SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1800-21

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
	:	On Appeal from a Judgment of
Plaintiff-Respondent,	:	Conviction of the Superior Court,
	:	Law Division, Bergen County
v.	:	
	:	Ind. No. 19-02-0239-I
TACUMA E. ASHMAN,	:	
	:	Sat Below: Hon. Robert N. Vinci. J.S.C.,
Defendant-Appellant.	:	Hon. Christopher Kazlau, J.S.C., and
	:	Hon. Gary N. Wilcox, J.S.C., and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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35T - January 28, 2022 – sentencing adjourned
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PROCEDURAL HISTORY

Bergen County Indictment No. 18-06-0575-I, filed June 15, 2018, charged defendant-appellant Tacuma Ashman and codefendant Shawn Harewood with one count of conspiracy to commit robbery under N.J.S.A. 2C:5-2 and 2C:15-1 and, in six counts, as accomplices under N.J.S.A. 2C:2-6 to: armed robbery of Safaree Samuels and armed robbery of Corey Bryant under N.J.S.A. 2C:15-1; gun possession under N.J.S.A. 2C:39:5b and 2C:39-4a; eluding under N.J.S.A. 2C:29-2b; and resisting arrest by flight under N.J.S.A. 2C:29-2a. (Da 1-4)[1] Superseding Indictment No. 19-02-0239-I, filed on February 22, 2019, charged Ashman and Harewood with the same seven counts and added Carl Harry as a third indictee on all counts. (Da 5-8)

In October 2019, Harry pled to an amended third-degree charge of conspiracy to commit theft in exchange for a term of probation. (Da 9-12) Harewood and Ashman went to trial.[2] Their joint trial began on October 7, 2021. (15T 45-5 to 46-7) After seven days of trial, on October 26th, the matter was adjourned due to the illness of Harewood's counsel's wife. (23T 4-6 to 17) By

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[1] "Da" – appendix
"PSR" – Presentence Report

[2] Upon learning that the state did not plan to call Harry as a witness at the Harewood-Ashman trial, the court commented that Harry "received such an incredible deal and you don't want the jury to hear it." (22T 20-2 to 8)

November 8th, with trial still suspended, it became clear that Harewood's counsel would not be able to return to court anytime soon. Both defendants moved for a mistrial, but the court granted the motion only as to Harewood. (27T 13-6 to 20, 23-20 to 21, 28-21 to 25, 29-15 to 30-4, 36-8 to 9; 28T 37-12; Da 13-14)

Trial resumed with Ashman as the sole defendant and continued for an additional two days of testimony. (28T 47-4; 29T 200-22 to 201-2) At the close of the state's case, Ashman moved for judgment of acquittal on all counts, pointing out, among other things, that neither of the victims had identified him as one of the robbers; the police witness could not identify him as one of the occupants of the SUV involved in a police chase after the offense; and that not only did the state lack fingerprint and DNA evidence tying him to the robberies, but the state failed to prove that anything had been stolen from one of the two alleged robbery victims. (29T 131-5 to 16, 132-15 to 141-22)[3] While the court denied the motion on all counts (29T 159-21 to 22), the state agreed to dismiss the eluding charge under Count 6 (29T 142-3 to 15).

On the morning of the third day of deliberations, the court replaced a juror

[3] With respect to the state's failure to prove that anything was stolen from one of the alleged robbery victims, the jury asked, during deliberations, "Is a theft that occurred to one person also associated with a second party that is present?" (31T 5-1 to 3, 19-11 to 23)

who reported a Covid exposure and instructed the jury to begin deliberations anew. (32T 3-8 to 20, 19-14 to 20-17) The following day, five days after deliberations commenced and the third day of deliberations for the reconstituted jury, the jury returned its verdict acquitting Ashman of conspiracy to commit robbery and possession of an unlicensed gun under Counts 1 and 4 and convicting him, under Counts 2, 3, 5, and 7, of armed robbery of Samuels and Bryant, possession of a gun for an unlawful purpose, and resisting arrest. (34T 15-9 to 19-4; Da 15-18)[4]

At sentencing, in February 2022, with the resisting-arrest charge dismissed (36T 40-19 to 21), the court merged the gun conviction with the first-degree robberies under Counts 2 and 3 and imposed consecutive 15-year NERA terms on the robberies, amounting to an aggregate sentence of 30 years, 25½

[4] Minutes after it discharged the jury (36T 20-24 to 25-5), the court noted discrepancies between the jury's pronouncement of the verdict and its verdict sheet concerning the lesser-included offense of conspiracy to commit theft as a lesser offense of the charge of conspiracy to commit robbery under Count 1 and resisting arrest by flight under Count 7. (36T 16-7 to 19, 24-4 to 25-13) Although the state said it would resolve the matter by dismissing Counts 1 and 7 (36T 25-14 to 25), and although the jury was discharged and no discrepancy was detected concerning the guilty verdicts under Counts 2, 3, and 5, the court recalled the jury to review its guilty verdicts on Counts 2, 3, and 5. (36T 26-1 to 17, 32-21 to 33-15, 34-21 to 35-1) On recall, the verdicts were confirmed by the foreperson and jury poll. (36T 36-5 to 39-20) Thereafter, the state dismissed the conspiracy and resisting charges under Counts 1 and 7. (36T 40-11 to 21)

years without parole. (36T 57-7 to 58-21; Da 19-26)[5/6]

The Notice of Appeal was filed on February 18, 2022. (Da 31-34)

STATEMENT OF FACTS

Safaree Samuels is a hip hop musician. (18T 9-16 to 18, 10-11 to 14) He testified that he wears a lot of expensive jewelry as part of his professional image and posts photographs of the pieces on Instagram and Twitter as a promotional tool. (18T 29-23 to 30-9, 101-3 to 6)[7]

On April 1, 2018, Samuels performed at a club in the Bronx. (18T 28-10 to 18) By 1:30 the next morning, he had returned to his apartment building in Fort Lee, accompanied by his newly hired, part-time chef, Corey Bryant, and had parked in the building's garage. (18T 21-24 to 22-1, 27-17 to 25, 34-15 to 16, 81-5 to 9; 21T 29-11 to 13, 35-16 to 36-15, 60-7 to 12) As Samuels and Bryant exited Samuels's car, they were confronted by two men. (18T 36-22 to

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[5] Harewood was retried in July 2022. He was acquitted of conspiracy to commit robbery, all gun charges, all charges with respect to Bryant, and first-degree robbery of Samuels. He was convicted of second-degree robbery of Samuels, eluding, and resisting arrest under Counts 2, 6, and 7. In November 2022, he was sentenced to eight years, 85% without parole on the robbery and a consecutive ten years, 50% without parole on the merged eluding and resisting charges, amounting to an aggregate sentence of 18 years, with a parole term just short of 12 years. (Da 27-30)

[6] The Office of the Public Defender ordered the July 5, 2022 and July 7, 2022 transcripts from codefendant Harewood's trial; neither transcript is relied on or cited in this brief.

[7] Samuels claimed some 3.4 million followers. (18T 102-11 to 21)

25; 21T 37-5 to 16)

Samuels testified that one of the men held his hand with "the gesture of like a gun inside his hoodie, like pointing" (18T 37-14 to 17) and the other man had a gun that looked like an old, "scratched-up" semiautomatic (18T 37-25 to 38-6). Bryant recalled seeing a "real small" gun. (21T 39-7 to 11)[8]

Although Samuels did not mention a green jacket in the statement he gave the police within hours of the offense (19T 192-10 to 193-3, 194-4 to 7), by the time of trial he testified that the gunman was wearing a hat and a green jacket. (18T 39-17 to 40-2). Samuels said the gunman told him to "give [him] everything" (18T 37-7 to 12), and that he turned over an earring, a watch, "three rings, ... three or four diamond bracelets, ... three diamond chains and pendants," and his wallet and cellphones. (18T 29-16 to 20, 42-2 to 15)[9/10] Samuels did not identify Ashman in a photo array or at trial. (19T 200-4 to 11; 22T 252-2 to 253-16; 28T 57-7 to 18, 60-2 to 16)

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[8] No gun was ever found. (28T 81-20 to 22)

[9] Video of the offense, recorded on the parking garage's motion-activated security cameras, was played at trial. The video was leaked within hours of the offense to TMZ and was also available on YouTube and social media sites. (15T 142-6 to 143-3; 21T 69-1 to 17, 105-17 to 20; 22T 185-1 to 8, 53-3 to 6)

[10] Samuels's wallet and several pieces of jewelry were recovered and returned to him (16T 76-4 to 10; 18T 50-16 to 18, 54-5 to 9, 67-20 to 22; 19T 244-21 to 24, 249-16 to 7); insurance covered some of his remaining losses (18T 232-2 to 17; 19T 178-6 to 8) .

Bryant testified that one of the robbers pointed a gun at him and asked who he was and that he identified himself as Samuels's part-time chef.[11] Although Bryant said his attention was focused on the gun, he recalled that the gunman was wearing a brown or black bomber jacket and a hat, adding that the gunman told him to sit on the car. (21T 37-7 to 23, 39-20 to 40-4, 87-23, 88-18 to 19, 91-15 to 94-5)

Bryant said that while the gunman turned his attention to Samuels, the second man patted him down and told him to sit on the floor. Bryant testified that although he was wearing jewelry and carrying a cellphone and debit cards, nothing was taken from him. (21T 37-22 to 25, 89-16 to 22, 94-6 to 13) Bryant did not identify Ashman in a photo array or at trial. (21T 94-22 to 24, 96-1 to 11, 100-19 to 101-1; 22T 253-17 to 254-4; 28T 57-7 to 18, 60-2 to 16)

Fort Lee patrol officer Natalie Mateus and her partner responded to a call about the robbery. As they approached Samuels's building, they saw a black Cadillac Escalade, with darkened headlights and no license plates, make a U-turn. The officers switched on their lights and siren to signal the SUV to pull over, but it sped up and headed to the nearby George Washington Bridge. (15T 91-1 to 9, 159-2 to 4, 168-10 to 170-1, 171-4 to 6, 190-19 to 24; 21T 149-10 to

[11] The court granted the state's motion to admit statements Ashman allegedly made to Samuels and Bryant during the offense. (Da 35-36)

19, 150-9 to 23)

The patrol car gave chase across the bridge. (15T 171-14 to 20) Once in New York, the SUV proceeded down the Henry Hudson Parkway until it crashed into a median and came to a stop at 158th Street. (15T 172-16 to 173-4) Mateus and Fort Lee police officer Gabriel Avella, who had joined the pursuit behind Mateus's car, said three Black men exited the SUV and ran into the woods alongside the highway. (15T 173-5 to 11; 231-20 to 21; 16T 10-11 to 13, 13-16 to 19, 14-17 to 21, 15-9 to 12) Neither Mateus nor Avella identified Ashman as one of the three men in the SUV. (15T 236-15 to 237-11; 16T 50-22 to 51-6)

Shortly after the crash, New York police apprehended Jonathan Ricketts in the woods alongside the highway near 158th Street. Ricketts was arrested, extradited to New Jersey, questioned by Fort Lee police, and charged with first-degree robbery, only to have the charge dismissed a few months later. (15T 180-15 to 182-6, 237-22 to 238-21; 20T 231-14 to 19; 22T 122-17 to 19)

At about 2:15 a.m., a New York police officer apprehended Harewood in the woods bordering the highway. (20T 182-3 to 15, 192-13 to 22, 195-14 to 22, 198-10 to 12) At a nearby stationhouse, Officer Avella identified Harewood by his clothing – a green jacket and black pants – as the driver who ran from the SUV. (16T 15-1 to 3, 20-2 to 10, 51-11 to 18, 58-21 to 59-2; 20T 197-11 to 14; 21T 142-18 to 20) The police seized and searched Harewood's cell phone. (20T

197-15 to 198-20; 21T 138-8 to 13, 143-8 to 20; 29T 28-9 to 14, 62-3 to 63-2)

The SUV was towed to the Fort Lee Police Department and searched. (19T 219-18 to 24, 220-24 to 221-5; 21T 157-9 to 11) A GPS tracking device was found in a wheel well. (18T 77-12 to 22; 21T 174-1 to 9) In the passenger compartment, the police found, among other things: a pair of binoculars; an earring; a chain; three cell phones; a wallet containing a card in Samuels's name; a red baseball cap; and a green jacket. (19T 242-25 to 243-5, 244-23 to 24, 249-16 to 25, 250-13 to 14; 20T 48-4 to 49-23, 56-13 to 19, 59-8 to 15, 75-13 to 16, 87-11 to 88-24, 117-18) One of the jacket pockets contained, among other things, a health-benefits card and a Visa debit card in Ashman's name and a bank receipt and a store receipt under Ashman's card number. (20T 62-9 to 25, 68-23 to 72-23)

One of the cell phones in the SUV, number 646-575-XXXX, was registered to Ashman. It contained pictures of Ashman in a hat and green jacket resembling the garments found in the SUV (20T 94-21 to 96-1; 21T 159-3 to 161-1, 163-13 to 164-3; 28T 96-20 to 22, 108-3 to 7, 117-2 to 25; 29T 96-19 to 22, 100-11 to 21); pictures of a watch and bracelet resembling Samuels's jewelry sent from Harewood's cell phone (21T 166-7 to168-2); and two or three pictures of jewelry that either originated with Ashman's phone or were sent to Ashman from cell-phone number 646-512-XXXX, which was registered to Ann Odette

Harewood (28T 118-23 to 119-3; 29T 100-17 to 103-23, 107-9 to 109-9, 119-7 to 20, 122-2 to 15).

Calls, texts, and pictures were exchanged between Ashman's phone and the 646-512-XXXX number between March 22nd and 27th, including a text asking, "When are we going to do this?" and "Link your man that you trust." (29T 105-9 to 106-12) Ashman's phone also contained calls and text messages exchanged with Harry on April 2nd and 3rd. (21T 170-7 to 13; 28T 61-4 to 62-1) Harewood's phone contained internet searches, conducted on March 29th and 30th, on whether "cops have access to housing building cameras" and on prices for apartments in Samuels's apartment building. (29T 69-24 to 70-20)

The police also found in the SUV a California registration card for the vehicle in the name of Ann Odette Harewood and a license plate matching the registration card. (19T 88-25 to 89-5, 90-20 to 93-14) The state did not offer fingerprint or DNA evidence in connection with the SUV or any of its contents. (19T 158-23 to 159-3; 28T 55-4 to 24, 70-2 to 8)

A T-Mobil employee provided records for company cellphone towers as well as calls and texts tied to cellphone number 323-980-XXXX, which belonged to a prepaid iPhone the police seized when they apprehended Harewood. (28T 102-18 to 103-3, 106-10 to 21, 110-7 to 24, 114-22 to 25, 118-17 to 20; 29T 36-23 to 37-3) A cell-site analyst testified that between March

28th and 30th, Ashman's phone and the prepaid phone made calls or texts in the vicinity of Samuels's building. (29T 14-4 to 7, 25-18 to 19, 29-9 to 21, 31-3 to 32-5, 33-11 to 20, 34-1 to 10)

The cellphone analyst testified that on the night of April 1st continuing into the morning of the 2nd, Ashman's phone and the prepaid phone were near the Bronx club where Samuels performed and then traveled to the vicinity of Samuels's building. Harewood's phone searched Apple maps for directions from the club to Samuels's address. (21T 143-8 to 20; 28T 61-4 to 62-1, 80-21 to 81-5; 29T 34-24 to 35-8, 36-3 to 17, 70-21 to 72-1, 92-18 to 93-12) The GPS device in the SUV's wheel well was linked to the prepaid phone. (21T 143-8 to 20; 29T 93-14 to 95-19) After 2:00 a.m. on April 2nd, the prepaid phone was near a pedestrian bridge on the Henry Hudson Parkway. (29T 81-13 to 19, 87-14 to 88-9)

Samuels testified that he went to high school with Harewood and hired him and other friends when he went on tour several years earlier. Since then, Samuels said, he and Harewood had "a falling out." (18T 12-13 to 25, 18-21 to 20-1) Samuels did not know Ashman. (18T 21-10 to 16)

While Ashman's phone contained circumstantial evidence connecting him to the offense, neither of the victims, nor anyone, including the third codefendant, Carl Harry, who pled guilty, identified Ashman as one of the

robbers; the police witness who identified Harewood as one of the three men who fled from the SUV did not identify Ashman; and there was no DNA or fingerprint evidence linking Ashman to the offense.

