryk then opened the car door, dove in, and tackled defendant, pinning him to the door.

In defendant's account, Officer Mlynaryk's weapon was drawn, and defendant struggled to keep the gun away from his body. The two began exchanging blows. Defendant testified he was in fear for his life, as Officer Mlynaryk kept saying "I'm going to fucking kill you." He punched defendant in the head and face multiple times; defendant suffered a broken cheekbone as a result.

Defendant testified he acted in self-defense and never intended to injure Officer Mlynaryk while struggling in the car. In defendant's version of events,

the car accidentally shifted into drive during the struggle, and began to roll forward as a result. It took a few seconds before defendant realized the car was moving, then he noticed that it was shifted into neutral when he heard the idle engine revving.

At the conclusion of the State's case, defendant moved under State v. Reyes, 50 N.J. 454 (1967), for a judgment of acquittal on counts one and two. The court denied this motion but granted a corresponding motion pertaining to count seven. The court also questioned the sufficiency of the evidence to sustain the State's burden on count ten and dismissed it with prejudice.

On December 18, 2019, the jury returned its verdict. It found defendant guilty of counts one, three (amended to third-degree aggravated assault, 2C:12-1(b)(7)), six, nine, and thirteen. Defendant was acquitted of the other charges, most notably for the purposes of the present appeal, possession of CDS with intent to distribute: N.J.S.A. 2C:35-5(a)(1) and -5(b)(1).

The court conducted a second trial before the same jury on the certain persons charge and the jury found defendant guilty. On January 2, 2020, defendant moved to dismiss his conviction on second-degree possession of a firearm in the course of committing, attempting, or conspiring to commit a violation of N.J.S.A. 2C:35-5(a)(1), 5(b)(1), pursuant to N.J.S.A. 2C:39-4.1(a).

Later, defendant moved to vacate the jury verdict on second-degree attempted aggravated assault—serious bodily injury, N.J.S.A. 2C:12-1(b)(1); and third-degree aggravated assault of a law enforcement officer, pursuant to N.J.S.A. 2C:12-1(b)(5)(a). The court denied those motions.

Defendant was sentenced on September 25, 2020, to an aggregate eighteen-year sentence with six years, nine months of parole ineligibility. This appeal followed.

I.

Defendant first argues the trial court erred by responding "yes" to the jury's question "did Officer Gallo ever testify he saw the gun?" which was posed to the court during deliberations. Defendant asserts this question is purely factual, therefore, providing an answer impermissibly violated the separation of the court's legal role and the jury's position as determiner of fact. Defendant also argues the answer is impermissibly imprecise because it might be interpreted two different ways.

Rule 1:2-1 controls judge and jury interactions, and provides "[a]ll trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences . . . and appeals shall be conducted in open court unless otherwise provided by rule or statute." Therefore, "[c]ourts have broad

discretion as to whether and how to conduct read-backs and playbacks." State v. Miller, 205 N.J. 109, 122 (2011). Simply put, a trial judge's response to jury questions must accurately state the law and avoid jury confusion. See State v. Carswell, 303 N.J. Super. 462, 480 (App. Div. 1997).

As such, when a jury requests clarification, the trial court has an obligation to clear the confusion. State v. Savage, 172 N.J. 374, 394 (2002) (citing State v. Conway, 193 N.J. Super. 133, 157 (App. Div. 1984)). For issues of fact, this typically takes the form of reading back witness testimony, at the discretion of the court. Higgins v. Polk, 14 N.J. 490, 492-93 (1954). Decisions concerning whether to conduct a readback are evaluated on an abuse of discretion standard. Miller, 205 N.J. at 122.

Here, nearly a month had passed between when the jury heard the testimony of the police officers and deliberations, therefore, the jury asked to review the dashcam footage and play back the recording of Officer Mlynaryk and Gallo's testimony. The court first played back the dashcam footage. It informed the jury they would then be able to listen to the testimony.

However, after playing the dashcam footage, the jury asked "'Did Officer Gallo ever testify he saw the gun?'[2] So we don't need to hear the whole

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[2] Officer Gallo testified on direct examination he saw the gun after the struggle between Officer Mlynaryk and defendant:

> [Officer Gallo:] I drove all the way to the location of where Officer Mlynaryk was. There was several of the other police officers that were working that day from Englewood that were there. I saw that . . . Officer Mlynaryk was . . . pacing around and . . . I asked him if he was okay. He looked like he was . . . hurting. And I saw that he had a gun in his right hand.
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> [Prosecutor:] Is that the gun that he is carrying as a part of his duty belt?
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> [Officer Gallo:] No. . . . He was limping. He was complaining of knee pain. You know, he said that the – that [defendant] physically resisted inside the car. There was a strong struggle and that, you know, . . . the handgun was removed from the left pocket of [defendant].

