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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2522-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAHYIM WASHINGTON, a/k/a
RAHIYM WASHINGTON, and
RAHYIM JR.,

Defendant-Appellant.

Submitted May 9, 2023 – Decided July 18, 2023

Before Judges Susswein and Chase.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 18-06-1965.

Joseph E. Krakora, Public Defender, attorney for
appellant (Marcia Blum, Assistant Deputy Public
Defender, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Amanda Frankel, Deputy Attorney
General, of counsel and on the brief).

PER CURIAM

Defendant Rahyim Washington appeals from his jury trial convictions for aggravated assault and a related handgun offense. He also challenges his sentence. Defendant was charged with shooting his close friend, Darius Brooks, and his former girlfriend, Adlaide Coleman, during an argument. He was acquitted of the counts pertaining to Coleman. Defendant also was acquitted of attempting to murder Brooks but was convicted of assaulting him and possessing a handgun for an unlawful purpose.

Defendant contends his Confrontation Clause rights were violated when a detective testified about the operability of a handgun found at the scene of defendant's arrest. Defendant argues the detective parroted an expert report made by two other detectives who test-fired the weapon. Those detectives were unavailable for trial. After carefully reviewing the record in light of the governing legal principles, we conclude the testifying detective did not conduct a sufficiently independent examination of the gun, and thus his testimony opining on its operability violated defendant's Confrontation Clause rights. We are satisfied, however, that the error was harmless beyond a reasonable doubt. We also reject defendant's sentencing contentions. As the State acknowledges, a limited remand is nonetheless necessary to correct two minor errors in the second amended judgment of conviction (JOC).

I.

The violent incident involving defendant, Coleman, and Brooks occurred in April 2018. In June 2018, defendant was charged by indictment with second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b); two counts of first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3(a)(1) and (2); two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and two counts of second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a).

Defendant was tried before a jury in October 2019. He was acquitted on the counts pertaining to Coleman as well as possession of a gun without a permit. As for the counts pertaining to Brooks, defendant was acquitted of attempted murder but convicted of aggravated assault and possession of a gun for an unlawful purpose. At sentencing, the trial judge merged the gun and aggravated assault convictions and imposed an extended twenty-year sentence subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. That sentence was ordered to run consecutively to a previously imposed term of five years with a fifty-percent period of parole ineligibility for unrelated charges.

We discern the following facts from the trial record. In the early afternoon of April 5, 2018, Coleman and Brooks, who were in a romantic relationship,¹ were resting in Coleman's apartment when someone entered the bedroom and

¹ Defendant had apparently given his "blessing" to Coleman and Brooks dating.

turned on the light. Brooks recognized defendant standing in the doorway, and the men began to argue. Coleman realized defendant had a gun after hearing Brooks tell defendant, "don't shoot." Defendant then fired three shots at the couple.

The first shot hit Coleman and passed through her right breast, leaving a scar but no other lasting injury. The next shot struck Brooks in the leg. The final shot struck Brooks's lower back, resulting in paralysis from the waist down. It appeared to Coleman that defendant struggled to unjam the gun before he fled.

Defendant was arrested the following day in the basement of his mother's house. A silver revolver found in the basement matched the description provided by the victims.

Defendant raises the following contentions for our consideration:

POINT I

THE ADMISSION OF DETECTIVE MELVIN'S EXPERT OPINION THAT THE GUN WAS OPERABLE, WHICH HE BASED ON A REPORT OF ONE OR MORE TESTS IN WHICH HE TOOK NO PART AND WHICH WERE CONDUCTED BY ONE OR MORE UNAVAILABLE WITNESSES WHOM DEFENDANT DID NOT HAVE A PREVIOUS OPPORTUNITY TO CROSS-EXAMINE, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

POINT II

THE MATTER MUST BE REMANDED FOR A NEW SENTENCING HEARING BECAUSE: 1) THE COURT IMPOSED AN EXCESSIVE SENTENCE WITHIN AN INCORRECT SENTENCING RANGE; 2) VIOLATED DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS EN ROUTE TO FINDING AN UNSUPPORTED AGGRAVATING FACTOR; AND 3) FOLLOWED THE YARBOUGH²¹ CRITERIA, WHICH APPLY WHERE THE DEFENDANT IS BEING SENTENCED FOR MULTIPLE OFFENSES, DESPITE THE FACT THAT DEFENDANT WAS BEING SENTENCED FOR A SINGLE OFFENSE.