LEGAL ARGUMENT

POINT I

THE BRYANT ROBBERY CONVICTION MUST BE VACATED BECAUSE: 1) THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENT OF THEFT FROM BRYANT; 2) THE COURT CHARGED THAT THE THEFT REFERRED TO THE JEWELRY STOLEN FROM SAMUELS; 3) THE COURT DID NOT ANSWER THE JURY'S QUESTION ABOUT THEFT; AND 4) THE COURT FAILED TO CHARGE AGGRAVATED ASSAULT BY POINTING A GUN AS A LESSER-INCLUDED OFFENSE. (Partly Raised Below)[12]

Robbery "entails a discrete theft from a single victim together with accompanying injury or force." State v. Sewell, 127 N.J. 133, 137 (1992). "[T]he person who is threatened [with injury or force] must also be the victim of a theft or attempted theft." State v. Carlos, 187 N.J. Super. 406, 409-10 (App. Div. 1982); see State v. Zembreski, 445 N.J. Super. 412, 433 (App. Div. 2016) ("The theft element [of robbery] is satisfied by an attempted or completed theft.

[12] Ashman raised the first claim on a motion for judgment of acquittal on the robbery (31T 156-14 to 157-11); the remaining claims were not raised below.

N.J.S.A. 2C:15-1(a)[.]").

Count 2 charged robbery of Samuels. Count 3 charged robbery of Bryant. (Da 5-6) To obtain a conviction for robbery under Count 2, the state had to prove that there was a theft or attempted theft from Samuels. To obtain a conviction for robbery under Count 3, the state had to prove that there was a theft or attempted theft from Bryant.

As discussed in Section A., the state did not prove that there was a theft from Bryant.[13] And while the jury could have convicted Ashman of robbery of Bryant if it found that there was an attempted theft from Bryant, the court never charged on attempted theft from Bryant. For that matter, the court never charged on theft from Bryant. The jury was told that the only theft or attempted theft for its consideration was the theft or attempted theft of jewelry from Samuels. (30T 177-16 to 18, 180-24 to 181-10, 183-22 to 24)[14] As discussed in Section B., the instruction mistakenly allowed the jury to attribute the theft/attempted theft from Samuels to the robbery charge against Bryant.

And, not surprisingly, given that it was told that the only theft at issue was the theft from Samuels, the jury recognized that the facts presented a one-

[13] Harewood, tried separately, was acquitted of robbing Bryant. (Da 25)

[14] Although it was clear that there was a consummated theft from Samuels (18T 42-2 to 15), the court charged on theft and attempted theft from Samuels (30T 180-24 to 181-10, 183-22 to 24).

theft/two robbery problem, and sent the court a note that asked, "Is a theft that occurred to one person also associated with a second party that is present?" (31T 5-1 to 3, 19-11 to 23) As discussed in Section C., the Court never explained, in response to the jury's question, that to convict of robbery of Bryant, the state had to prove that Ashman stole something from Bryant or attempted to steal something from Bryant, and allowed the jury to convict if it found only a theft from Samuels, thus leaving the jury with an erroneous instruction on a material element of the offense.

As discussed in Sections D. and E., the instruction on robbery was yet further flawed as the jury was never offered the option of finding aggravated assault by pointing a gun at Bryant under N.J.S.A. 2C:12-1b(4) as a lesser offense of the charged offense of armed robbery of Bryant.

And finally, as discussed in Section F., individually and cumulatively, these significant errors violated Ashman's constitutional right to due process and a fair trial and warrant reversal of the conviction for first-degree robbery of Bryant. U.S. Const., amends. VI, XIV; N.J. Const., art. I, ¶¶ 1, 10. R. 2:10-2; State v. Macon, 57 N.J. 325, 336 (1971) (plain error is reversible if "sufficient to raise reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached").

A. The state failed to prove theft from Bryant

"[D]ue process commands" that the prosecution prove guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970)); State v. Hill, 199 N.J. 545, 558-559 (2009) (holding same under state constitution). The state failed to prove robbery of Bryant because it failed to prove that Bryant was the victim of a theft.

R. 3:18-1 provides that the court "shall" enter judgment of acquittal at the close of the state's case "if the evidence is insufficient to warrant a conviction." In deciding whether to enter judgment of acquittal at the close of the state's case, a court must view all of the state's evidence, direct or circumstantial, and give the state all reasonably favorable inferences and decide whether "a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458-59 (1967). See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (in determining whether conviction should be reversed, "the critical inquiry ... is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); State v. Lodzinski, 246 N.J. 331, 339, 358-364, reconsid. granted 248 N.J. 451, rev'd on other grounds, 249 N.J. 116 (2021) (post-verdict acquittal motion considers "the entirety of the evidence"). "In assessing the sufficiency of the evidence on an acquittal motion, [the

reviewing court] appl[ies] a de novo standard of review." State v. Williams, 218 N.J. 576, 593-94 (2014).

To convict Ashman of the Bryant robbery, the state had to satisfy the elements of robbery under 2C:15-1a:

> 1. (a) A person is guilty of robbery, if in the course of committing a theft, he
>
> …
>
> (2) Threatens another with or purposely puts him in fear of immediate bodily injury[.]

The state failed to prove robbery of Bryant because it failed to prove that Bryant was the victim of a theft.

Bryant said so:

> [PROSECUTOR]: So they didn't take anything from you?
>
> [BRYANT]: No, not at all.

(21T 88-9 to 10)

Defense counsel said so:

> "Nothing is taken from Corey Bryant."

(30T 85-13 to 14)

And the court said so:

> Now, there is no evidence in this case that anything, any movable property, was actually taken from Corey Bryant … nothing was taken from Bryant.

(31T 22-18 to 20)

It was the state's case that defendants knew that Samuels sported a lot of expensive jewelry and planned to rob him when he pulled into his building's garage on April 2nd. (15T 45-10 to 46-4) The evidence indicated that defendants expected Samuels to be alone and were surprised to find a second man with him. Indeed, the second man, Bryant, testified that one of the robbers, who the jury apparently determined was Ashman, asked him who he was. (21T 87-23, 88-18 to 19) Bryant said that once he identified himself as Samuels's chef, the gunman directed him to sit on the car, after which the gunman turned his attention to Samuels. (21T 37-5 to 14, 39-20 to 40-4, 91-15 to 94-5)

While the gunman proceeded to separate Samuels from his jewelry (18T 42-2 to 15), his accomplice, apparently Carl Harry, patted Bryant down and told him to lie on the floor where Bryant remained until the robbers left. Bryant testified that neither Ashman nor Harry reached into his pockets; neither Ashman nor Harry asked him to turn over his valuables; and although Bryant was wearing jewelry and was carrying debit cards and a cellphone, neither Ashman nor Harry took anything from him. (21T 37-22 to 25, 87-25 to 88-25)

Yet, when Ashman moved at the close of the state's case for judgment of acquittal on the Bryant robbery charge (29T 135-6 to 137-15), the court denied the motion, relying on the use of force rather than theft, as follows:

> So whether or not anything was actually taken from Corey Bryant, it's clear based upon Corey Bryant's

> testimony, and Safaree Samuels[’s] testimony, and the video surveillance from the parking garage that both Mr. Samuels and Mr. Bryant were held at gunpoint, and Mr. Samuels[’s] jewelry was stolen from him. And whether anything was taken from Mr. Bryant or not, Mr. Bryant -- there’s evidence that Mr. Bryant was threatened with bodily harm in the course of the robbery whether anything was taken from him or not. But more than that. Mr. Bryant is actually pushed and ordered to get down on the ground, face down, and his pockets are run by one of the perpetrators as well.
>
> So most certainly there is substantial evidence in the record supporting the elements of first-degree robbery with respect to both -- with respect to Mr. Ashman. But with respect to Mr. Samuels and Mr. Bryant.

(29T 156-14 to 157-6)

A theft from Samuels alone cannot support two robbery convictions. As in this case, in Sewell, where the defendant committed only one theft but was convicted of multiple robberies, the New Jersey Supreme Court held that the “[d]efendant … could be convicted of only one robbery because he had committed only one theft[.]” 127 N.J. at 137-38, 150.

The defendant in Sewell stole a bucket of coins from a casino patron. He did not use or threaten force or inflict injury in the course of taking the bucket from its owner. But, in flight after commission of the theft, the defendant collided with four bystanders, which resulted in multiple convictions for

robbery.[15] Id. at 134-36. The Supreme Court vacated the bystander robbery convictions because nothing was stolen from the bystanders. Id. at 138; see State v. Mirault, 92 N.J. 492, 497 n.4 (1983) ("the presence of two threatened bystanders during theft from two other persons did not convert two thefts to four robberies").

As in Sewell, Bryant was a bystander who was assaulted by having a gun pointed at him in the course of the theft from Samuels.[16] As in Sewell, the theft from Samuels could not transform the assault against Bryant into the robbery of Bryant. Because nothing was stolen from Bryant, the conviction for robbery of Bryant must be vacated.

B. The court charged that the only theft or attempted theft at issue with respect to the robbery of Samuels and the robbery of Bryant was the theft or attempted theft of jewelry from Samuels

The Bryant robbery conviction must be reversed because the court failed to instruct on the essential element of Count 3: that Bryant was the victim of a theft or attempted theft. Instead, with respect to the charge on robbery of

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[15] The defendant in Sewell could be convicted of robbery of the owner of the coins as force used in immediate flight after the commission of the theft, against someone other than the victim of the theft, constitutes robbery. 2C:15-1.

[16] Points I.D. and I.E., below, argue that the jury should have been allowed to consider aggravated assault by pointing a gun, under 2C:12-1b(4), as a lesser offense of armed robbery of Bryant.

Bryant, the jury was instructed that it had to find that **Bryant** was threatened with force or put in fear of immediate bodily and that **Samuels** was the victim of a theft or attempted theft. Because **theft or attempted theft from Bryant** was an essential element of **robbery of Bryant**, but the jury was only asked to determine whether there was a theft or attempted theft from **Samuels**, and was never asked to find that there was a theft or attempted theft from **Bryant**, the conviction for first-degree robbery of **Bryant** must be vacated.

As there was no theft from Bryant, it was understandable that the court instructed only on theft from Samuels. But neither did the court instruct on attempted theft from Bryant. It instructed only on theft from Samuels and alternatively attempted theft from Samuels.

The court combined its instructions on the two robberies, stating: "Counts 2 and 3 charge the defendant with the crime of robbery in the first degree" (30T 166-4 to 5), and that Count 2 applied to Safaree Samuels and Count 3 applied to Corey Bryant (30T 166-5 to 18). The court explained, with respect to both Counts 2 and 3, that "the State must prove beyond a reasonable doubt that the defendant was in the course of committing a theft." (30T 167-6 to 8)

But neither Count 2 nor Count 3 named the victim of its predicate theft. (Da 5-6) And the court never stated, in the course of its instruction on first-degree or second-degree robbery, that the state had to prove, under Count 2, that

Ashman committed a theft against Samuels, and had to prove, under Count 3, that Ashman committed a theft against Bryant.

Moreover, the court's instructions on theft and attempted theft as lesser-included offenses of robbery failed to clarify that the state had to prove that there was a theft from Bryant. Instead, the court stated that both theft and attempted theft applied **only** to the theft of Samuels's jewelry.

As with its instruction on first-degree robbery, the court combined its instruction on the lesser-included offenses, charging: "Theft from the person [and] attempted theft from the person are lesser-included offenses to **Counts 2 and 3** of the indictment." (30T 176-7 to 9) At this point, and unlike with the robbery instruction, the court identified the victim of the alleged theft and the attempted theft and the items stolen: it told the jury that both the theft and the attempted theft referred to **Samuels's jewelry**: "[T]he State alleges that the movable property taken or over which control was unlawfully exercised was jewelry." (30T 177-16 to 17) And as Samuels testified that the appraised value of the stolen jewelry exceeded $75,000 (18T 224-6 to 226-19), the instructions on theft and attempted theft, which asked whether the jury found that the value of the property taken or attempted to be taken was at least $75,000, confirmed that Samuels was the sole victim of any theft or attempted theft. (30T 180-24 to 181-10, 183-22 to 24)

Because nothing was taken from Bryant, and Samuels was the only one from whom jewelry was taken, the instruction limited the jury's consideration of theft and attempted theft to the theft or attempted theft of Samuels's jewelry. Thus, the jury was never asked to find that there was a theft or attempted theft from Bryant. Without a finding on the essential element of theft or attempted theft from Bryant, the conviction for first-degree robbery of Bryant must be vacated.

C. The court failed to provide the jury with adequate guidance in response to its note inquiring about theft

The jury realized that the case presented a one-theft/two-robbery problem and sent the court a note asking, "Is a theft that occurred to one person also associated with a second party that is present?" (31T 5-1 to 3, 19-11 to 23)

The short answer to the jury's question is, "No." The somewhat longer and more complete answer is that when a theft "occur[s] to one person," "a second party that is present" is not the victim of theft by "association," and that to convict of robbery of Samuels, the jury had to find that Ashman stole something from Samuels, and to convict of robbery of Bryant, the jury had to find that Ashman stole something from Bryant. See State v. Lawson, 217 N.J. Super. 47, 51 (App. Div. 1987) (each "robbery conviction must be premised upon a separate theft"). The court did not provide the jury with the short answer or the more comprehensive answer; the court did not properly instruct the jury

on the law with respect to theft as an element of robbery of Bryant under Count 3.

"It is axiomatic that clear and correct jury charges are essential to a fair trial," State v. Robinson, 165 N.J. 32, 40 (2000); see State v. Grunow, 102 N.J. 133, 148-49 (1986) (the "judicial obligation to assure the jury's impartial deliberations … with proper and adequate instructions is at the core of the guarantee of a fair trial"). And "[w]hen a jury requests clarification, the trial judge is obligated to clear the confusion." State v. Graham, 285 N.J. Super. 337, 342 (App. Div. 1995). The court's response to the jury's question did not clear the jury's confusion and allowed the jury to convict Ashman of robbery of Bryant without understanding the legal significance of the fact that there was no theft from Bryant. The inadequate instruction on a material element of the offense violated Ashman's constitutional right to due process and a fair trial.

As noted, Count 2 charged robbery of Samuels and Count 3 charged robbery of Bryant, and while neither count identified the victim of the predicate theft (Da 5-6),[17] the court instructed, with respect to both counts, that the property stolen in the theft was jewelry (30T 177-16 to 18). It was undisputed

[17] Count 2 charged that Ashman, "in the course of committing a theft did threaten immediate bodily injury to Safaree Samuels … while armed … with a deadly weapon[.]" (Da 5-6) In identical language, Count 3 charged that Ashman, "in the course of committing a theft did threaten immediate bodily injury to Corey Bryant … while armed … with a deadly weapon[.]" (Da 6)

that Samuels was the only one from whom jewelry was stolen and that nothing was taken from Bryant. (21T 88-9 to 10) Thus, the jury's question indicating that it found that a theft had occurred to one person, clearly referred to the theft from Samuels. And as Bryant was the only "second party" present during the theft from Samuels, in asking whether the theft from Samuels "could also be associated with a second party that is present," the jury was questioning whether, in the absence of a theft from Bryant, it could attribute the theft from Samuels to the robbery charge against Bryant. See State v. Berry, 471 N.J. Super. 76 (App. Div.), certif. gr. 252 N.J. 80 (2002) ("jury question shows [what] the jury was focusing on").

And that is how the prosecutor understood the jury's note. Discussing the note with the court, the prosecutor stated: "[W]here the [jury's] question is coming from … well, in the course of committing a theft against Safaree Samuels, can that qualify as the ['']in the course of course of committing a theft['] element for the robbery against … Corey Bryant?" (31T 7-4 to 10) For its part, the court observed that although the use of force could be "associated" from one person to a second person, "It's different regarding theft. The elements of theft from a person require proof beyond a reasonable doubt of a theft from the person of, in this case, Safaree Samuels and Corey Bryant." (31T 5-14 to 22) Unfortunately, the court made that comment out of the jury's presence when it

was discussing the jury's note with the parties and failed to repeat that critical distinction between force and theft when it addressed the jury. Nor did the court explicitly state in its response to the jury's note that the jury could not return two convictions for robbery if there was only one theft.