Then on cross, he testified:

> [Defense Counsel:] Did there ever come a time . . . that you saw a gun[?]
>
> [Officer Gallo:] Yes, sir.
>
> [Defense Counsel:] Who had – where did you see this gun?
>
> [Officer Gallo:] Officer Mlynaryk had the gun in his hand.

testimony." The judge held a long conversation with counsel and discussed how to answer the question. It was the State's initial position that the entirety of the testimony should be played back. In response, defense counsel suggested answering "Officer Gallo testified that he received the gun from Officer Mlynaryk and that there were no other times when Officer Gallo saw the gun." The prosecutor objected to this characterization, and suggested, if the court were to give an answer, the correct answer would be a one word "yes" and that the jury would then be free to ask any follow up questions. The State continued: "I . . . think that [the jury] want[s] more context than just a yes and in that regard maybe we need to play everything. I don't want to waste anybody's time, but I think . . . sometimes you have to play it through to prevent future issues." The

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> [Defense Counsel:] Okay. So that was the first time you saw this gun, correct?
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> [Officer Gallo:] Yes, sir.
>
> [Defense Counsel:] You never saw [defendant] with a gun, correct?
>
> [Officer Gallo:] No, sir.

defense never raised a formal objection to phrasing the answer as "yes" but clearly advocated for other formulations.

The judge ultimately gave the following answer:

> That answer, the lawyers and I agree upon it, is yes. Then you wrote, "So we don't need to hear the whole testimony." So[,] from this do I understand that now that I've answered this question you don't want to hear the testimony of Officer Gallo?
>
> . . . .
>
> UNIDENTIFIED JUROR: That's enough.

Defendant now argues this answer is misleading because his theory of the case is that he never had a gun, and instead it was planted by Officer Mlynaryk to justify an otherwise unprovoked attack. He asserts the judge overstepped the bounds of clarifying questions of law and instead entered the factfinding role reserved for the jury. The answer "yes," he argues, is ambiguous without context, because it could be taken to mean that Officer Gallo saw the gun in the possession of defendant when his actual testimony included no such assertion.

At its core, the question asked by the jury was factual. As such, it should have been answered by way of a playback of the previous testimony, not the interposition of the court. That said, the one-word answer given by the court here is correct. Officer Gallo testified that he saw the gun.

The issue is whether the court's given answer—"yes"—undermines confidence that the deliberative process produced a just result as to the weapons possession charges. State v. Parsons, 270 N.J. Super. 213, 224-25 (App. Div. 1994). We conclude it did not. The judge's answer was factually correct and did not obviate the fact that the jurors heard the testimony of all parties, including the defendant, firsthand. Furthermore, the context in which the court gave its answer reinforces our conclusion. The jurors reviewed the video evidence just prior to asking the question. The video clearly shows Officer Gallo was concerned primarily with Aarons, not defendant. Officer Gallo and Aarons spoke through the driver's side door, then on the street by the curb. The only plausible timeframe for Officer Gallo to "see" the gun in defendant's possession would be during the time period where Aarons was still seated within the vehicle. It is abundantly clear from the video Officer Gallo saw no such thing. He raised no alarm and turned his back to defendant for several minutes, while Officer Mlynaryk stood near the passenger window.

We discern no way any rational juror could have believed Officer Gallo saw the gun in this earlier timeframe given his behavior.

Therefore, given the totality of this evidence, there is no reasonable possibility the jury made the impermissible inference that defendant contends—

and this error does not rise to the threshold required for our reversal on a harmful or plain error basis. State v. G.E.P., 243 N.J. 362, 389 (2020).

II.

Next, defendant argues he was unduly prejudiced because he was shackled throughout jury selection and much of the trial. Defendant appeared throughout the proceedings in his jail uniform—by choice—and was verbally uncooperative throughout the case. Defendant also argues the courtroom was packed with "excessive" members of law enforcement officers, which rendered the environment inherently prejudicial.