POINT III

THE JUDGMENT MUST BE AMENDED TO STATE THAT DEFENDANT WAS CHARGED AND CONVICTED UNDER COUNT [SEVEN] OF N.J.S.A. 2C:39-4A.

II.

We first address defendant's Confrontation Clause argument. The prosecutor at trial sought to prove the silver revolver found in the basement was operable. The prosecutor hoped to call one of the two Newark Police Department detectives who test-fired the weapon, but both had become unavailable to testify. The State instead called Detective Lamar Melvin after asking him "if he'd go ahead and . . . do a quick retest regarding the operability,

² State v. Yarbough, 100 N.J. 627 (1985).

so that he would be in a position to offer testimony on it." Detective Melvin did not do a full retest but did examine the gun's firing mechanisms.

After being qualified as an expert, Detective Melvin acknowledged on direct examination that two of his colleagues had previously examined the gun. Detective Melvin explained that after he personally examined the gun, he "concurred with the findings of" the other detectives that the gun was operable.

Detective Melvin acknowledged on cross-examination that, unlike the unavailable detectives, he had not personally test-fired the gun. When asked how he could tell it was operable, he responded, "[b]ecause . . . all the mechanisms are in place that will allow the weapon to work. And there are test fires to the firearm itself." He acknowledged under cross-examination that "test firing of a shot [is] required to determine operability."

Defense counsel moved to strike Detective Melvin's testimony, arguing he was "going off a report that he has no direct knowledge of." At sidebar, the prosecutor explained that Detective Melvin was not able to test-fire the gun for logistical reasons and that he was relying on the mechanics of the gun. The judge pointed out, however, that Detective Melvin specifically considered the test-fires in rendering his opinion. The judge then asked defense counsel, "why can't he review the prior test fires? He doesn't have to do his own test fires."

Defense counsel said she would "go back and ask him further questions," whereupon her objection was overruled.³

When defense counsel resumed her cross-examination, Detective Melvin explained that both non-testifying detectives would have test-fired the gun in accordance with laboratory guidelines. He confirmed that he did not watch either of those tests and had no personal knowledge of whether the guidelines were followed. He testified he "kn[e]w what they did" "[b]ased on [their] report." He also claimed his examination of the gun was sufficient to determine its operability but offered no answer when asked why test-firing is routinely performed if a physical examination was sufficient. He testified that "[g]oing solely on what [he] did with this gun, [he could] . . . testify that it was operable."

III.

Criminal defendants are guaranteed the right to confront the witnesses against them by the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution. The United States Supreme Court recently described the right of confrontation as a "bedrock" constitutional protection. Hemphill v. New York, 595 U.S. ____, 142 S. Ct. 681, 690 (2022). That right is violated when a "testimonial" statement is entered into

³ The State does not argue that defense counsel waived her objection by agreeing to ask further questions.

evidence without an opportunity for defendant to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 53–54 (2004). Forensic laboratory reports are generally considered "testimonial" and subject to the Confrontation Clause. State v. Michaels, 219 N.J. 1, 6 (2014).

When a forensic report is introduced, "the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification" is insufficient to satisfy the Confrontation Clause. Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011). However, our Supreme Court has held testimony that references another scientist's report is permissible "so long as the testifying witness is qualified to perform, and did in fact perform, an independent review of testing data and processes, rather than merely read from or vouch for another analyst's report or conclusions." State v. Roach, 219 N.J. 58, 61 (2014).

The Court made clear, however, that any such use of a "surrogate" expert's testimony is limited, stressing that "the testimony must be provided by a truly independent and qualified reviewer of the underlying data and report, and the witness may not merely parrot the findings of another." Id. at 79. Additionally, "his or her verification of the data and results must be explained on the record." Id. at 80. The Court referred to this Confrontation Clause principle as the "anti-parroting caveat." Id. at 79–80.