The jury's confusion undoubtedly derived from the court's own instruction, which, as discussed in Point I.C., above, stated that the theft and attempted theft charges referred to Samuels's jewelry: "[T]he State alleges that the movable property taken or over which control was unlawfully exercised was jewelry." (30T 177-16 to 18)

It was indisputable that jewelry was taken from Samuels, and only Samuels, and that "there is no evidence in this case that anything, any movable property, was actually taken from Corey Bryant[.]" (31T 22-18 to 20) But the court did **not** instruct that theft and attempted theft of the jewelry were **only** lesser-included offenses of the robbery of Samuels. It instructed that theft and attempted theft of the jewelry were lesser-included offenses of **both** the robbery of Samuels charged in Count 2 **and** the robbery of Bryant charged in Count 3. As neither jewelry nor anything was taken from Bryant, the court's instruction that theft and attempted theft of the jewelry were lesser-included offenses of **both** robberies mistakenly allowed the jury to find that the theft or attempted theft against **Samuels** satisfied the theft element with respect to the robbery of

Bryant under Count 3. And the court's response to the jury's note did not correct that mistake.

"[A]nswer[ing] jury questions posed during the course of deliberations ... ordinarily requires explanation beyond rereading the original charge. The court's failure to do so may require reversal." Pressler & Verniero, Current N.J. Court Rules, Comment 7 on R. 1:8-7 (2022). Here, the court responded to the jury's question about "associating" a theft against one person with "a second party" by telling the jury to read its original charge, which it had sent into the jury room (30T 219-3 to 7), and which, so far from answering the jury's question, had prompted its question. Then, the court reread sections of its original charge, after which it added a muddled, confusing, and non-responsive discussion about theft. The court never explained that theft from one person could not be "associated with another person who was present," and never offered the simple declarative sentence that the state had to prove theft from Samuels to prove robbery of Samuels and theft from Bryant to prove robbery of Bryant.

The court responded to the jury's note as follows:

> …In order for you to find Tacuma Ashman guilty of robbery, the State is required to prove each of the following elements beyond a reasonable doubt. …
>
> One, that the Defendant was in the course of committing a theft. And two, that while in the course of

committing that theft, the Defendant threatened another with or purposefully put him in fear of bodily injury. …

So, when the elements speak of while being in the course of committing that theft, the Defendant threatened another with, or purposefully put him in fear of immediate bodily injury, that can be the alleged victim who is the actual object of the theft, the person that some – that is being – that something is sought to be taken from, and the person – the person of another, another person, can also be someone present who is threatened with – who is threatened with or purposefully put in fear of immediate bodily injury. Okay? Even if nothing was taken from that other person. All right? Do you understand that? Okay.

. . .

So, when we're dealing with robbery in the first degree, robbery in the second degree, another person can be the object of the theft, and can also be another person present who was threatened or put in fear of immediate bodily injury, all right?

When we're dealing with theft from the person and attempted theft from the person, it has to deal specifically with the specific alleged victim.

. . .

So, it is not – if there was another person present – if there was another person present, it – their presence may be relevant in your consideration, and you are to consider all of the evidence, okay?

. . .

But in order to prove theft from the person beyond a reasonable doubt, the State has to prove each of the elements of theft from the person beyond a – beyond a reasonable doubt with respect to that specific alleged victim. And you'll see in the verdict sheet that we have separate counts pertaining to the alleged victim of Safaree Samuels and pertaining to the alleged victim of Corey Bryant. All right?

> Now, there is no evidence in this case that anything, any movable property, was actually taken from Corey Bryant, all right? Everyone understand? Okay.

(31T 20-10 to 22-20) (emphases added)

The court's response did not answer the jury's question about associating one theft with two robberies, and failed to state "the law of the case applicable to the facts that the jury may find." State v. Green, 86 N.J. 281, 287-88 (1981). The court itself pointed out the fact at the heart of the jury's question – that nothing "was actually taken from Corey Bryant." (31T 22-18 to 20) Yet it failed to explain the legal significance of that fact – that Corey Bryant could not be the victim of a theft by "association."

The highlighted passages above told the jury that if it found theft from one person and assault of another, it could convict of robbery; the court never stated that, to convict of robbery of Samuels, it had to find that there was a theft from Samuels, and to convict of robbery of Bryant, it had to find that there was a separate theft from Bryant. See State v. Belliard, 415 N.J. Super. 51, 70 (App. Div. 2010) (finding plain error where "[t]he judge's instructions were generally correct but were not specifically tailored to address one of defendant's principal defenses"); State v. Lopez, 378 N.J. Super. 521, 533 (App. Div. 2005), rev'd in part on other grounds, 187 N.J. 91 (2006) ("In supplementing the jury charge, it is not enough in every case to merely reiterate legal principles to the jury. …

[T]he better practice is to mold the instructions in a manner which explains the law to the jury within the context of the particular facts of the case.").

The court's reliance on the verdict sheet to sort out the instructional problem was misplaced. "A verdict sheet is intended for recordation of the jury's verdict and is not designed to supplement oral jury instructions." State v. Gandhi, 201 N.J. 161, 196 (2010). Moreover, as a practical matter, referring to the verdict sheet in this case did not clear the jury's confusion. Telling the jury that the verdict sheet listed separate counts for robbery of Samuels and robbery of Bryant did not answer the jury's question whether "a theft that occurred to one person [is] also associated with a second party that is present?" The jury's note indicated that it understood that there were separate counts of robbery for Samuels and Bryant; the jury was asking whether it could convict of both counts of robbery if there was only one theft, and the court never clearly explained that if it found that there was only one theft, it could not convict of two robberies.

The court should have responded to the jury's note by explaining that if the jury did not find that Bryant himself was the victim of a theft, it could not find that he was the victim of a robbery. The jury's one-theft/two-robbery question struck at the core of the Bryant robbery charge; the court's inadequate response constitutes plain and reversible error and violated Ashman's constitutional right to due process and a fair trial.

D. The court erred in failing to charge aggravated assault by pointing a gun at Bryant under 2C:12-1b(4) as a lesser-included offense of armed robbery under 2C:15-1

"[T]rial courts have an independent duty to sua sponte charge on a lesser-included offense ... where the facts in evidence clearly indicate the appropriateness of that charge." State v. Alexander, 233 N.J. 132, 143 (2018) (internal quotation marks omitted). And "because correct jury charges are especially critical in guiding deliberations in criminal matters, improper instructions on material issues are presumed to constitute reversible error." State v. Jordan, 147 N.J. 409, 421-22 (2004).

"[I]n *most* robberies some form of assault will be a lesser included offense[.]" Cannel, Criminal Code Annotated, Comment N.J.S. 2C:15-1 (2022) (italics in original). This case is no exception: assault by pointing a gun at Bryant under 2C:12-1b(4) was a lesser-included offense of the charged offense of armed robbery of Bryant. Although not requested, a charge on pointing a gun was a clearly indicated lesser-included offense of armed robbery.

Bryant testified that one of the robbers, who the jury determined was Ashman, pointed a gun at him. Bryant stated that Ashman was "right quick with the gun," and that he used the gun to order Bryant to "get over here." (21T 37-7 to 23, 106-18 to 21) Bryant also testified that nothing was stolen from him. (21T 88-9 to 10) Although there was no theft from Bryant, the jury was instructed on

second-degree robbery and second-degree theft as lesser-included offenses of robbery (30T 175-18 to 183-24), both of which required the jury to find that Bryant was the victim of a theft. But the jury was not allowed to consider the lesser offense that best fit the facts – assault by pointing a gun at Bryant under 2C:12-1b(4).

Even if the jury found, despite the court's flawed instructions, that there was no theft from Bryant and therefore no robbery of Bryant, it may well have been reluctant to acquit of all charges with respect to Bryant when Bryant testified that a gun was pointed at him. Because the jury was not given the option of convicting of the lesser offense of assault by pointing a gun, it may well have returned the only charge that included a gun offense – first-degree armed robbery. See State v. Bell, 241 N.J. 552, 562 (2020) ("instructing ... on lesser-included offenses is intended 'to give juries a range of options so that they will not be forced to decide between a conviction for a crime more serious than the one committed or no conviction at all'") (quoting State v. Short, 131 N.J. 47, 58 (1993)); State v. Sloane, 111 N.J. 293, 299 (1988) (unless jury is offered a lesser offense, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.") (emphasis in original) (quoting Keeble v. United States, 412 U.S. 205, 212 (1973)).

N.J.S.A. 2C:1-8 provides that "conduct [may] constitute[] more than one offense," and states, in section d., that "[a] defendant may be convicted of an offense included in an offense charged[.]" "Section 1-8(d) 'calls for a comparison of the statutory definitions of the respective offenses to ascertain whether they have common or overlapping elements that require proof of identical facts.'" Alexander, 233 N.J. at 146 (quoting State v. Muniz, 118 N.J. 319, 324 (1990)); see State v. Thomas, 187 N.J. 119, 129 (2006) (offense is included where proof establishing greater offense also "establish[es] every element of a lesser offense [or] ... offenses are the same but a lesser degree of culpability is required to establish the lesser offense") (internal quotation marks omitted)). At the same time, the Supreme Court has cautioned that "the statutory definition of lesser-included offenses … is not all-encompassing,' nor are the statutory categories 'water-tight compartments.'" State v. Purnell, 126 N.J. 518, 531 (1992). Here, the proof required to establish the greater offense of first-degree armed robbery is also sufficient to establish every element of the lesser offense of assault by pointing a firearm.

Count 3 charged armed robbery of Bryant under 2C:15-1a(2) and 2C:15-1b (Da 6), under which a person is guilty if:

> 1. (a) in the course of committing a theft, [the actor]:
>
> . . .
>
> (2) Threaten[ed] another with or purposely put[] him in fear of immediate bodily injury

. . .

1. (b) [while] armed with and/or threaten[ing] the immediate use of a deadly weapon.

N.J.S.A. 2C:11-1c defines a "deadly weapon" as a "firearm or ... [anything] "capable of producing death or serious bodily injury." The only deadly weapon in this case was a firearm: Samuels and Bryant both stated that one of the robbers, who the jury determined was Ashman, pointed a gun at them. (18T 37-25 to 38-6; 21T 39-to 11)

It is fourth-degree aggravated assault under 2C:12-1b(4) if an actor:

> (4) Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in subsection f. of N.J.S. 2C:39-1, at or in the direction of another, whether or not the actor believes it to be loaded[.]

On this record, armed robbery and pointing a gun have "common or overlapping elements that require proof of identical facts." Alexander, 233 N.J. at 146. The only purpose in pointing a gun at Bryant was to communicate the threat that the gunman was ready to use it if Bryant did not comply with his demand. See State v. Battle, 209 N.J. Super. 255, 260 (App. Div. 1986) (explaining that, because "a theft attended by an aggravated assault, as defined by N.J.S.A. 2C:12-1(b), [i]s first-degree robbery," aggravated assault under 2C:12-1(b) is a lesser included offense of first-degree robbery). Aggravated assault **by pointing a gun** at Bryant is a lesser included offense of the charged

offense of robbery of Bryant **"**[while] armed with and/or **threaten[ing] the immediate use of a deadly weapon**" as assault by pointing is established by less than all the facts necessary to establish armed robbery.

Where, as here, the defendant does not request an instruction on the lesser included offense, the trial court need not "meticulously sift through the entire record ... to see if some combination of facts and inferences might rationally sustain a lesser charge." State v. Funderberg, 225 N.J. 66, 81 (2016). But, even without a request, a court is obligated to give a lesser-included offense instruction "when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." State v. Maloney, 216 N.J. 91, 107 (2013) (internal quotation marks omitted)); see State v. Canfield, 252 N.J. 497, 501 (2022) (per curiam) (charge on unrequested lesser offense "only required if it is 'clearly indicated' by the facts in evidence") (internal quotation marks omitted); State v. Dunbrack, 245 N.J. 531, 545 (2021) (even if not requested, court should give lesser charge when it "is obvious from the record"); N.J.S.A. 2C:1-8e (instruction appropriate where there is "a rational basis for a verdict convicting the defendant of the included offense").

In this case, where Bryant testified that one of the robbers pointed a gun at him, evidence of the assault-by-pointing charge was clearly indicated. Indeed, the court itself stated: "Corey Bryant was ... a victim at the point of a handgun."

(36T 46-15 to 16) And as there was no dispute that there was no theft from Bryant; indeed, the court itself charged that nothing was taken from Bryant (31T 22-18 to 20); "the facts provided a rational basis for the jury to acquit on" the charged offense of armed robbery and convict on the lesser offense of pointing a gun. Id. at 547. On this record, the absence of an instruction on assault under 2C:12-1b(4) constituted plain and reversible error and violated Ashman's right to due process and a fair trial.

E. The court erred in failing to charge aggravated assault by pointing a gun at Bryant under 2C:12-1b(4) as a lesser-related offense of armed robbery under 2C:15-1

If the Court does not find that pointing a gun was a lesser-included offense of the charged offense of armed robbery, it should find that it was a lesser-related offense, and that it was error to not charge it as such. A lesser-related offense "shares a common factual ground, but not a commonality in statutory elements, with the crimes charged in the indictment." Thomas, 187 N.J. at 133. For the reasons discussed in Point I.D., above, on these facts, pointing a gun under 2C:12-1b(4) shares a common factual ground with the charged offense of armed robbery "[while] armed with and/or threaten[ing] the immediate use of a deadly weapon" under 2C:15-1b.

The New Jersey Supreme Court has long held that the principle that a lesser offense should be charged even if its elements differ from those of the

greater offense "'comports with our general view that subject to fair notice the jury should resolve the degree of an actor's guilt on the basis of the evidence presented to the jury.'" Purnell, 126 N.J. at 531 (quoting Sloane, 111 N.J. at 300). And the Court has stated that a defendant is entitled to an instruction on a lesser-related offense when he "requests or consents to the related offense charge, and there is a rational basis in the evidence to sustain the related offense." Alexander, 233 N.J. at 144-45 (quoting Thomas, 187 N.J. at 133).

While the Supreme Court has not held the trial court to "a sua sponte obligation to charge the jury on a related offense that was not requested or consented to by the defense," Thomas, 187 N.J. at 134, that does not relieve the trial court of its "obligation to see to it that the jury, as the representative of the public, is given all of the facts and all of the possible offenses that might reasonably be found from such facts." State v. Choice, 98 N.J. 295, 298-99 (1985). Indeed, the New Jersey Supreme Court has cautioned that "the failure to submit a lesser offense to the jury which does not satisfy the Code's definition of a lesser-included offense may under some circumstances violate the due process guarantees of the federal and state constitutions." State v. Brent, 137 N.J. 107, at 117 (1994) (quoting State v. Battle, 256 N.J. Super. 268 (App. Div. 1992)); see State v. Simon, 79 N.J. 191, 206 (1979) ("Th[e] judicial obligation[] to assure the jury's impartial deliberations upon the guilt of a criminal defendant

… in accordance with proper and adequate instructions[] is at the core of the guarantee of a fair trial."). At a minimum, the trial court must give the defendant notice and opportunity to consent to a charge on a clearly indicated lesser-related offense. See Purnell, 126 N.J. at 531 ("[S]ubject to the requirements of fair notice, an offense, if supported by the evidence, should be charged to the jury even though it does not meet the Code's definition of lesser included offense."). On this record, the omission of an instruction on the clearly indicated offense of pointing a firearm as a lesser-related offense of armed robbery was plain and reversible error.

F. The cumulative effect of the errors mandates reversal

"[E]ven when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008) (per curiam). For the reasons discussed, each of the individual errors, from the failure to prove theft to the multiple instructional errors set forth in this point violated Ashman's right to due process and a fair trial and warrants reversal of the Bryant robbery conviction. But if the Court does not so find, it must find that the cumulative effect of the errors violated Ashman's right to due process and a fair trial and mandates reversal of the Bryant robbery conviction.

POINT II

MISTRYING THE CASE AS TO THE CODEFENDANT BUT NOT DEFENDANT LEFT THE JURY WITH ONLY DEFENDANT TO BLAME FOR THE OFFENSE AND VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL. (27T 36-8 to 9; 28T 37-12)

For seven days, trial consisted of two defendants – Ashman and Harewood – charged with the same offense. But, after seven days, the court ordered a mistrial as to Harewood, thus radically altering the nature of the case to Ashman's prejudice. Once Harewood was excised from the case and the jury was left with only Ashman to hold liable for the offense, the jury could not reach an impartial verdict.