A trial judge's control of trial proceedings is subject to an abuse of discretion standard. State v. Jones, 232 N.J. 308, 311 (2018). This extends to keeping a defendant restrained during trial, however, the judge's discretion in this regard is "sharply limited" by constitutional considerations. State v. Roberts, 86 N.J. Super. 159, 164 (App. Div. 1965). There must be "sound reason" for the use of restraints and a "strong case of necessity." Ibid.; see also State v. Artwell, 177 N.J. 526, 534 (2003) ("Consistent with the right to a fair trial, a trial court may not require a defendant to appear before the jury in restraints absent compelling reasons."). The use of restraints in the courtroom during proceedings should "not be permitted except to prevent . . . escape or

[defendant from] injuring others, and to maintain a quiet and peaceable trial." Roberts, 86 N.J. Super. at 163. Additionally, "a defendant's character, reputation, or criminal record may [also] indicate a need for physical restraints." State v. Mance, 300 N.J. Super. 37, 50-51 (App. Div. 1997). When a defendant has been violent towards law enforcement personnel previously, this standard is more easily met. Ibid.

Procedurally speaking, "a full-blown [adversarial] hearing is not required whenever a trial court is confronted with the question of whether a witness is to testify in restraints." State v. Kuchera, 198 N.J. 482, 496 (2009). Instead, a "candid colloquy among the court, counsel[,] and security staff should suffice to provide an informed basis on which the trial court can exercise its discretion." Ibid.

Here, such a "candid colloquy" occurred; the use of shackles was extensively discussed over a number of days. For example, the following discussion occurred during jury selection:

> THE COURT: . . . [Defense counsel] has indicated that he would not like to see—
>
> [DEFENDANT]: Because I'm in jail.
>
> THE COURT: He would not like to see the jury see [defendant] sitting there with shackles on . . . .

[DEFENSE COUNSEL]: Correct. That's correct.

THE COURT: Okay. So, [defendant], I'm going to have the office[r] take the shackles off you but if you misbehave, if you do anything in any way that causes security concerns –

[DEFENDANT]: Misbehave how?

THE COURT: If you do anything you'll have them right back on, and if you do it in front of the jury you'll get shackled right in front of the jury panel, so don't do that. All right, I'm going to give you the benefit –

[DEFENDANT]: So you might as well just leave them on me.

THE COURT: You want to leave them on. You don't want to take them off?

[DEFENDANT]: Today is my release date. You can take them off at the jail so I can go home.

THE COURT: Okay. So one more time. [Defense counsel] thinks it's a really bad idea for the jury panel to see you wearing handcuffs –

[DEFENDANT]: I don't understand what he's talking about, I don't under[stand] what you're talking about, I don't understand –

THE COURT: Yeah, you understand.

[DEFENDANT]: – what he's not talking about.

THE COURT: So do you want – do you want – [defense counsel] thinks those should come off.

[DEFENDANT]: I wanna go home. That's what I want to do. I wanna go home.

THE COURT: [Defendant], if I have the officers take[] them off are you going to behave and sit down in the chair or not?

[DEFENDANT]: Are you going to let me go home?

THE COURT: I guess not.

[DEFENDANT]: I'm asking you a question. Are you going to let me go home?

THE COURT: You're not going home until the trial is over. If the jury acquits you, you're going to go home.

[DEFENDANT]: There's not going to be a trial.

THE COURT: Yeah, there is. There is. I think since you won't answer my questions, [defense counsel], you've made a record –

[DEFENDANT]: So that make – that makes me – that makes me a bad person because I'm not answering your questions.

THE COURT: [Defense counsel], you've made a record that you want the shackles off. I can't get this gentlem[a]n to even tell me that he'll behave if I – if they take them off. I have one, two, three, four, five, six, seven, eight sheriff's officers in here right now. He sits eight feet away from a woman who is going to be the court clerk, he sits . . . five feet away from [the prosecutor] and maybe eight feet away from me. He won't even tell me that he's going to be – going to behave himself.

The next day, the reasons for the shackling were placed on the record, in a discussion with counsel and court security staff. One sheriff's officer voiced concern because her staff had observed defendant "looking at" the firearms of the personnel within the room.

Then, after initially being restrained, defendant eventually calmed and was allowed to testify without shackles. Finally, when giving jury instructions, the court directed the jurors not to speculate about the use of handcuffs.

After reviewing the entire record, we conclude the court attempted to conduct the trial without using restraints and exhibited patience and concern for defendant's rights. Defendant was noncompliant and engaged in efforts to undermine the judge's ability to bring defendant's case to conclusion. An extensive discussion of the use of restraints between the court, counsel, and security personnel occurred on the record. See Kuchera, 198 N.J. at 496. The jury was instructed not to consider the restraints in rendering its decision. And at the earliest opportunity, once defendant ceased being disruptive, the restraints were removed. We discern no abuse of discretion.

III.