In the matter before us, after being qualified as an expert, Detective Melvin acknowledged that two other detectives had test-fired the gun and that he "concurred with the findings of" the other detectives that the gun was operable. We are not persuaded that Detective Melvin's testimony meets the requirements of the anti-parroting caveat. We deem it especially important that he acknowledged on cross-examination that "test firing of a shot [is] required to determine operability." However, he did not conduct his own test-firing experiment and relied on the tests performed by the other detectives. Nor did he independently review testing data or processes within the meaning of the anti-parroting caveat, but rather accepted the conclusions in the other experts' report.

As Detective Melvin candidly acknowledged, he did not watch either test-firing⁴ and had no personal knowledge as to whether those experiments were done in accordance with laboratory guidelines. Thus, to reach his conclusion as to operability, Detective Melvin essentially parroted important portions of the report made by the non-testifying experts. See id. at 61. Because we are not convinced Detective Melvin's expert opinion was arrived at independently of the prior examinations of the gun performed by non-testifying experts, we conclude the admission of Detective Melvin's expert opinion over the defense's objection

⁴ The record does not indicate whether the test-firings were electronically recorded.

violated defendant's right to confront and cross-examine the detectives who had test-fired the weapon.

That conclusion does not end our analysis, however, because the State argues that any such constitutional violation was harmless. It is well-established that "not every 'constitutional' error can sensibly call for a new trial. . . . [A]n error may indeed be harmless despite its constitutional hue." State v. Macon, 57 N.J. 325, 338 (1971). Confrontation Clause violations are not immune from a harmless error analysis. See State v. Carrion, 249 N.J. 253, 274 (2021) (evaluating "whether the confrontation violation that occurred . . . was harmless"). As a general proposition, purported errors brought to the attention of the trial court are reviewed for "harmful error." State v. G.E.P., 243 N.J. 362, 389 (2020). The determinative question under that standard is whether the "error [was] 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" State v. Jackson, 243 N.J. 52, 73 (2020) (alterations in original) (quoting State v. Prall, 231 N.J. 567, 581 (2018)).

In arguing the error in this case was harmful, defendant notes there is reason to doubt the credibility of the victims' identification based on the jury's acquittals and the victims' alleged motivation to frame defendant.⁵ Defendant

⁵ Prior to the shooting, defendant had accused Coleman and Brooks of stealing drugs from him. Defendant contends the victims "may have falsely charged him

also relies heavily on the fact that the trial judge instructed the jury "that it could consider the gun in deciding if [defendant] was guilty." The trial court's instruction did not address the operability of the gun but rather whether it was the same weapon used in the shooting incident, noting:

A[delaide] Coleman and Darius Brooks testified that they were both shot with a silver revolver. No forensic evidence has been entered demonstrating that the gun recovered was used in the shootings. I have admitted the evidence [of the gun recovered at the scene of defendant's arrest] only because it may help you in determining a . . . material issue in dispute in this case; that is, whether the State has proven an element of attempted murder and/or aggravated assault and/or possession of a weapon and/or possession of a weapon for an unlawful purpose. That is[,] the crimes he is charged with in this case.

Whether this evidence does in fact establish an element of an offense charged is for you to decide. You may decide that the evidence does not and is not helpful to you at all. In that case you must disregard the evidence. On the other hand, you may decide that the evidence does satisfy an element of an alleged offense charged and use it for that specific purpose.

[(Emphasis added).]

The State's case did not depend on whether the loaded gun found in the basement was operable. Operability was not an element of any of the offenses for which defendant was charged. Operability was only relevant in that an

in an attempt to have him removed from circulation so they would not have to pay him for their purported theft."

inoperable weapon would have been less likely to have been the one that was fired in Coleman's apartment. We note defense counsel highlighted during her summation that the gun was fully loaded when it was recovered. That fact reasonably suggests the gun's owner believed it was capable of firing.

The proofs regarding where the weapon was found and its similarity to the gun described by the victims, in contrast, were far more consequential in establishing that the silver revolver found at the time and place of defendant's arrest was the same revolver used in the shooting. Detective Melvin's testimony did not touch on where or how the weapon was found by police.