"Incapacity of a juror or the judge" is ground for a mistrial. State v. Rechtschaffer, 70 N.J. 395, 406 (1976). In this case, it was the codefendant's lawyer who provided the ground for the mistrial: midtrial, Harewood's counsel became unavailable due to an "unanticipated" "serious family medical emergency[.]" (27T 17-11 to 13, 18-1 to 38) As a result, Harewood and Ashman both moved for a mistrial. (27T 13-17 to 20, 28-21 to 25) The court granted Harewood's motion but continued the trial against Ashman. (27T 36-8 to 9; 27T 37-12)

"A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached[.]" Illinois v. Somerville, 410 U.S. 458, 464

(1973). "'[T]he denial of the motion is reviewable only for an abuse of discretion.'" State v. Herbert, 457 N.J. Super. 490, 503 (App. Div. 2019) (quoting State v. Winter, 96 N.J. 640, 647 (1984)). On this record, where the state established that a robbery was committed, and charged two defendants with the offense, and presented inculpatory evidence against both of them, but the jury was ultimately allowed to convict only one of them, the jury was more likely to resolve its doubts against the only person it could hold responsible. Under the circumstances, the court sorely abused its discretion in continuing the trial against Ashman alone, violating his right to due process and a fair trial. U.S. Const., amends. VI, XIV; N.J. Const., art. I, ¶¶ 1, 10; see Macon, 57 N.J. at 335 ("an error is reason for reversal [if it presents] some degree of possibility that it led to an unjust verdict").

From its opening statement, the prosecution claimed that "Shawn Harewood was the mastermind behind this [offense]." (15T 54-13) The evidence established that Harewood and Samuels had been friends but had had a "falling out" (18T 12-13 to 25, 18-21 to 20-1), thus providing Harewood with a motive for the robbery. According to the state, although Harewood originated the plan to rob Samuels, he could not execute the robbery himself for fear Samuels would recognize him. (18T 20-2 to 4) It was the state's case that Harewood recruited Ashman and Harry to carry out the robbery while Harewood drove them to and

from the scene. (15T 45-18 to 25, 47-6 to 10, 54-13 to 14)

The police identified Harewood as the driver of the getaway car, which was registered to his mother, and arrested Harewood when he crashed the car following the commission of the robbery. (19T 88-25 to 89-5, 90-20 to 93-14, 184-17 to 186-19, 192-20 to 22, 199-19 to 25; 21T 129-8 to 130-5; 28T 29-2 to 5)[18] In addition, the GPS tracker found in the wheel well of Samuels's car was linked directly to the prepaid iPhone Harewood was carrying when he was apprehended. (21T 143-8 to 20; 29T 90-24 to 91-1, 93-14 to 95-19) The phone contained pictures, texts, internet searches, and location data connecting Harewood to the robbery. (20T 197-15 to 19; 21T 138-8 to 13, 143-1 to 20; 29T 34-24 to 35-8, 62-3 to 72-1)

Although the state maintained that Ashman committed the robberies, the victims did not identify Ashman as the robber. (19T 200-4 to 11; 21T 94-22 to 24, 96-1 to 11, 100-19 to 101-1; 22T 252-2 to 254-4; 28T 57-7 to 18, 60-2 to 16) Thus the case against Ashman was strictly circumstantial, and the circumstantial evidence connecting him to the offense – a cell phone and a jacket – was found in Harewood's car. (20T 62-9 to 25, 68-23 to 72-23, 94-21 to 96-1; 21T 159-3 to 161-1, 163-13 to 164-3, 166-7 to 168-2; 27T 108-3 to 7, 117-2 to

[18] Harewood and Ashman were both charged with eluding. (Da 7) Harewood was convicted of the offense (Da 25-28), while the state dismissed the eluding charge against Ashman (29T 142-3 to 15; 30T 164-15 to 18).

25; 29T 96-19 to 22, 100-11 to 21) Unlike Harewood, Ashman was not identified as an occupant of the getaway car and was not found at the crash site. (15T 236-15 to 237-11; 16T 50-22 to 51-6) And there was no DNA or fingerprint evidence tying Ashman to the car. (19T 158-23 to 159-3; 28T 55-4 to 24, 70-2 to 8)

For the first seven days of trial, Ashman and Harewood were tried together, thus allowing the jury to determine each defendant's liability and whether and how to apportion responsibility for the offense between them. But, after hearing extensive inculpatory offense against Harewood, Harewood was dismissed from the case. (15T 54-13 to 14; 27T 36-8 to 9) The jury was told that he would "be tried at a later date" and not to hold his "absence … against Tacuma Ashman." (28T 17-4 to 25) But the jury had begun the trial with the authority to evaluate the guilt or innocence of both defendants. And although the evidence had not changed, the jury was abruptly told it could only hold Ashman liable for the offense.

It is one thing to expect a jury to follow an instruction to disregard a fleeting improper remark. It is a very different proposition to expect a jury, after seven days of a joint trial of two defendants, to recalibrate its assessment of the entire case from a two-defendant/shared-lability crime to a case in which, despite the evidence against the dismissed codefendant, it could not convict him for the crime and could only convict the remaining defendant. It was highly

improbable, if not wholly unrealistic, to expect that the jury's assessment of Ashman's liability would not be adversely affected – consciously or subconsciously – by the midtrial withdrawal of his codefendant. See United States v. Bruton, 391 U.S. 123, 135 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored").

Having been told that Harewood had a motive to rob Samuels and had originated the plan to rob him, that Harewood's phone was linked to a GPS tracking device on Samuels's car, and that Harewood was caught fleeing the scene of the robbery, the jury was primed to convict Harewood for the offense. But then the jury was abruptly forbidden to hold him responsible for the offense. On the other hand, in view of the fact that Samuels and Bryant both failed to identify Ashman as the robber and Ashman was not caught fleeing the scene, or, indeed, identified as an occupant of the getaway car, the jury may well have had a reasonable doubt about whether Ashman committed the robbery. At the same time, the jury was instructed that it could find Ashman "legally responsible for the criminal conduct of Shawn Harewood[.]" (30T 207-8 to 14) Barred from convicting Harewood, the jury was more likely to overcome any doubts about Ashman's culpability and convict Ashman as the only defendant it could hold

responsible for the offense.

The prejudice engendered by Harewood's withdrawal from the case after seven days of trial was not and could not be cured by an instruction. The only adequate remedy was to mistry the case as to both defendants.

POINT III

THE MATTER MUST BE REMANDED FOR A NEW SENTENCING HEARING BECAUSE THE COURT EXPRESSLY STATED THAT IT WAS PENALIZING DEFENDANT FOR NOT ADMITTING HIS GUILT OR EXPRESSING REMORSE, RELIED ON DISMISSED CHARGES, AND MISAPPLIED THE YARBOUGH[19] FACTORS TO REACH AN EXCESSIVE SENTENCE OF 30 YEARS, 25½ YEARS WITHOUT PAROLE. (36T 57-7 to 58-21; Da 17-24)

Ashman is the father of four. (PSR 16-17) He is a high-school graduate, studied drafting at a technical college, and subsequently completed programs for air-conditioning, refrigeration-repair, and building-maintenance. (PSR 16) Between 2004 and 2018, he worked for an insulation contractor; an auto-parts retailer; a paper-supply business; a paint store; a staffing-service company; and an air-conditioning repair service. (PSR 14-15)

Ashman has been addicted to alcohol, oxycodone, and cocaine for many

[19] State v. Yarbough, 100 N.J. 627 (1985).

years, and suffers from asthma. (PSR 13) In his 40 years preceding this offense, Ashman had incurred three municipal and one indictable conviction. Before the court sentenced him to 30 years' imprisonment for this offense, he had received only probationary terms. (PSR 1, 6, 8-10)

Sentencing under the code is offense-oriented; factors that pertain to the defendant carry less weight than those that aggravate the offense. State v. Hodge, 95 N.J. 369, 375-77 (1984). The court did not find any factors in aggravation of the offense and cited only aggravating factors that relate to the defendant: (3), the risk he will reoffend; (6), his record; and (9), deterrence. N.J.S.A. 2C:44-1a(3), (6), and (9). (36T 63-1 to 64-4) See State v. Abdullah, 184 N.J. 497, 506 n.2 (2005) (noting that aggravating factors (3), (6), and (9) all relate to recidivism). And in arriving at aggravating factors (3) and (9) and rejecting mitigating factors (8) and (9),[20] the court improperly placed substantial weight on Ashman's failure to incriminate himself at sentencing and on allegations, later dismissed, that he committed offenses while he was in jail on the instant charges. In addition, the court misapplied the Yarbough factors. The multiple violations of the sentencing guidelines resulted in an unwarranted

[20] Under mitigating factor (8), the court can consider that "[t]he defendant's conduct was the result of circumstances unlikely to recur[.]" Under mitigating factor (9), the court can consider that "[t]he character and attitude of the defendant indicate that the defendant is unlikely to commit another offense[.]" N.J.S.A. 2C:44-1b(8) and (9).

consecutive term and excessive sentence for these offenses and this defendant. See State v. Melvin, 248 N.J. 321, 341 (2021) (appellate deference to sentencing court "presupposes and depends upon the proper application of sentencing considerations); State v. Fuentes, 217 N.J. 57, 70 (2014) (violation of sentencing guidelines is ground for reversal).

A. The failure-to-confess and remorse errors

In support of its request for an aggregate sentence of 31 years (36T 32-17 to 18), the state argued that Ashman "was not taking any responsibility for … his involvement in this case" (36T 16-24 to 25) and did not "indicate[] any remorse at all" (36T 33-20 to 22). The court agreed, repeatedly expressing its disapproval that Ashman "doesn't take any responsibility for this" (36T 48-6 to 14, 50-3 to 4), and deeming his apparent absence of remorse as "extremely concerning to this Court" (36T 49-5 to 9). The court made it clear that these "omissions" on Ashman's part were determinative in its decision to reject mitigating factors (8) and (9). The court said:

> …[T]hat is unfortunate because I did not make up my mind about this sentence until I heard from you, Mr. Ashman. I did not make up my mind. I kept an open mind because I wanted to hear something sincere from you. Okay. Um, so I don't find a basis for Mitigating Factors 8 and 9.

(36T 61-4 to 25)

The United States and New Jersey Supreme Courts have forbidden courts

from penalizing a defendant for not confessing guilt or expressing contrition at sentencing. In Mitchell v. United States, 526 U.S. 314 (1999), the U.S. Supreme Court pointed out that the Fifth Amendment privilege against being "compelled in any criminal case to be a witness against [one]self" applies with equal force at sentencing. Accordingly, the Court held, a defendant may not be "enlist[ed] … as an instrument in his or her own condemnation," id. at 325, and a court may not draw [an] adverse inference" from the defendant's silence at sentencing, id. at 317. Similarly, the New Jersey Supreme Court has cautioned that "the sentencing judge should not himself seek to induce a defendant to confess," or "increase[] the sentence because [the defendant] defended against the charge and did not admit his guilt at sentencing." State v. Poteet, 61 N.J. 493, 497, 495 (1972); see State v. Jiminez, 266 N.J. Super. 560 (App. Div. 1993) ("a sentencing judge may not enhance the penalty because [a defendant] contests his guilt"); see also State v. Marks, 201 N.J. Super. 514, 539-40 (App. Div. 1985) ("a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision"). The court erred in penalizing Ashman for not confessing guilt at sentencing or expressing remorse.

Moreover, neither the defendant's failure to express remorse nor his explicit rejection of remorse are aggravating factors under the Criminal Code. For that matter, there is no legal consensus on whether a defendant who

expresses remorse is less likely to reoffend. Susan A. Bandes, Remorse and Criminal Justice, Emotion Review, Vol. 8, 14-15 (October 23, 2015). See State v. Case, 220 N.J. 49, 54 (2014) (sentence may not be based on "unfounded assumptions"). Indeed, there is no legal consensus on the definition of remorse or on how to identify remorse.[21] "Conversely, there is evidence that ... evaluating remorse via demeanor is particularly problematic across racial and cultural divides and where the defendant is a juvenile, mentally ill, or taking psychotropic drugs." Id. at 15.

The matter must be remanded for a new sentencing hearing because the court improperly treated Ashman's silence at sentencing as a reason to increase his sentence.

B. The dismissed-charges error

In support of aggravating factor (3), "The risk that the defendant will commit another offense," 2C:44-1a(3), the court said it was relying in part on charges the state alleged Ashman committed after the instant offense, which were unresolved at the time of sentencing – and have since been dismissed.

> THE COURT: … I also might add, also, that even during the Trial -- okay -- there were separate witness tampering charges against Mr. Ashman, and even

[21] "[T]here *is* evidence that certain types of shame are tied to an *increased* likelihood of future criminal activity." Bandes, Remorse and Criminal Justice, at 15 (italics in original). Thus if remorse is related to a decreased likelihood of criminal activity, it is essential to be able to distinguish it from shame. Id.

> during the Trial Mr. Ashman was charged … for conduct alleged at the County Jail that he was, uh, distributing, uh, controlled substances that were being smuggled into the jail. Uh, those, uh, charges are pending. Uh, but, uh, I only cite those for the record as giving me even greater concern about the risk that he will commit another offense, as well.

(36T 65-13 to 22) In fact, the witness-tampering charges as well as the drug charges were later dismissed. (28T 44-17 to 45-8; Da 37-40)

In State v. K.S., 220 N.J. 190, 193 (2015), the New Jersey Supreme Court held that "because the record includes no admissions of conduct to support the truth of the allegations in … dismissed ... charges," "prior dismissed charges may not be considered for any purpose." The matter must be remanded for resentencing because the court improperly considered in aggravation of sentence two dismissed charges. See State v. Haliski, 140 N.J. 1, 18 (1995) (holding that extended term imposed based on prior conviction that is later reversed must be vacated); see also Fuentes, 217 N.J. at 70 (sentence may be reversed where court relied on unsubstantiated aggravating factor).

C. The Yarbough errors

The court abused its discretion in imposing consecutive – and equal – sentences on the two robberies. The court explained its decision to impose consecutive terms as follows:

> [W]hy am I doing that? First of all, there can be no free crimes in a system for which the punishment must fit

> the crimes. See State v. Yarbough, 100 N.J. 627, [6]43 [1985)].

(36T 54-16 to 21) The court "emphasize[d]" that as this entailed a "violent at gunpoint robbery of two individuals" (36T 55-11 to 12), a failure to impose consecutive terms "would be to diminish the seriousness of these crimes" (36T 56-10 to 11).

To begin with, the court misread Yarbough's "no-free crimes" principle to hold that the failure to impose consecutive sentences on the two robberies would render one of them a "free crime." The "no-free crimes" principle "does not require the court automatically to impose consecutive sentences for multiple offenses." State v. Rogers, 124 N.J. 113, 121 (1991). The "no-free crimes" principle stands for the proposition that a crime is not free where the punishment fits the crime. The Yarbough guidelines contemplate that a concurrent term may be the fitting punishment for some crimes.

The facts of this offense weighed in favor of concurrent terms for the two robberies. At a minimum, the imposition of 15 years on both robberies violates the Yarbough guideline that "successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]" Id.; see State v. Pennington, 154 N.J. 344, 362 (1998) (directing court "to explain why a shorter second term for the same offense is not warranted if consecutive terms are reimposed").

While Ashman was convicted of robbing two people, the court acknowledged that Ashman's only objective was to rob Samuels, that Bryant was unexpectedly caught up in the robbery of Samuels, and that the entire incident took only a few minutes. (36T 55-16 to 18) It is indisputable that both robbery convictions "stem[] from the same incident," Yarbough, 100 N.J. at 638. And "[w]here separate crimes grow out of the same series of events or from the same factual nexus, consecutive sentences are not imposed." State v. Lester, 271 N.J. Super. 289, 293 (App. Div. 1994); see State v. Miller, 205 N.J. 109, 129 (2011) (Yarbough guidelines weigh in favor of concurrent terms where crimes were not predominantly independent of each other and were committed at the same time and place).

Finally, in accordance with State v. Torres, 246 N.J. 246 (2021), the Court must order a remand for a fairness analysis to review the imposition of the consecutive sentences that resulted in the aggregate term of 30 years, 25½ years without parole. Where, as here, after a sentencing court has imposed consecutive terms under the Yarbough guidelines, it must provide "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding[.]" Id. at 268. The fairness evaluation is "the necessary second part to a Yarbough analysis[.]" Id. Accordingly, this matter must be remanded for an explicit statement explaining the overall fairness of the

sentence of 30 years.