Defendant next argues the jury impermissibly convicted him of count nine while simultaneously acquitting him of count two. Count nine is a firearm charge—possession of a firearm while committing a CDS offense—under N.J.S.A. 2C:39-4.1(a). Count two pertains to N.J.S.A. 2C:35-5(a)(1), first-degree manufacturing, distributing, or dispensing CDS. Defendant asserts he cannot be convicted of possession of a firearm during a CDS offense while simultaneously being acquitted of that CDS offense.

We review inconsistencies in jury verdicts to determine whether "there exists a sufficient evidential basis in the record to support the charge on which the defendant is convicted." State v. Banko, 182 N.J. 44, 46 (2004). "We accept inconsistent verdicts in our criminal justice system, understanding that jury verdicts may result from lenity, compromise, or even mistake." State v. Goodwin, 224 N.J. 102, 116 (2016). Our review determines only "whether the evidence in the record was sufficient to support a conviction on any count on which the jury found the defendant guilty." Ibid. (quoting State v. Muhammad, 182 N.J. 551, 578 (2005)).

Inconsistent jury verdicts are permissible so long as they remain supported by evidence within the record. Banko, 182 N.J. at 46. Courts should not

speculate as to the reasons why a jury reaches a particular verdict. Id. at 53. However, where "inconsistent verdicts preclude the establishment of an element of the offense," such verdicts may be invalid. State v. Peterson, 181 N.J. Super. 261, 267 (App. Div. 1981). When considering whether a verdict is impermissibly inconsistent, "it is appropriate to consider the evidence in the light most favorable to the prosecution and to determine whether a rational trier of fact could have found each element of the offense beyond a reasonable doubt." Id. at 331 (citing Jackson v. Virginia, 443 U.S. 307, 317-19 (1979)).

N.J.S.A. 2C:35-5(a)(1) makes it a crime "for any person knowingly or purposely . . . to manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a [CDS] . . . ." The corresponding jury instruction directed the jurors to find defendant guilty on this count if the State proved "that the defendant had the intent to distribute the cocaine . . . . The intent must refer to the defendant's purpose to distribute . . . and not merely to possess." He was acquitted.

On the other hand, N.J.S.A. 2C:39-4.1(a) makes it a crime for a person to have "in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a violation of . . . N.J.S.A. 2C:35-5." Accordingly, the jury was instructed "the State must prove . . . that

[defendant] possessed the firearm while he was in the course of committing, attempting to commit; and/or conspiring to commit the crime of possession . . . with the intention to distribute."

The trial judge reasoned the convictions were not contradictory because the jury might have believed either: 1) the defendant, while short of possessing the cocaine, took a substantial step in the process of possessing with intent to distribute; 2) the defendant agreed with Aarons that Aarons would possess cocaine with the intention to distribute; or 3) defendant agreed to aid Aarons in planning or committing the act of possessing cocaine with the intention to distribute.

However, when we look at the specific elements, which constitute these crimes, they do not support the judge's conclusion. To violate N.J.S.A. 2C:35-5, the jury needed to find two elements: possession and intent to distribute. The jury clearly found defendant guilty of possession because they convicted him of count one. It follows as a matter of logic that the only possibility justifying acquittal under N.J.S.A. 2C:35-5 is that the jury did not find that defendant had the intent to distribute, i.e., the second element.

Simultaneously, to violate N.J.S.A. 2C:39-4.1(a), the jury needed to find both defendant had possession of a firearm and either 1) possession of a drug

with intent to distribute; 2) had attempted to possess the drug with the intent to distribute; or 3) had conspired to possess the drug with the intent to distribute. Intent is a key element of all these versions of the offense.

Defendant is correct. One cannot "attempt to have an intent" or "conspire to have an intent." State v. Robinson, 136 N.J. 476, 485 (1994) (holding attempt crimes are categorized by whether the underlying crime attempted "requires a purposeful state of mind"). One either has the requisite intention at the time of the attempt or illegal agreement, or they are not guilty of the crime.

Here, the defendant was explicitly acquitted of N.J.S.A. 2C:35-5 on the basis he lacked an intent to distribute. The judge's reasoning—the defendant might still be convicted on a theory of conspiracy or attempt—might support a conviction in the case that defendant did not actually possess the drug because that step can be decided upon initially and fulfilled at some later time. However, this same logic cannot rescue a conviction when the element at issue is mental state, as such a condition is binary. Either defendant had the required intention at the time, or he did not. The jury found he did not. Thus, even viewed in the light most favorable to the State, the conviction under N.J.S.A. 2C:39-4.1(a) is impermissibly illogical. Peterson, 181 N.J. Super. at 330-31.

IV.