We add the jury was instructed both before Detective Melvin's testimony and during the final charge that it was required to assess the expert's credibility and assign whatever weight to the testimony it deemed appropriate. Specifically, the judge explained with respect to Detective Melvin's testimony:

It is always within the special function of the jury to determine whether the facts on which the answer or testimony of an expert is based actually exist. The value or weight of the opinion of the expert is dependent upon, and is no stronger than, the facts on which it is based. In other words, the probative value of the opinion will depend upon whether from all of the evidence in this case, you find that those facts are true. You may, in fact, determine from the evidence in the case that the facts that form the basis of the opinion are true, are not true, are true in part only, and, in light of such findings, you should decide what effect such determination has upon the weight to be given to the opinion of the expert. Your acceptance or rejection of

the expert opinion will depend, therefore, to some extent on your findings as to the truth of the facts relied upon.

The jury was fully aware that Detective Melvin had not test-fired the gun.

In light of all of these circumstances, we do not believe the "error [was] 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" Jackson, 243 N.J. at 73 (alterations in original) (quoting Prall, 231 N.J. at 581).

IV.

We turn next to defendant's sentencing contentions. Defendant argues: (1) the trial judge improperly analyzed the applicable extended term range; (2) the judge abused his discretion in finding aggravating factor three, the risk defendant will reoffend, N.J.S.A. 2C:44-1(a)(3); and (3) the judge erred in applying the Yarbough factors to impose consecutive sentences and did not consider the overall fairness of the sentence as now required by State v. Torres, 246 N.J. 246 (2021).

In reviewing the imposition of a sentence, appellate courts are guided by an abuse of discretion standard. State v. Konecny, 250 N.J. 321, 334 (2022). That deferential standard applies so long as "the trial judge follows the Code and the basic precepts that channel sentencing discretion." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Case, 220 N.J. 49, 65 (2014)). If the

sentencing court does so, the reviewing court will affirm the sentence, unless it "shock[s] the judicial conscience." Case, 220 N.J at 65.

Defendant's arguments concerning the imposition of an extended term as a persistent offender under N.J.S.A. 2C:44-3(a) lack sufficient merit to warrant extensive discussion. R. 2:11-3(e)(2). Defendant does not dispute that he meets the criteria as a persistent offender. See State v. Pierce, 188 N.J. 155, 161–62 (2006). Rather, he contends the judge did not consider the entire range of potential sentences because it did not discuss the ordinary-term range. We agree the applicable range for an extended sentence "starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." Id. at 169. Our Supreme Court in Pierce made clear a court may sentence a defendant below the extended term range even if the statutory requirements for an extended term are met. Ibid. However, the Court nonetheless emphasized that "[w]here, within that range of sentences, the court chooses to sentence a defendant remains in the sound judgment of the [sentencing] court." Pierce, 188 N.J. at 169.

In the matter before us, the sentencing judge stated "N.J.S.A. 2C:43-7 provides the range of extended sentences. In the case of a conviction for a second[-]degree crime, an extended term shall be fixed by the [c]ourt between [ten] and [twenty] years." See N.J.S.A. 2C:43-7(a)(3). The judge did not refer

specifically to the range of ordinary terms for a second-degree crime, mentioning only the range for a second-degree extended term. He found, however, "[t]he preponderance of the aggravating factors weigh in favor of this [c]ourt imposing an extended term custodial sentence toward the highest end of the range." The judge thereupon sentenced defendant to the maximum possible term—twenty years. Because the judge, in his discretion, found the maximum authorized sentence was warranted, his failure to mention the ordinary-term range is immaterial and affords no basis for appellate intervention.

Defendant next argues the judge burdened defendant's right to silence and to the assistance of counsel by not crediting defense counsel's statement that defendant felt remorse and by criticizing defendant's failure to make a statement during his presentence interview. Defendant contends the judge used those circumstances as the basis for finding aggravating factor three—the risk defendant will reoffend. That contention is belied by the record.

The judge stated:

[Defendant's] presentence report notes that, when he was interviewed on July 12th, 2019, he declined to make a statement, which means he declined to take responsibility, which means he does not show any remorse [for] what he did to his friend.

He didn't make a statement here today, and you receive no credit from this [c]ourt for having your attorney apologize on your behalf.

But that statement was not made in the context of finding aggravating factor three. Rather, it was made in the context of finding that mitigating factor nine—the "character and attitude of the defendant indicate that the defendant is unlikely to commit another offense," N.J.S.A. 2C:44-1(b)(9)—did not apply. Defendant cites no authority for the proposition that a sentencing judge is obliged to accept an attorney's claim of a defendant's remorse as a mitigating circumstance.