CONCLUSION

The Bryant robbery conviction must be reversed because the state failed to prove the essential element that Bryant was the victim of a theft. And both the Bryant and Samuels robbery convictions must be reversed because Ashman was unduly prejudiced when, after seven days of trial, Harewood was excised from the trial, leaving Ashman as the sole defendant. If the Court does not reverse the convictions, it must order a remand for a new sentencing hearing because the proceeding was riddled with error.

Respectfully submitted,
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Dated: March 20, 2023

New Jersey Superior Court
Appellate Division

DOCKET NO. A-001800-21

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division,
v.	:	Bergen County.
TACUMA E. ASHMAN,	:	Sat Below: Hon. Robert Vinci, J.S.C.
Defendant-Appellant.	:	Hon. Gary Wilcox, J.S.C. Hon. Christopher Kazlau, J.S.C. and a jury.

BRIEF AND APPENDIX
ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On February 22, 2019, a Bergen County grand jury charged defendant, Tacuma Ashman, and two co-defendants, Shawn Harewood and Carl Harry, in a superseding indictment with the following crimes: count one, second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2; count two, first-degree robbery of Safaree Samuels, N.J.S.A. 2C:15-1; count three, first-degree robbery of Corey Bryant, N.J.S.A. 2C:15-1; count four, second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b); count five, second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a); count six, second-degree eluding, N.J.S.A. 2C:29-2(b); and count seven, fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2). (Da5 to 8).

The Honorable Christopher Kazlau, J.S.C., presided over defendant's jury trial, which started as a joint trial with Harewood on October 7, 2021.[1] In the midst of trial, an immediate family member of Harewood's counsel was hospitalized with a life-threatening illness requiring ongoing emergency treatment, which rendered Harwood's counsel unavailable to continue. (27T8-15 to 18, 18-7 to 11, 19-1 to 12). On November 8, 2021, Harewood requested

[1] Before trial, co-defendant Harry agreed to testify for the State and pleaded guilty to third-degree conspiracy to commit theft pursuant to a negotiated plea bargain. (Da9 to 12; 5T4-2 to 13). Harry did not ultimately testify at defendant's trial.

and received a mistrial due to his counsel's absence. (27T13-17 to 19, 31-8 to 33-16; Da13 to 14). On the issue of whether the trial should proceed in the absence of Harewood, defendant initially opposed granting a mistrial in his case as well, (27T13-25 to 15-8), only to subsequently change his mind and request one. (27T28-21 to 29-1). On November 9, 2021, the court denied defendant's motion for a mistrial. (28T37-6 to 40-15).

On November 10, 2021, the State rested and defendant moved for a judgment of acquittal. The court denied defendant's motion, except as it pertained to count six, eluding, which the court dismissed with the consent of both parties. (29T150-18 to 159-20).

On November 22, 2021, the jury returned a guilty verdict as to count one, the lesser-included offense of conspiracy to commit theft; counts two and three, the armed robberies of Samuels and Bryant; count five, possession of a handgun for an unlawful purpose; and count seven, resisting arrest. The jury found defendant not guilty on count four, possession of a handgun without a permit, presumably because the State did not present any affirmative proof that defendant lacked a carry permit. (34T15-8 to 17-17). The court polled all of the jurors, and they indicated that the foreperson accurately reported their verdict. (34T17-25 to 19-4).

Immediately after excusing the jury, the court reviewed the verdict sheet and noticed that "not guilty" had been checked as to count one, the lesser-included offense of conspiracy to commit theft. The court also found that there was no answer to a jury interrogatory connected with the jury's guilty verdict on count seven, resisting arrest. (Da15 to 18; 34T24-8 to 25-13). The State dismissed counts one and seven due to the discrepancies. (34T25-6 to 25, 40-11 to 21). Employing a belt and suspenders approach, the court recalled the jurors and polled them about their verdict as to the remaining guilty adjudications in which there were no discrepancies – counts two, three, and five. The jurors unanimously reaffirmed that defendant was guilty of those crimes. (34T37-14 to 39-9).

On February 4, 2022, the court sentenced defendant to consecutive fifteen-year terms on the first-degree robbery convictions. Pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, the court imposed an eighty-five percent parole disqualifier and ten years of parole supervision upon release. The court also imposed a number of fines and fees. The court merged count five, possession of a firearm for an unlawful purpose, into the first-degree robberies. (36T57-7 to 59-4; Da23 to 26).

Defendant filed a notice of appeal on February 18, 2022. (Da32).

COUNTER-STATEMENT OF FACTS

In 2018, Safaree Samuels, a musician and reality television personality, lived in an apartment building near the George Washington Bridge (GW Bridge) in Fort Lee. (18T9-18 to 10-17, 22-1 to 7). On April 1, 2018, Samuels was scheduled to perform at a venue in the Bronx. (18T28-10 to 18). Samuels wore expensive jewelry as part of his attire for that evening, including a diamond watch, three bracelets, three diamond chains, multiple rings, and an earring. He explained that ornate items were part of the "uniform" in his industry. (18T29-11 to 30-9; 19T174-5 to 175-11). The appraised value of the jewelry surpassed $150,000. (22T83-2 to 85-9). He also wore a long red coat; the sleeves of the coat extended past his wrists. (18T30-10 to 31-1).

At approximately 11:00 p.m. that day, Samuels drove his car to the venue; he was accompanied by his stylist and Corey Bryant, his personal chef. (18T31-9, 32-10). Samuels received the remaining balance of the fee for his performance in cash at the venue, which was approximately $2000. (18T35-7). Samuels performed for two hours and then left. He dropped off his stylist in the Bronx, and drove to Fort Lee accompanied by Bryant. (18T34-8 to 20). They parked inside the garage of Samuels' apartment building, and sat in the car for a brief period while Samuels looked for pictures and videos to post on social media. (18T35-20 to 24).

Samuels and Bryant got out of the car. Suddenly, two males came toward them; one of individuals pointed a handgun at Samuels. Samuels focused on the gun, so he did not get a "good look" at their faces. (18T36-22 to 25, 39-5 to 9). Bryant also did not get a clear look at their faces, as he focused on the gun and faced the car during much of the encounter. (21T38-25 to 39-10, 90-1 to 18, 106-21).

Initially, the gunman, who was about as tall as Bryant and the shorter of the two robbers, grabbed Bryant's right arm and directed him to sit on the car. The second robber, a "tall, dark-skinned guy" with a "black hoodie," approached Bryant and "they patted down [Bryant's] pockets." (21T37-4 to 38-7, 87-22 to 88-8, 89-16 to 90-18). Bryant had no concealed weapons or expensive valuables at the time, and the robbers did not take anything. Specifically, Bryant did not have any cash, wallet, watch, rings, or other jewelry outside of his earrings. He brought his identification, debit card, keys, and phone. (21T83-4 to 84-4, 88-4 to 25). Bryant kept these personal items in a "slot" in his jacket. (21T88-4 to 8). One of the robbers eventually told Bryant to get on the ground, and Bryant complied. (21T37-4 to 25).

Meanwhile, the gunman, whom Samuels recalled wearing a green jacket and hat, told Samuels to "give me everything." He explicitly demanded Safaree's watch, even though it was covered by his sleeve. The gunman did

not have an accent when he spoke. (18T37-11 to 40-2; 21T39-19).[2] Samuels handed over numerous items including his phones, wallet, money, watch, bracelets, and chain necklaces. (18T42-8 to 15, 51-2). The gunman forced Samuels to lie down on the ground and, at one point, Samuels "felt" the gun behind his head. (18T40-17 to 21). During the ordeal, Samuels never saw a second weapon, but observed that the second robber held his hand under his sweatshirt like he had a gun. (18T37-14 to 19; 19T180-14 to 20).

Samuels stayed on the ground for what seemed like forever. (18T41-10 to 15). Bryant estimated that the entire incident lasted two to three minutes. (21T40-24 to 25). When Bryant and Samuels realized that the robbers left, they ran into the apartment building and contacted the police. (15T90-18 to 91-17; 18T41-17 to 42-1, 50-1 to 7).

At approximately 2:00 a.m. on April 2, 2018, Officer Natalie Mateus of the Fort Lee Police Department and her partner, Officer Patrick Cillo, were on patrol approximately one block away from Samuels' apartment building. (15T168-10 to 24). The officers received a dispatch and saw a dark-colored Cadillac Escalade without a license plate make an erratic U-turn. (15T169-7 to 11). The vehicle drove past the police officers, who then tried to initiate a

[2] The third co-defendant, Carl Harry, spoke with an accent. (21T170-18; 22T211-10).

motor-vehicle stop with the police lights and siren. The Escalade accelerated onto the GW Bridge. (15T169-21 to 170-1). The officers pursued the vehicle, as it swerved around traffic at speeds exceeding ninety miles per hour. (15T171-16 to 23, 198-17 to 20). The officers continued to pursue the Escalade off of the GW Bridge into New York City. The Escalade crashed into a median on a ramp leading toward the Henry Hudson Parkway.[3] With two exploded tires, the vehicle drove on its rims until it finally stopped on the parkway near the exit for 158th Street in Manhattan. (15T172-16 to 173-4).

Officer Mateus saw three black males – a driver, front-seat passenger, and rear-seat passenger – jump out of the Escalade and run into oncoming northbound traffic. They made it across the highway and entered a wooded area. (15T173-7 to 11, 213-10, 235-13 to 14). Officers Mateus and Cillo stopped their police car near the Escalade and confirmed there were no other occupants. The officers then pursued the suspects on foot into the wooded area on the side of the highway. (15T173-14 to 22).

Officer Gabriel Avella of the Fort Lee Police Department, who had joined in the pursuit across the GW Bridge, stopped his vehicle thirty feet

[3] The parties and witnesses often used the Henry Hudson Parkway and West Side Highway interchangeably, (e.g., 15T211-8; 20T211-24; 22T49-23, 111-14 to 21), although the Henry Hudson Parkway only turns into the West Side Highway south of 72nd Street in Manhattan.

away from the Escalade. (16T14-1 to 16, 31-9). When he arrived, he saw three thin black males exit the Escalade: the driver wore a green sweater and dark jeans; the rear-seat passenger wore whitewash jeans and white sneakers; and the front-seat passenger wore dark jeans. (16T15-1 to 8). Officer Avella attempted to pursue them, but ultimately he and the others lost sight of the suspects in the densely-wooded area. (15T174-23; 16T15-11 to 25, 43-25).

In response to a dispatch at 2:07 a.m., Officer Phillip Robinson of the New York City Police Department (NYPD) and additional officers canvassed the area around Riverside Park by the Henry Hudson Parkway where the suspects fled. (20T185-23 to 186-8, 189-12, 192-20 to 22; 21T13-5 to 6). The police found a suspect, Shawn Harewood, attempting to hide by lying flat on railroad tracks near 145th Street inside of the park. Subsequent investigation would reveal that Samuels knew Harewood for almost twenty years until their friendship abruptly ended around 2016. (18T18-23 to 20-1; 20T186-1 to 19, 195-22, 199-21 to 200-5; 21T13-2, 15-17). The police told Harewood not to move when they approached. (20T186-22 to 187-6). The area was full of garbage from the highway, and not a place where you would normally find a person. (21T130-10 to 12). Harewood tried to escape by climbing over a wall, but other officers were able to apprehend him at approximately 2:18 a.m. (20T187-12 to 188-4, 192-4). The police seized a phone found on Harewood

during his arrest, which the police would later learn used a prepaid account and thus did not have a subscriber (hereinafter "Harewood's burner phone"). (20T197-19 to 198-20; 21T143-8 to 20; 28T106-12 to 21, 115-11; 29T25-9 to 21). Later that morning, Officer Avella identified Harewood as the driver of the vehicle. (16T20-2 to 10, 55-2, 58-21 to 59-2).[4]

During the trial, Samuels identified Harewood in court based on their prior relationship, not as one of his assailants during the robberies. Samuels did not identify defendant as one of his assailants in a pretrial photographic array; he testified that he had no known interactions with defendant prior to the robberies. (18T20-22 to 21-14, 36-22 to 39-16; 19T153-17 to 54-13; 22T253-2 to 16).

During the subsequent investigation, the police obtained surveillance video of the robbery taken from inside the parking garage, which was played

[4] The NYPD also arrested a second man, Jonathan Ricketts, in the general area, who was initially misidentified as one of the suspects. Ricketts admitted to the police that he "may have been" in the Escalade, though he acted strange and unstable during questioning. (15T278-24; 21T133-6 to 7; 22T228-2 to 11). Ultimately, the charges against Ricketts were dismissed due to exonerating evidence. (15T181-8 to 182-6, 245-12 to 13; 22T221-4 to 10). Specifically, Ricketts was wearing red jeans when the police found him. The dash-cam video of the suspects running away from the Escalade did not show anybody wearing red pants. (21T134-1 to 9; 22T239-16 to 18). In addition, data and information form Ricketts phone showed that it was not near the robbery, and that he did not communicate with any of the other suspects. (21T140-16 to 19).

for the jury at trial. (18T49-3 to 22; Pa1).[5] Additional surveillance showed that two individuals jumped over a wall from the parking deck to the south side of the garage. (16T66-21 to 67-2). The police searched the area where the two individuals would have landed and found one of Samuels' bracelets on the ground. (16T71-6 to 13, 85-17 to 21; 18T55-18 to 23).

The police towed and searched the abandoned Escalade. (21T153-6 to 19). The police found some of Samuels' stolen items in the vehicle, including a gold chain, bracelet, earring, and wallet. (18T50-24 to 55-16; 20T46-8 to 18, 50-3 to 9, 81-9 to 21, 87-11 to 88-24). They also found the Escalade's registration and license plate. (20T84-20 to 91-6). The registered owner of the Escalade was Annodette Harewood. (20T91-4).

The police found a number of defendant's items in the Escalade. Specifically, they found a state identification card, debit card, and insurance card all with defendant's name. (20T55-16, 168-24 to 25). Defendant's debit and insurance card were in the pocket of a green jacket. (20T61-17 to 22, 66-6 to 72-23). Inside of one of his jacket pockets, the police found a piece of paper with a handwritten phone number for Harewood's burner phone. (20T73-3 to 7; 30T136-11 to 20). In addition, the police found a red baseball

[5] The State will mail copies of the disk to the Appellate Division clerk's office. The name of the file showing the robbery is "parking 141 april 2nd."

hat in the rear of the vehicle that defendant had worn in a photograph on a date prior to the robberies. (20T75-13 to 80-22; 21T160-23 to 170-1). Finally, the police found defendant's cell phone between the front driver's street and center console of the Escalade. (20T94-21 to 96-1, 141-13 to 14). The phone's number was registered in defendant's name, (29T29-4 to 30-19), and defendant admitted during a phone call after his arrest that his phone and identification were "found in the truck," which was how the police were "link[ing] me to it." (28T159-16 to 167-25).

A search of defendant's cell phone revealed yet further incriminating evidence. For example, the police found recent photographs stored on the phone of defendant in which he was wearing the same green jacket and red hat that had been found in the vehicle. (21T159-23 to 25, 160-23 to 170-1; 29T107-22 to 109-9). In addition, on March 22, 2018, a phone contact labeled "SP" had sent defendant a text message from a phone number subscribed to by "Annodette Harewood" (hereinafter "Harewood's phone"). The text message sent from Harewood's phone to defendant's phone included two photographs of jewelry: one item was the same make and model as the watch stolen from Samuels; and the second item was the same make and model as one of Samuels' bracelets that the robbers were unable to remove from his wrist that evening. (18T61-8 to 15, 70-16 to 22, 76-4 to 13; 29T101-19 to 103-23).

On March 27, 2018, defendant's and Harewood's phones engaged in the following exchange:

> Harewood's Phone: "So ur good?"
> Harewood's Phone: "I'm not texting u down like this"
> Defendant's Phone: "Nah I'm at work."
> Defendant's Phone: "When we going to do this"
> Harewood's Phone: "Where ur gonna gonna [sic] be tonight"
> Harewood's Phone: "Ima try to link tonight or tomorrow"
> Harewood's Phone: "Link ur man that u trust we gonna go see him!!"
> Defendant's Phone: "Ok"
>
> [(29T105-22 to 106-12; Pa2).]

On March 30, 2018, defendant's phone text messaged a contact in his phone entitled MAK, "Yo, where the heater at?" Defendant's phone subsequently called the number, and the call lasted five seconds. (29T106-22 to 107-8). Defendant's twin brother would later testify that he was "MAK" and had received that text message. He claimed that the message referred to an electrical heater, not a gun. (29T168-3 to 14).