Finally, we address the sufficiency of the sentencing judge's analysis in applying aggravating and mitigating factors under N.J.S.A. 2C:44-1. When we evaluate sentences, we use an abuse of discretion standard. State v. Torres, 246 N.J. 308, 318 (2018). "[A] trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989). We are obligated to affirm the sentencing determinations of the trial court unless "1) the sentencing guidelines were violated; 2) the findings of aggravating and mitigating factors were not based upon competent credible evidence in the record; or 3) the application of the guidelines to the facts of the case shocks the judicial conscience." State v. Bolvito, 217 N.J. 221, 228 (2014) (internal quotation marks omitted).

The court found several aggravating factors, including defendant's risk of re-offense, N.J.S.A. 2C:44-1(a)(3); defendant's prior criminal record, N.J.S.A. 2C:44-1(a)(6); and the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). The judge found the excessive hardship of incarceration, N.J.S.A. 2C:44-1(b)(11), as a mitigating factor. However, the court declined to find several requested mitigating factors, including: a distant

or nonexistent history of prior criminal activity, N.J.S.A. 2C:44-1(b)(7); the conduct was the result of circumstances unlikely to recur, N.J.S.A. 2C:44-1(b)(8); and the character and attitude of defendant renders re-offense unlikely, N.J.S.A. 2C:44-1(b)(9).

Review of a criminal defendant's sentence inquires as to whether the findings of fact regarding aggravating and mitigating factors were based on competent and reasonably credible evidence in the record; whether the trial court applied the correct sentencing guidelines; and whether the application of the factors to the law constituted such clear error of judgment as to shock the judicial conscience. State v. Fuentes, 217 N.J. 57, 70 (2014).

First, defendant submits the court impermissibly weighted its analysis of aggravating and mitigating factors according to a point scale. We disagree; there is nothing in the judge's use of points to indicate it was arbitrary or prone to abuse. See, e.g., State v. Whitaker, 79 N.J. 503, 512 (1979).

Second, defendant argues the judge improperly emphasized defendant's youth as an aggravating factor at the time he committed a previous offense (possession of CDS). Our Supreme Court has held (since the conclusion of this case), youth may only be considered as a mitigating, not aggravating, factor.

State v. Rivera, 249 N.J. 285, 303 (2021). Resentencing on this point is warranted.

We reject defendant's argument the judge erred by emphasizing defendant's "lack of remorse" when weighing aggravating factor three. However, we agree with defendant's argument the court committed a Melvin[3] error in applying aggravating factor nine, when it stated: "Had [defendant] been able to get the pistol out of his pants pocket he would have used it to shoot Officer Mlynaryk." Melvin stands for the proposition that acquitted conduct cannot support factual findings during sentencing—"the findings of juries cannot be nullified through lower-standard fact findings at sentencing." 248 N.J. at 352. Here, defendant was acquitted of "possession of a firearm with a purpose to use it unlawfully against the person . . . of another." N.J.S.A. 2C:39-4(a)(1). The State concedes the judge's statements violate Melvin.

Defendant also submits the court impermissibly imposed three consecutive sentences. The judge sentenced him to four and one half years on count one (possession); four and one half years on counts five and six (aggravated assault); and nine years on counts eight, nine, and thirteen (weapons

[3] State v. Melvin, 248 N.J. 321, 352 (2021).

offenses).[4] The State concedes a remand is necessary on this point as well, in order to address consecutive sentences under the standards developed in Yarbough[5] and Torres. In sum, resentencing is clearly warranted due to the above issues.

V.

Finally, we have considered all of defendant's assertions of errors under the plain or harmful error standards. Plain errors—those raised on appeal without objection below—are those "clearly capable of producing an unjust

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[4] Aarons, not defendant, was charged with count twelve, but the court, in error, referenced count twelve on the record in its written sentencing statement and in the judgment of conviction pertaining to defendant. The sentence indicated for count twelve—four years, six months—defendant also asserts, is illegal for a fourth-degree offense (defendant's conviction for count thirteen was in the fourth-degree). We remand for correction on this as well.

[5] Yarbough factors include whether:

> (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[.]
>
> [100 N.J. at 644, holding modified by State v. Torres, 246 N.J. 246 (2021).]

result." G.E.P., 243 N.J. at 389; R. 2:10-2. "In the context of a jury trial, the possibility must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Id. at 389-90 (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). Harmful errors—those properly objected to—occur when "in all the circumstances there [is] a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." Id. at 389 (quoting State v. Mohammed, 226 N.J. 71, 86-87 (2016)). To the extent we have not addressed defendant's remaining arguments, we are satisfied they do not constitute plain or harmful error and are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed, except as to count nine, which is vacated. Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.