We are satisfied, moreover, that the gravamen of the judge's finding that aggravating factor three applied was that defendant has been a habitual offender since childhood. After reciting defendant's record of juvenile and adult convictions, the sentencing judge concluded, "[i]t is clear to this [c]ourt that the defendant will re-offend unless he is appropriately sentenced in this case. There is no evidence that exists to detract from the reasonable likelihood that [defendant] would offend again if not appropriately sentenced." The judge gave that factor "substantial and heavy weight." We see no abuse of discretion in making that finding. See Konecny, 250 N.J. at 334.

Nor did the sentencing judge err in ordering the merged sentence imposed on the present convictions to be served consecutively to the sentence previously imposed on unrelated convictions. The record shows that the present crimes were committed while defendant was released pending sentencing on the

previous convictions. This circumstance is governed by N.J.S.A. 2C:44-5(h),⁶

which states:

When a defendant is sentenced to imprisonment for an offense committed while released, with or without bail, pending disposition of a previous offense, the term of imprisonment shall run consecutively to any sentence of imprisonment imposed for the previous offense, unless the court, in consideration of the character and conditions of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others.

Because a JOC is not entered until sentence is imposed, see R. 3:21-5, the present crimes were committed while defendant was released pending disposition of the previous crimes for purposes of N.J.S.A. 2C:44-5(h).

In Torres, our Supreme Court held that "an explanation for the overall fairness of a sentence by the sentencing court is required in this setting, as in other discretionary sentencing settings, to 'foster[] consistency in . . . sentencing in that arbitrary or irrational sentencing can be curtailed and, if necessary, corrected through appellate review.'" Torres, 246 N.J. at 272 (alteration and omission in original) (quoting Pierce, 188 N.J. at 166–67). The setting in Torres, however, did not involve the statutory presumption of consecutive sentences that arises under N.J.S.A. 2C:44-5(h) and applies in the matter before us. Rather,

⁶ We note that neither the judge nor the prosecutor cited to or relied upon N.J.S.A. 2C:44-5(h).

the "overall fairness" standard in Torres arose in a setting where the decision to impose consecutive or concurrent sentences rested in the trial court's discretion.

We note that in other sentencing contexts, and specifically the presumption of imprisonment codified in N.J.S.A. 2C:44-1(d), our Supreme Court has made clear that the "serious injustice which overrides the need to deter such conduct by others" formulation is extremely strict and narrowly constrains a trial court's sentencing discretion. See State v. Jabbour, 118 N.J. 1, 7 (1990) ("The 'serious injustice' exception to the presumption of imprisonment applies only in 'truly extraordinary and unanticipated circumstances.'" (quoting State v. Roth, 95 N.J. 334, 358 (1984))). We do not construe the general rule in Torres that sentencing courts must consider the overall fairness of consecutive sentences as altering the strict presumption of consecutive sentences required by N.J.S.A. 2C:44-5(h). We therefore conclude there is no need to remand this matter for the trial court to make an explicit finding as to the overall fairness of consecutive sentences.

V.

The State does not dispute that a limited remand is necessary to correct errors in the second amended JOC. Although the judge at the sentencing hearing correctly cited the offense under count seven—possession of a gun for an unlawful purpose—he cited the wrong statute in the JOC. "In the event of a

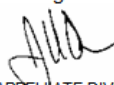
discrepancy between the court's oral pronouncement of sentence and the sentence described in the [JOC], the sentencing transcript controls and a corrective judgment is to be entered." State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016) (citing State v. Rivers, 252 N.J. Super. 142, 147 n.1 (App. Div. 1991))).

Furthermore, the State acknowledges the trial judge listed the wrong number of counts for purposes of calculating the Victims of Crime Compensation Office (VCCO) assessment in the second amended JOC. That resulted in a \$100 assessment, whereas the State claims the assessment should be fifty dollars. We therefore remand for the court to correct the JOC to reflect the proper citation for the firearms conviction and the adjusted VCCO assessment.

To the extent we have not specifically addressed any argument raised by defendant, it is because it lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We remand for the limited purpose of correcting the JOC in accordance with Section V of this opinion. We do not retain jurisdiction. In all other respects, we affirm defendant's convictions and the custodial sentence that was imposed.

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


CLERK OF THE APPELLATE DIVISION