The investigation also piled up additional evidence against Harewood. Included in this inculpatory evidence: the police found a GPS tracking device surreptitiously lodged in the rear-wheel well of Samuels' vehicle and Harewood's burner phone contained a mobile application for using that device. (21T174-6 to 9; 29T73-15 to 76-14, 93-24 to 94-2). Harewood's burner phone also showed that on March 29, 2018, the phone's user made the following internet query, "Do cops have access to housing building cameras?" (29T70-3

to 5). The next day, the phone searched the cost of apartments in the building where Samuels resided. (29T70-18 to 20). At 11:42 p.m. on April 1 – the night of the robberies – Harewood's burner phone entered the address of the venue in which Samuels was performing into a Google Maps application. (29T71-4 to 19). Approximately thirty minutes later, the burner phone entered Samuels' address into an Apple Maps application. (29T71-22 to 72-1). The phone again displayed Samuels' address in the Apple Maps application at 12:44 a.m. on April 2. (29T92-18 to 93-12). From 12:44 a.m. to 12:47 a.m., Harewood's burner phone opened the phone application linked to the aforementioned GPS device that had been surreptitiously lodged in the rear-wheel well of Samuels' car and toggled between that application and the Apple Maps application. (29T73-15 to 76-14, 93-24 to 94-19).

An analysis of the cell phone towers accessed by defendant's phone and Harewood's burner phone added yet more evidence of their guilt. The records suggested that defendant and Harewood (1) had previously surveilled Samuels' apartment building; (2) were near the venue during Samuels' performance; and (3) were in the area of the robberies on the morning of April 2, 2018.

Specifically, between 9:15 p.m. and 10:30 p.m. on March 28, 2018, and 8:00 a.m. and 3:20 p.m. on March 30, defendant's phone and Harewood's

burner phone connected to towers near Samuels' apartment building.[6] Neither phone connected to any towers in that area of Fort Lee at any earlier point in February or March 2018. (29T31-3 to 32-5, 32-10 to 33-8, 34-1 to 10). On April 1, 2018, at 11:08 p.m., defendant's phone accessed a tower in the Bronx, (29T34-24 to 35-8), and more precise location data found on Harewood's burner phone showed that it was located at or near the venue in which Samuels was performing at 11:54 p.m. (29T85-17 to 86-10). Between 1:25 a.m. and 2:00 a.m. on April 2, 2018, defendant's phone and Harewood's burner phone were both using phone towers just south of the GW Bridge, i.e., near the location of Samuels' apartment building. (29T36-13 to 17). More precise location data from Harewood's burner phone showed that it was located outside the Samuels' parking garage between 1:36 and 2:01 a.m. By 2:14 a.m. – within a few minutes of his arrest by the NYPD – Harewood's burner phone was in a wooded area next to the Henry Hudson Parkway. (29T86-18 to 88-13; Pa3 to 6).

[6] Special Agent John Hauger of the FBI explained that when a cell phone is used, it connects to the strongest, clearest signal, which is usually but not always the closest tower. (29T15-1 to 9, 38-9 to 10).

LEGAL ARGUMENT

POINT I

THE COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE ROBBERY OF BRYANT, AND THE STATE ADDUCED AMPLE EVIDENCE IN SUPPORT OF THAT CONVICTION.

In Point I, defendant advances five claims attacking his conviction solely as to the robbery of Corey Bryant. The first claim, whether the State presented sufficient evidence to prove a robbery of Bryant, is the only one defendant raised with the trial court. The other four claims – whether the court erred in the jury charge, erred in its answer to a jury question, erred by failing to charge aggravated assault as a lesser-included offense, and erred by failing to charge aggravated assault as a related offense – are raised for the first time on appeal.

The State disagrees with defendant's contentions. The State presented ample evidence as to all elements of the robbery of Bryant. The State did not need to prove a successful theft from Bryant, as attempted theft also satisfies the robbery statute, and there is incontrovertible evidence that the robbers patted down Bryant in hopes of finding weapons or valuables to steal. Moreover, the trial court correctly instructed the jury regarding the elements of robbery, and did not misinform the jury in response to its question about whether a theft of one party may be associated with another party. Finally, aggravated assault for pointing a firearm (hereinafter "pointing"), N.J.S.A.

2C:12-1(b)(4), is not a lesser-included offenses of armed robbery, N.J.S.A. 2C:15-1, and the trial court was not permitted, let alone obligated, to charge pointing in the absence of defendant's request.

A. The Trial Court Correctly Denied Defendant's Motion for a Judgment of Acquittal as to the Robbery of Bryant

Defendant first argues that the trial court should have granted defendant's motion for a judgment of acquittal "[b]ecause nothing was stolen from Bryant." (Db18). This argument is flawed because, as defendant correctly points out earlier in his brief, "the jury could have convicted [defendant]" for the "robbery of Bryant if it found that there was an attempted theft from Bryant." (Db12). Given that Bryant testified that the robbers patted him down, and the surveillance footage shows the robbers rummaging through his clothing, there was overwhelming evidence of an attempted theft of Bryant. The robbers were clearly searching for something on Bryant – such as weapons or valuables – and they do not evade criminal liability merely because they could not find what they were seeking.

In relevant part, our criminal code provides that "[a] person is guilty of robbery if, in the course of committing a theft, he . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury[.]" N.J.S.A. 2C:15-1(a)(2). An act that "occurs in an attempt to commit theft" is deemed to be "in the course of committing a theft." N.J.S.A. 2C:15-1(a). The actor does not

need to put the victim of the theft or attempted theft in fear; it is still a robbery where another person was threatened or put in fear during the course of the theft or attempted theft. See State v. Mirault, 92 N.J. 492, 498-99 (1983). However, every robbery conviction must be based upon a separate theft or attempted theft. State v. Lawson, 217 N.J. Super. 47, 51 (App. Div. 1987). For example, the robbery statute "should not be extended . . . to sustain two robbery convictions for assaults upon two victims in immediate flight after a theft or attempted theft from a third victim." Id.; accord State v. Sewell, 127 N.J. 133, 137 (1992).

As for motions for a judgment of acquittal, the long-established standard was articulated in State v. Reyes, 50 N.J. 454, 458-59 (1967):

> [T]he question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

The court "'is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State.'" State v. Papasavvas, 170 N.J. 462, 521 (2002) (quoting State v. Kluber, 130 N.J. Super. 336, 342 (App. Div. 1974)).

Here, the trial court denied defendant's motion for a judgment of acquittal as to the count charging a robbery of Bryant, in part citing the

evidence that he was ordered down to the ground and that "his pockets [we]re run[.]" (29T156-23 to 157-1). The court's ruling was correct, as the only plausible reason why the robbers patted down Bryant and rummaged through his clothing was to take items. Perhaps they were looking for valuables, but were unsuccessful because, as Bryant testified, the limited personal items he brought with him were stored in a "slot" in his jacket. (21T88-4 to 8). Perhaps they were only looking for weapons to seize for their own safety, which Bryant did not have on his person. No matter the case, the act is an attempted theft, i.e., a "substantial step in a course of conduct planned to culminate" a theft. N.J.S.A. 2C:5-1. And, under the law, the attempted theft of Bryant is the necessary predicate that supported the robbery charge as to him. See Lawson, 217 N.J. Super. at 50-51.

Defendant here does not contest that Bryant was patted down, (Db16), but fails to acknowledge what necessarily follows from that fact: there was an attempt to steal something from Bryant. In short, the court correctly denied defendant's motion for a judgment of acquittal under virtually any standard, let alone the state-friendly standard adopted in Reyes, 50 N.J. at 458-59.

B. The Trial Court Correctly Instructed the Jury that Attempted Theft Is Deemed to Be "In the Course of Committing a Theft"

For the first time on appeal, defendant argues that the court committed reversible error because "with respect to the charge on robbery of Bryant, the

jury was instructed that it had to find that Bryant was threatened with force or put in fear of immediate bodily [injury] and that Samuels was the victim of a theft or attempted theft." (Db18 to 19). The State disagrees. The court did not instruct the jury that the theft or attempted theft of Samuels served as the predicate for the robbery of Bryant. Instead, the court correctly informed the jury that one element of robbery is that it must be committed "in the course of committing a theft" and that an attempted theft is deemed to be "in the course of committing a theft."

This Court's standards for reviewing jury instructions are well settled. A "trial court must give 'a comprehensible explanation of the questions that the jury must determine[.]'" State v. Baum, 224 N.J. 147, 159 (2016) (quoting State v. Green, 86 N.J. 281, 287 (1981)). "In passing upon the propriety of a trial court's instruction, this court will examine the entire charge to see whether the jury was misinformed as to the controlling law. . . . The test, therefore, is whether the charge in its entirety was ambiguous or misleading." State v. R.B., 183 N.J. 308, 324 (2005) (citation and internal quotation marks omitted).

Here, the court told the jurors that one element of robbery is that "defendant was in the course of committing a theft" and "[a]n act is considered to be in the course of committing a theft if it occurs . . . in an attempt to

commit the theft[,] during the commission of the theft itself[,] or in immediate flight after the attempt or commission." (30T167-8 to 12). This language is taken directly from the model jury charge, which does not require any further specification regarding the identity of the victim of the theft or attempted theft. See Model Jury Charge (Criminal), "Robbery in the First Degree (N.J.S.A. 2C:15-1)" (rev. 9/10/12). The court also later defined an attempted theft for the jury. (30T182-2 to 183-10).

For the first time on appeal, defendant argues that the court identifying the jewelry as the stolen item when discussing the State's theory of liability on the lesser-included offense of theft, (30T177-16 to 17), must have led the jury to believe that the State only alleged a theft or attempted theft as to Samuels. This argument fails for two reasons.

First, identifying the State's theory as to a different crime – the lesser-included offense of theft – is not the same as identifying the State's theory as to each robbery. The jury would not have simply assumed that the theories were the same, especially here where the State singled out the attempted theft of Bryant as a basis for defendant's guilt of robbery. That is, the State argued during its summation, "[J]ust because the items were taken off of Safaree Samuels and not Corey Bryant, he's still a victim, too. This was a young man who was working for Safaree Samuels only a short amount of time when a gun

was pulled on him and yes, nothing was taken from him but as you will be instructed by the [c]ourt, it does not have to be effectuated." (30T141-5 to 11).

Second, during its discussion of the verdict sheet, the court explained to the jury that only second-degree robbery and attempted theft from Bryant were lesser-included offenses of the Bryant robbery. (30T225-23 to 226-18; Da16 to 17). The court further instructed the jury that the question for it to consider on the lesser-included charge of attempted theft was whether defendant "commit[ed] the crime of attempted theft from the person of Corey Bryant." (30T226-11 to 18). Thus, taken in sum, and reading the instructions as a whole, the jury was well aware that the State alleged an attempted theft of Bryant.

It bears emphasis that defendant must do more than convince this Court there was an error in the charge. Defendant must demonstrate plain error because he did not lodge any of the objections that he now advances on appeal. "As applied to a jury instruction, plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969)). "In addition, any finding of plain

error depends on an evaluation of the overall strength of the State's case." Id. And our Supreme Court draws a distinction between "an incomplete instruction rather than an affirmative misstatement of the law." State v. Marrero, 148 N.J. 469, 496 (1997).

In this case, as explained in Point I. A., supra, it is plain that Bryant was the victim of an attempted theft, and thus it is plain that there were two robberies in this case as opposed to one. Defendant's allegations that the court misinformed the jury lack merit. Defendant's concomitant claim that the trial court could have been more specific is true of virtually any jury charge and does not establish plain error. The jury charge here was in no way clearly capable of producing an unjust result. R. 2:10-2.

C. The Court Correctly Answered the Jury's Question

Defendant next argues that the court erred in responding to the following inquiry, "Is a theft that occurred to one person also associated with a second party that is present?" (31T5-1 to 3, 19-11 to 23). Defendant argues that the short answer is "No" and that a longer answer should have told the jury that "to convict of robbery of Bryant, the jury had to find that [defendant] stole something from Bryant." (Db21).

The State again disagrees. Once the court clarified the jury's question, the court correctly explained that a robbery may involve conduct perpetrated

against only the victim of the theft or attempted theft, but a robbery may also occur if the perpetrator threatens or puts someone other than that victim in fear of immediate bodily injury during the course of the act. In other words, so far as robbery is concerned, a theft or attempted theft against one victim may indeed be "associated" with a second victim. To the extent that defendant argues for the first time on appeal that the court should have said more, he cannot show plain error.

1. The Jury's Question and the Court's Answer

One of the questions the jury asked during deliberations inquired, "Is a theft that occurred to one person also associated with a second party that is present?" (31T5-2 to 3). The court consulted with the attorneys, and initially defense counsel argued that the query only pertained to the lesser-included offense of theft as opposed to robbery. (31T8-8 to 20). The court disagreed with counsel's interpretation, but agreed with defense counsel's suggestion to clarify the question with the jury. (31T12-3 to 9). The court then brought out the jury and sought clarification, to which the jury affirmed that the question pertained to the robbery crimes as well as the lesser-included theft crimes. (31T19-15 to 23). The court then referred the jury to the elements of the written charge and explained:

> With regard to robbery in the first degree or second degree, okay? In order for you to find [defendant] guilty of robbery, the State is

required to prove each of the following elements beyond a reasonable doubt. . . . One, that the [d]efendant was in the course of committing a theft. And two, that while in the course of committing that theft, the [d]efendant threatened another with or purposefully put him in fear of immediate bodily injury. Now, robbery in the first degree requires the additional element of being armed with or threatening the immediate use of a deadly weapon. Robbery in the second degree does not require that element, okay?

So, when the elements speak of while being in the course of committing that theft, the [d]efendant threatened another with, or purposefully put him in fear of immediate bodily injury, that can be the alleged victim who is the actual object of the theft, the person . . . that something is sought to be taken from, and . . . the person of another, another person, can also be someone present . . . who is threatened with or purposefully put in fear of immediate bodily injury. Okay? Even if nothing was taken from that other person. All right? Do you understand that? Okay.

Now, with respect to theft from the person, and attempted theft from the person, there is a distinction between robbery in the first degree and second degree, and theft from the person and attempted theft from the person. Because . . . if you do consider those lesser included offenses, those pertain to the specific alleged victim, and no one else. Okay?

So, when we're dealing with robbery in the first degree, robbery in the second degree, another person can be the object of the theft, and can also be another person present who was threatened or put in fear of immediate bodily injury, all right? When we're dealing with theft from the person and attempted theft from the person, it has to deal specifically with the specific alleged victim. Okay? Do you understand that? All right? So . . . if there was another person present . . . their presence may be relevant in your consideration, and you are to consider all of the evidence, okay? And it's your recollection of the evidence that controls.

But in order to prove theft from the person beyond a reasonable doubt, the State has to prove each of the elements of theft from the person . . . beyond a reasonable doubt with respect to that specific

> alleged victim. And you'll see in the verdict sheet that we have separate counts pertaining to the alleged victim of Safaree Samuels and pertaining to the alleged victim of Corey Bryant. All right?
>
> Now, there is no evidence in this case that anything, any movable property, was actually taken from Corey Bryant, all right? Everyone understand? Okay.
>
> [(31T20-10 to 22-20).]

Defense counsel did not object to any aspect of this response. His initial objection was satisfied when the court clarified that the jury's question referred to the crimes of theft and robbery.

2. The Court Correctly Explained the Law

The law discussed by the court in response to the jury's question is well settled. As previously mentioned, our criminal code provides in pertinent part that "[a] person is guilty of robbery if, in the course of committing a theft, he . . . inflicts bodily injury or uses force upon another; or . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury[.]" N.J.S.A. 2C:15-1(a)(1) and (2) (emphasis added).

Forty years ago, in Mirault, 92 N.J. at 493, our Supreme Court addressed "whether using force or inflicting bodily injury on a police officer investigating a burglary constitutes the assault 'upon another' that elevates theft to robbery." The Court held that "it does," observing that our code enhances a theft to a robbery when, during the course of a theft, a qualifying

harm (e.g., bodily injury) is perpetrated against "another." Id. at 493, 499. The Court reasoned that "[a]s used in the statute, the term 'another' is broader than . . . some other term restricted to the actual theft victim[,]" and thus a robbery could occur when the thief assaults an investigating officer as opposed to the victim of a theft. Id. at 499; see also State v. Sein, 232 N.J. Super. 300, 303 n.2 (App. Div. 1989) (explaining that a robbery could occur when the injury or force is used against a "bystander" as opposed to the theft victim).

Given this well-settled law, the trial court correctly answered the jury's question regarding whether a "theft that occurred to one person [is] also associated with a second party that is present[.]" (31T5-2 to 3). The court correctly informed the jury that theft from a victim may be associated with a second party as it pertained to robbery. More specifically, the court told the jury:

> So, when the elements speak of while being in the course of committing that theft, the [d]efendant threatened another with, or purposefully put him in fear of immediate bodily injury, that can be the alleged victim who is the actual object of the theft, the person . . . that something is sought to be taken from, and . . . the person of another, another person, can also be someone present . . . who is threatened with or purposefully put in fear of immediate bodily injury. Okay? Even if nothing was taken from that other person.
>
> [(31T20-25 to 21-12) (emphasis added).]

Defendant argues that the "short answer" to the jury's question is "No." (Db21). But defendant's proposed short answer is wrong. A theft or attempted

theft from a victim is a robbery if the perpetrator "[t]hreatens another with or purposely puts him in fear of immediate bodily injury" during the act. N.J.S.A. 2C:15-1(a) (emphasis added). The term "another" in the statute could be the target of the theft, but it also could be an additional party such as a responding police officer. See Mirault, 92 N.J. at 499. And thus the court's summary of its own response – "if there was another person present . . . their presence may be relevant in your consideration," (31T22-5 to 7) – was in fact the correct response.

Defendant also argues that a longer answer should have told the jury that "to convict of robbery of Bryant, the jury had to find that [defendant] stole something from Bryant." (Db21). But that proposed answer is wrong again. The jury did not have to find that defendant or a person for which he was legally accountable "stole something from Bryant." As discussed in Point I.A., supra, the definition of "theft" in the robbery statute expressly incorporates acts that "occur[] in an attempt to commit theft." N.J.S.A. 2C:15-1(a).

And, moreover, the court's response to the jury question characterized the "alleged victim" of the robbery as the person "who is the actual object of the theft, the person . . . that something is sought to be taken from." (31T20-25 to 21-12). Given that the court had already told the jury that the State alleged Bryant was the robbery victim in count three, (30T166-12 to 18), the

jury would have inferred that guilt on count three was based on the theory that Bryant was the victim of the attempted theft. This understanding of the response is consistent with the State's summation, which insisted that Bryant is "a victim, too[]" because "yes, nothing was taken from him but as you will be instructed by the [c]ourt, it does not have to be effectuated." (30T141-5 to 11). Cf. State v. Marshall, 123 N.J. 1, 145 (1991) (reasoning that "the prejudicial effect of an omitted instruction must be evaluated in light of the totality of the circumstances – including all the instructions to the jury, [and] the arguments of counsel[]").

The State acknowledges that the general thrust of defendant's argument here is that the court should have been more explicit that the jury needed to find that there were two victims of theft or attempted theft in order for there to be two robberies. However, defendant did not make this request or object to the court's answer in the trial court. Thus, defendant must show plain error.

The plain error test for responding to jury questions is the same as that used for challenges to jury instructions. See State v. Berry, 254 N.J. 129, 147-48 (2023). Accordingly, defendant must demonstrate that the alleged error by the court in response to the jury question constituted "legal impropriety . . . prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that

of itself the error possessed a clear capacity to bring about an unjust result." Chapland, 187 N.J. at 289 (citation and internal quotation marks omitted).

Defendant fails to meet the test for plain error here for two reasons. First, the court answered the jury's question and did not misstate the law in its response for all of the reasons previously discussed. Second, there was no bona fide issue regarding whether Bryant was the victim of an attempted theft. The robbers patted Bryant down and rummaged through his clothing, as evidenced by his testimony and the surveillance video. The only reasonable inference is that the robbers took this action to seize valuables or a weapon from Bryant. Thus, defendant has not carried his burden of demonstrating that the alleged error possessed a clear capacity to bring about an unjust result. The jury correctly found defendant guilty of the Bryant robbery.

D. Defendant Was Not Entitled to a Sua Sponte Jury Instruction for Pointing as to the Bryant Robbery

Defendant further argues that the court erred in failing to charge pointing under N.J.S.A. 2C:12-1(b)(4) as a lesser-included offense of armed robbery. The State responds that pointing is not a lesser-included offense of armed robbery. In any event, the charge was not clearly indicated and there was no basis for the jury to acquit defendant of the Bryant robbery while finding him guilty of pointing at Bryant.

1. Pointing Is Not a Lesser-Included Offense of Armed Robbery

"The determination of whether an offense is included within an offense charged is not open-ended." State v. Thomas, 187 N.J. 119, 131 (2006). In relevant part, our code provides that a lesser-included offense "is established by proof of the same or less than all the facts required to establish the commission of the offense charged" or "[i]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest . . . suffices to establish its commission." N.J.S.A. 2C:1-8(d)(1) and (3). A lesser-included-offense analysis "calls for a comparison of the statutory definitions of the respective offenses to ascertain whether they have common or overlapping elements that require proof of identical facts." State v. Alexander, 233 N.J. 132, 146 (2018) (citation and internal quotation marks omitted). Lesser-included offenses are distinct from "related offenses," which merely "share a common factual ground, but not a commonality in statutory elements, with the crimes charged in the indictment." State v. Thomas, 187 N.J. 119, 132 (2006).

The distinction between a related and lesser-included offense is well-illustrated by State v. Alexander, 233 N.J. at 147, wherein the Supreme Court addressed whether serious bodily injury aggravated assault (SBI aggravated assault), N.J.S.A. 2C:12-1(b)(1), is a lesser-included offense of armed robbery,

N.J.S.A. 2C:15-1. There, a grand jury indicted the defendant for armed robbery, among other crimes, charging that he inflicted bodily injury with a deadly weapon during an attempted theft. The facts at trial established that the defendant and three accomplices demanded money from the victim and slashed the victim across his forehead with a knife when he refused. The victim's injury resulted in a permanent scar. At trial, the defendant testified about a dispute with the victim, but claimed that there was no attempt to steal. The jury convicted the defendant of armed robbery, conspiracy, and weapons crimes. Id. at 136-39.

On appeal, the defendant claimed that the trial court erred by not sua sponte charging the jury on SBI aggravated assault, N.J.S.A. 2C:12-1(b)(1), as a lesser-included offense of armed robbery, N.J.S.A. 2C:15-1. The Supreme Court rejected this claim, reasoning that SBI aggravated assault did not constitute a lesser-included offense because (1) it "requires a greater injury element than that in the State's robbery charge, cf. N.J.S.A. 2C:1–8(d)(3)"; and (2) it "must be established by proof of more facts than those needed to establish 'bodily injury', cf. N.J.S.A. 2C:1-8(d)(1)." Id. at 147. That is, SBI aggravated assault required proof of "'bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ,'" whereas

the elements of robbery only required proof of bodily injury or force on the victim. Id. (quoting N.J.S.A. 2C:11-1(b))

Notably, the Court found that SBI aggravated assault was not a lesser-included offense despite the fact that the victim suffered a permanent scar on his face from the slash across his forehead – which, by definition, is a serious bodily injury. See N.J.S.A. 2C:11–1(b) (defining serious bodily injury to include "serious, permanent disfigurement"). The Court observed that those factual circumstances may render SBI aggravated assault "a related offense of the State's robbery charge," but that an analysis of lesser-included offenses depends on a comparison of statutory elements. Alexander, 233 N.J. at 147.

Here, the analysis and result are essentially the same. On the one hand, pointing would have required the State to prove that defendant (1) "knowingly pointed a firearm at or in the [direction] of another" and (2) "acted under circumstances that manifested extreme indifference to the value of human life." Model Jury Charge (Criminal), "Aggravated Assault (N.J.S.A. 2C:12-1(b)(4)" (rev. 3/21/05). On the other hand, the armed robbery charge required the State to prove that defendant (1) in the course of committing a theft; (2) "did threaten immediately bodily injury" or "purposefully put [the victim] in fear of immediate bodily injury[]"; and (3) was armed with or threatening the immediate use of a deadly weapon. (Da6; see N.J.S.A. 2C:15-1(a)).

Thus, the first element of pointing – that defendant pointed a gun in the direction of the victim – requires proof of additional facts and involves a higher risk of injury than that required to establish an armed robbery. The robbery charge merely required the State to prove that defendant was armed with or threatened the use of a deadly weapon, not that he actually pointed the weapon at the victim. See N.J.S.A. 2C:15-1(a); see also State v. Smith, 198 N.W.2d 630, 633 (Wis. 1972) (holding that "pointing a firearm is not an included offense with the armed robbery statute" because "pointing the weapon is not a fact necessary to prove armed robbery"); Morris v. Commonwealth, 609 S.E.2d 92, 96 (Va. Ct. App. 2005) (reasoning that brandishing a firearm is not a lesser-included offense of robbery because "robbery can be committed without brandishing").

In addition, the second element of pointing – that the defendant acted under circumstances that manifested extreme indifference to the value of human life – again requires proof of more facts and a higher risk of injury than that required to establish an armed robbery. The legal theory of the indictment charged defendant with threatening or putting Bryant in fear of bodily injury while armed with or threatening the use of a deadly weapon. (Da6) (emphasis added). The pointing charge would have required proof that "defendant acted under circumstances that manifested extreme indifference to the value of

human life," i.e., that "the defendant acted in a way which showed that defendant did not care that someone might be killed." Model Jury Charge (Criminal), supra.

Thus, like in Alexander, 233 N.J. at 147, the crime of pointing "requires a greater [risk of] injury element than that in the State's robbery charge, cf. N.J.S.A. 2C:1-8(d)(3), and must be established by proof of more facts than those needed to establish" the State's robbery charge, cf. N.J.S.A. 2C:1-8(d)(1). It does not matter that the facts presented at trial may have ultimately satisfied the elements of pointing. That would merely indicate that pointing was a related offense, i.e., an offense that "share[s] a common factual ground, but not a commonality in statutory elements, with the crimes charged in the indictment." Alexander, 233 N.J. at at 144. The analysis of lesser-included offenses "calls for a comparison of the statutory definitions of the respective offenses[.]" Id. at 146 (emphasis added) (citation omitted).

Because the charge of pointing was at most a related offense of the armed robbery charge, the trial court was precluded from charging it in the absence of defendant's request. The law is clear that "trial courts are never required to charge a jury sua sponte on related offenses." Id. at 144. "Jury instructions on related offenses raise constitutional concerns because criminal defendants have rights to a grand jury presentment and fair notice of criminal

charges against them." Id.; see N.J. Const. art. I, ¶ 8. In order to protect a defendant's rights, "a trial court may instruct the jury on a related offense only when 'the defendant requests or consents to the related offense charge, and there is a rational basis in the evidence to sustain the related offense.'" Id. at 144-45 (quoting Thomas, 187 N.J. at 133).

In this case, defendant did not request or consent to the court charging the jury with pointing. Defendant concedes as much in his brief. (Db33). Consequently, the court did not err by leaving pointing out of its charge.

2. The Crime of Pointing Was Not Clearly Indicated and There Was No Basis for the Jury to Acquit Defendant of the Bryant Robbery Yet Find Him Guilty of Pointing

In addition to pointing not being a lesser-included offense, defendant's claim here also fails because the charge was not clearly indicated by the record and there was no basis for the jury to find defendant innocent of the Bryant robbery but guilty on the alleged lesser-included offense.

"An unrequested charge on a lesser included offense must be given only where the facts in evidence 'clearly indicate' the appropriateness of that charge." State v. Savage, 172 N.J. 374, 397 (2002). "In determining whether the facts in evidence clearly indicate that a charge should be given, the trial court is not required 'to scour the statutes to determine if there are some uncharged offenses of which the defendant may be guilty.'" State v. Dunbrack,

245 N.J. 531, 545 (2021) (quoting State v. Sloane, 111 N.J. 293, 302 (1988)). "The trial court is also not saddled with the burden of sifting meticulously through the record to find 'some combination of facts and inferences that might rationally sustain' the lesser included offense." Id. (quoting State v. Choice, 98 N.J. 295, 299 (1985)). Rather, "the record clearly indicates a lesser-included charge . . . if the evidence is jumping off the page." Id. (quoting State v. Denofa, 187 N.J. 24, 41-42 (2006)).

Even where a lesser-included offense meets this standard, a trial court should only provide the instruction if there is a basis to believe that the jury will acquit of the charged offense and convict of the lesser. This is because "[t]he submission of an included crime is justified only where there is some basis in the evidence for finding the defendant innocent of the crime charged and yet guilty of the included crime." State v. Brent, 137 N.J. 107, 115 (1994) (quoting Model Penal Code § 1.08 cmt. at 42–43 (Tentative Draft No. 5, 1956)); see, e.g., State v. Cassady, 198 N.J. 165, 179 (2009) (holding that a trial court not required to instruct jury as to the lesser-included theft where the facts adduced at trial established a "plain and simple" bank robbery).

Here, defendant asserts that Bryant testified that one of the robbers pointed a gun at him, but defendant does not cite to any testimony substantiating this claim. The most that Bryant testified to in terms of the

firearm is that the robber holding a gun approached him, grabbed his arm, and directed him to sit on a car. (21T37-7 to 23). The presence of the firearm surely scared and intimidated Bryant, but scaring and intimidating is not the same as pointing a firearm – a necessary element under N.J.S.A. 2C:12-1(b)(4). Defendant's argument essentially infers from the testimony that a gun was pointed at Bryant, though an inference from testimony does not meet the clearly indicated standard. See Dunbrack, 245 N.J. at 545. The evidence calling for the charge must be "obvious" and "jump[] off the page." Id. The evidence of pointing at Bryant was not obvious and did not jump off the page.[7]

Nor was it clearly indicated that defendant "acted under circumstances that manifested extreme indifference to the value of human life," i.e., that "the defendant acted in a way which showed that defendant did not care that someone might be killed." Model Jury Charge (Criminal), "Aggravated Assault (N.J.S.A. 2C:12-1b(4)," supra. Mere possession of a firearm during the course of a robbery does not clearly indicate that defendant did not care whether Bryant might be killed.

[7] As the defense points out, the court's sentencing remarks indicate that it inferred that defendant pointed a gun at Bryant. (36T46-15 to 16; Db33 to 34). However, a sentencing court is not confined to render findings of fact that jump off the page; the court need only ensure that its findings are based on competent and credible evidence in the record. State v. Roth, 95 N.J. 334, 365-66 (1984).

Finally, there was also no rational basis in the record that would have allowed the jury to acquit defendant of the Bryant robbery yet find him guilty of pointing. Here, for the reasons already discussed in Point I.A., B., and C., supra, the pat down and rummaging in Bryant's clothing clearly constituted an attempted theft. If the jury believed that defendant was a robber, then they were going to convict him of the robberies. If they did not believe it, then he would have been acquitted of both robberies. There was no rational basis to believe that the jury would acquit defendant of the Bryant robbery but find him guilty of pointing at Bryant. See Cassady, 198 N.J. at 179.[8]

E. The Trial Court Is Not Permitted to Instruct the Jury on Related Offenses Unless the Instruction is Requested by the Defense

Defendant alternatively argues that the court erred by not charging pointing under N.J.S.A. 2C:12-1(b)(4) because it is a "related" offense of armed robbery. (Db34). The State disagrees because our case law specifies that a court has no obligation to charge unrequested related offenses. In fact, the trial court is not allowed to instruct a jury on related offenses without a waiver by defendant of his right to a grand jury presentment.

[8] The State notes that defendant does not claim that the armed robbery conviction of Samuels should be reversed based on a failure to charge the alleged lesser-included offense of pointing, even though pointing was not charged as to that robbery as well. Presumably, this is because defendant believes that there was no rational basis for the jury to acquit defendant of the armed robbery of Samuels yet find him guilty of pointing a firearm at Samuels.

Time and time again, our Supreme Court has explained that a trial court is under no obligation to instruct the jury on a related offenses unless requested by defendant. See Alexander, 233 N.J. at 144 ("In contrast to lesser-included offenses, trial courts are never required to charge a jury sua sponte on related offenses.") (emphasis added); State v. Maloney, 216 N.J. 91, 107–08 (2013) ("[D]ue to constitutional grand jury and notice considerations, trial courts are under no obligation to give, sua sponte, a related offense instruction that is not requested by either the prosecution or the defense."); Thomas, 187 N.J. at 134 (reversing appellate panel's ruling that it was error to not charge a related offense because "the trial court has no sua sponte obligation to charge the jury on a related offense that is not requested or consented to by the defense[]").

All of the cases cited by defendant in his brief are inapposite. Defendant cites to broad language in State v. Choice, 98 N.J. 295, 298-99 & n.5 (1985), but the Court's analysis there addressed the trial court not charging a lesser-included offense – manslaughter in a murder case. The case thus supports the unremarkable proposition that a trial court must instruct on an unrequested lesser-included offense in the event that certain other conditions are met.

Defendant also cites to Brent, but that case again addresses a lesser-included offense requested by the defendant. 137 N.J. at 110. The language

relied on in the defense brief related to the Supreme Court's discussion of the applicable standard when defendant requests a charge. Id. at 117.

Finally, defendant cites to State v. Purnell, 126 N.J. 518, 531 (1992), where the Supreme Court held in a death-penalty case that the trial court erred by not charging on felony murder despite observing that "felony murder is not a lesser-included offense of murder." Five years later, the Court recognized the limited reach of its holding, observing that Purnell "requires that felony murder be submitted to the jury in capital cases if rationally supported by the evidence even if it is not technically a lesser-included offense of capital murder." State v. Cooper, 151 N.J. 326, 361 (1997) (emphasis added).

In Cooper, 151 N.J. at 361, the defendant argued that Purnell and three other cases showed that murder was a unified crime. The Court "decline[d] to extend" Purnell and the other three decisions relied on by the defendant "to noncapital murder," in part because the Court's "capital jurisprudence[] stresses the importance of providing a jury with every opportunity to spare a defendant's life." Id. at 362.

This case does not involve felony murder or the death penalty. There is thus no reason this Court should depart from our Supreme Court's unequivocal guidance that "trial courts are never required to charge a jury sua sponte on related offenses." Alexander, 233 N.J. at 144 (emphasis added). The court

here correctly opted not to charge a related offense without a request by defendant.

F. Defendant Is Not Entitled to a Reversal of his Conviction for the Robbery of Bryant Based on the Accumulation of Alleged Errors

Defendant contends that a reversal of his Bryant conviction is required because of the cumulative effect of alleged errors addressed above. The State relies on its previous arguments in response and further observes that "[a] defendant is entitled to a fair trial but not a perfect one." State v. Marshall, 123 N.J. 1, 170 (1991).

POINT II

THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL.

In his next argument, defendant asks this Court to vacate all of his convictions,[9] arguing that the trial court should have declared a mistrial in his case once it declared a mistrial as to Harewood. The State disagrees. The court correctly determined that all of the evidence previously admitted in the joint trial would have been admissible in a trial of only defendant, and that any possible prejudice to defendant could be cured with an appropriate jury instruction. The trial court thus soundly exercised its discretion in rejecting defendant's belated motion for a mistrial.

[9] This argument stands in contrast to defendant's Point I, where defendant attacks only his conviction for the robbery of Bryant.

A. Defendant First Opposes the Grant of a Mistrial and Then Asks for One; the Court Denies the Motion

During the joint trial, an immediate family member of Harewood's counsel was rushed to the emergency room and hospitalized with a life-threatening illness; the family member required hospitalization and treatment into the "foreseeable future," meaning weeks or months. (27T18-7 to 11, 19-1 to 12, 42-2 to 11). The sudden and serious health emergency prevented Harewood's counsel from coming to court. (27T8-15 to 18, 13-5 to 12).

Harewood eventually requested a mistrial in his case due to his counsel's absence. (27T13-17 to 19). The court, which had already adjourned the trial for more than week, (23T; 24T; 25T; 26T), granted Harewood's motion. In support of its ruling, the court found that Harewood retained his counsel for trial and only wanted him to try the case. (27T19-13 to 19). The court found that the two associates at Harewood's counsel's firm had not been present for all of the proceedings and were inadequately prepared to takeover. (27T19-20 to 20-11). The court concluded that depriving Harewood of his counsel of choice, who was one of the "finest criminal defense attorneys" in the state, as well the lack of alternatives, justified a mistrial. (27T31-8 to 33-16).

Of course, granting Harewood's motion for the mistrial raised the issue of how the trial against defendant should proceed. On this question, defendant's counsel initially urged that the "case against [defendant] can

proceed" without Harewood and that defendant was "not asking for a mistrial." (27T13-25 to 14-16). Defendant's counsel asserted that a properly instructed jury would be able to "compartmentalize" the evidence as it pertained to defendant and Harewood, and that granting a mistrial as to defendant would be "extremely . . . prejudicial." (27T14-5 to 15-8).

As discussions on the record continued, defendant's perspective apparently evolved and he adopted the opposite stance, requesting that the court grant a mistrial in his case as well. (27T28-21 to 29-1, 34-8 to 16). In light of defendant's new motion, the court requested that the parties brief the matter for a decision to be made on the following day. (27T34-8 to 35-2).

The next day, defense counsel again used the term "compartmentalize," but he now argued that jury would not be able to compartmentalize the evidence. (28T29-19 to 30-4). Defense counsel added that there was no prejudice to the State because there would be a second trial with Harewood, which he asserted could just as easily be a joint trial with defendant that would include "same witnesses, same everything, same set of facts, same indictment, same everything." (28T30-5 to 31-7).

Following argument, the court denied defendant's motion. As part of its rationale, the court explained that "had [defendant] been tried separately from the beginning, that evidence against Mr. Harewood most certainly would have

been admissible against [defendant] in a separate trial." (28T37-21 to 38-4). The court thus found no basis for the assertion that the joint trial had been unduly prejudicial, observing that defendant never moved to sever. (28T39-19 to 25). The court found that any potential prejudice could be cured by a jury instruction, (28T39-5 to 19), and that it could provide a third-party guilt charge if defendant wanted to blame others as part of his strategy. (28T40-1 to 15).

The court then issued the following instruction to the jury, the language of which had previously been agreed to by defendant:

> I know and I'm sure that you have all been wondering about the delay of the past few days. . . . I have had to adjourn the trial the past few days for a specific reason. You'll notice that the defendant, Shawn Harewood, and his attorney . . . are not present. Unfortunately, due to a family medical emergency that arose last week . . . Mr. Harewood's attorney, is unable to continue to participate in the trial at this time. I can tell you that that family medical emergency is not COVID-19 related, okay? But it is a serious family medical emergency, and it is perfectly understandable that [he] is unable to continue. Therefore, we are unable to continue the trial as to Shawn Harewood and Shawn Harewood . . . will be tried at a later date. We will be continuing the trial as to the defendant, Tacuma Ashman only. The absence of Shawn Harewood from this trial is irrelevant to your determination to whether [defendant] is guilty or not guilty of the charges. You are to base your decision solely upon the evidence [add]uced in this courtroom and nothing else. The mere absence of Shawn Harewood from this trial is not to be held against [defendant] during your deliberations and consideration of the evidence.
>
> [(28T9-12 to 14, 16-22 to 17-25).]

B. The Court Correctly Denied Defendant's Motion for a Mistrial

"The grant of a mistrial is an extraordinary remedy to be exercised only when necessary 'to prevent an obvious failure of justice.'" State v. Yough, 208 N.J. 385, 395 (2011) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)). A mistrial motion requires the court's determination on whether the alleged prejudice can be effectively cured by a cautionary instruction or other measures. State v. Winter, 96 N.J. 640, 646-47 (1984). Decisions to grant or deny mistrials are discretionary, id., and the trial court is in the best position to determine whether a curative instruction will prevent prejudice to a defendant. State v. Loftin, 146 N.J. 295, 365-66 (1996).

In State v. Zapata, 297 N.J. Super. 160 (App. Div. 1997), the appellate court reviewed an argument similar to the one defendant now advances. In that case, three defendants were tried jointly for narcotics offenses. During cross-examination, a detective mistakenly mentioned that he had arrested one of the defendants for a separate offense on a different occasion. Id. at 168. All of the defendants moved for a mistrial, but the trial court granted only the motion of the defendant mentioned by the detective. Id. Before resuming the trial, the trial court charged the jury that the absent defendant's trial "had been severed from the present trial and that [the detective's] response should in no

way prejudice the two remaining defendants." Id. At the conclusion of trial, both remaining defendants were convicted of the charges. Id.

On appeal, one of the defendants argued that his mistrial motion should have been granted. The appellate panel rejected that argument. In doing so, the panel explained that the detective's comment pertained only to one defendant and any prejudice to the others was "indirect" and "cured by the trial court's careful and thorough curative instructions." Id. at 176. Ultimately, the panel reasoned that a "trial court's decision to grant [one defendant's] motion for a mistrial and to deny [another's]" is proper as long as the two defendants are not "similarly circumstanced." Id.; accord Commonwealth v. Hatten, 496 A.2d 837, 839 (Pa. Super. 1985) (holding that trial court should have continued trial against defendant despite granting a mistrial for codefendant based on prejudicial remarks affecting the codefendant).

Here, applying this Court's holding in Zapata, 297 N.J. Super. at 176, it is incontrovertible that defendant and Harewood were not "similarly circumstanced": defendant's counsel could continue with the trial, while Harewood's counsel could not continue due to a dire family emergency.

Moreover, the court correctly found that defendant suffered no prejudice because all of the State's evidence would have been admissible in a trial of only defendant. The reason why is clear: the State offered evidence that

defendant and Harewood planned to commit these crimes together. For example, evidence that the police arrested Harewood following the pursuit of the Escalade, also tended to inculpate defendant because only days prior Harewood and defendant were exchanging photographs of Samuels' jewelry, text messaging about when to conduct the crimes, and casing Samuels' apartment building together in Fort Lee. Defendant cannot reasonably argue – and seemingly does not argue on appeal – that evidence tending to directly implicate Harewood was irrelevant to the case against defendant.

In any event, to the extent that there was any evidence introduced in the joint trial that was irrelevant to defendant, that clearly would not have established grounds for a mistrial either. Courts around the country have rejected plenty of mistrial motions where the defendant argued that the jury could not separate the evidence against him from the evidence against a co-defendant who was severed from the case. See United States v. Valentino, 436 F. App'x 700, 708 (7th Cir. 2011); United States v. Sanders, 563 F.2d 379, 384 (8th Cir. 1977); Leach v. United States, 402 F.2d 268, 268 (5th Cir. 1968).

Indeed, courts have also frequently rejected such motions in joint trials even when one or multiple codefendants plead guilty in the middle of trial. Webb v. State, 403 N.E.2d 359, 360 (Ind. Ct. App. 1980) ("In a number of cases courts have analyzed situations . . . in which one of several jointly-tried

defendants changed his plea from not guilty to guilty in the midst of trial[]" and "[i]n every one [of those cases] . . . the court on appeal determined that the circumstances at trial warranted a finding that the changes of plea did not occasion substantial prejudice to the remaining defendants' rights."); accord State v. Casey, 71 A.3d 1227, 1234 (Vt. 2013).

One of the reasons why courts regularly find no prejudice in these scenarios is that juries are entrusted to parse out the evidence of guilt in multiple-defendant trials all the time. If juries were not capable of doing this, there would be virtually no joint trials. Tellingly, defendant never moved for severance on the grounds that evidence that only incriminated Harewood unfairly prejudiced him. See R. 3:15-2(b) (allowing for relief from prejudicial joinder). And, perhaps even more tellingly, defense counsel below urged the court to grant defendant's motion for mistrial precisely because the court could jointly try defendant and Harewood at a later time. (28T30-5 to 31-7). Defense counsel's position at trial begs the question: If a jury is capable of separately assessing the guilt of defendant and Harewood at a joint trial, why were they unable to do so here?

On appeal, defendant argues that the prejudice inhered in requiring the jury to "recalibrate its assessment of the entire case from a two-defendant/shared-l[i]ability crime to a case in which . . . it could not convict

[Harewood] for the crime and could only convict the remaining defendant." (Db40). But the theory as to defendant's guilt did not change based on whether it was a joint or separate trial. From the opening statements to the closing statements, the State maintained that Harewood and defendant committed these crimes together. (15T46-1 to 4; 30T114-14 to 23).

In addition, the jury's knowledge that Harewood still faced trial for his conduct at a later date undercuts defendant's speculation that the jury may have convicted defendant only because the court took away Harewood as an option. Specifically, when informing the jury about the mistrial, the court made clear that Harewood would be tried "at a later date," and that the reason the trial against him could not continue was due to his counsel's "serious family medical emergency." Adding yet more layers of protection, the court also instructed the jury that the "absence of Shawn Harewood from this trial is not to be held against [defendant] during your deliberations" and that Harewood's absence from trial "is irrelevant to your determination to whether [defendant] is guilty or not guilty of the charges." (28T16-22 to 17-25).

As this Court knows, "[o]ne of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." State v. Burns, 192 N.J. 312, 335 (2007). True, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the

consequences of failure so vital to the defendant," that we cannot solely rely on jury instructions to neutralize unduly prejudicial circumstances. Bruton v. United States, 391 U.S. 123, 135 (1968). But defendant suffered no undue prejudice, let alone the kind of prejudice that could not be mitigated with a thorough and thoughtful instruction like the one the court used here.

In sum, defendant cites to no cases finding that a mistrial was warranted under these circumstances, and numerous cases hold exactly the opposite. The record does not reveal anything near an "obvious failure of justice" warranting the "extraordinary remedy" of granting defendant a mistrial. Yough, 208 N.J. at 397. The court was thus well within its discretion in denying defendant's motion for a mistrial.

POINT III

THE TRIAL COURT IMPOSED A FAIR AND JUST SENTENCE.

Defendant raises multiple legal challenges to the sentenced imposed by the court. The State submits that the court correctly sentenced defendant to consecutive fifteen-year terms for the two robberies after conducting the proper analysis under State v. Yarbough, 100 N.J. 627 (1985).

An appellate court "should disturb the sentence imposed by the trial court only in situations where the sentencing guidelines were not followed, the aggravating and mitigating factors applied by the trial court are not supported

by the evidence, or applying the guidelines renders a particular sentence clearly unreasonable." State v. Roach, 146 N.J. 208, 230 (1996). The test "is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review." State v. Munoz, 340 N.J. Super. 204, 222 (App. Div. 2001) (quoting State v. Ghertier, 114 N.J. 383, 388 (1989)).

In this case, the court sentenced defendant to consecutive fifteen-year terms on the first-degree robbery convictions. Pursuant to NERA, N.J.S.A. 2C:43-7.2, the court imposed an eighty-five percent parole disqualifier and ten years of parole supervision upon release. The court merged count five, possession of a firearm for an unlawful purpose, into the first-degree robberies. (36T57-7 to 59-4; Da23 to 26). In support of the sentence, the court found aggravating factors three, six, and nine. (36T63-2 to 64-8). The court found mitigating factor eleven. (36T62-11 to 14). The court found that, on a qualitative basis, the aggravating factors substantially and overwhelmingly outweighed the mitigating factors. (36T64-9 to 15).

The court also employed the Yarbough analysis to impose consecutive sentences on the two robbery convictions. The court found that a qualitative weighing of the factors, specifically that there were multiple victims of

separate acts of violence, warranted consecutive sentences. The court emphasized that defendant held two separate victims with a gun, Bryant was taken to the ground and patted down, and that Samuels had items of jewelry ripped from his body. (36T54-19 to 56-16). The court explained that it imposed the midrange on each count bearing in mind the overall outer limit of the sentence. (36T58-17 to 21).

Defendant challenges the court's assessment of the aggravating and mitigating factors, arguing that the court "erred in penalizing Ashman for not confessing guilt at sentencing or expressing remorse." (Db45). As a legal matter, this assertion is incorrect because a defendant's lack of remorse and failure to take responsibility is appropriately considered by a sentencing court. See State v. Carey, 168 N.J. 413, 427 (2001) (holding that aggravating factor three was supported by a letter the defendant wrote to the court in which he did not "directly accept responsibility for the crash or admit that he has a problem of drinking and driving"); accord State v. O'Donnell, 117 N.J. 210, 216 (1989); State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991). Finding a lack of remorse is not the same as penalizing a defendant for choosing not to speak at sentencing, e.g., Mitchell v. United States, 526 U.S. 314, 317 (1999), or for not pleading guilty in the first place, e.g., State v. Jiminez, 266 N.J. Super. 560, 570 (App. Div. 1993).

As a factual matter, it is clear from the hearing that the court was troubled by a letter that defendant sent in which he affirmed that he was not "fully responsible for what the State has alleged" and that he wanted to express his "deepest apology" to one of the victims, only to undercut this half apology and deny any responsibility during his allocution. (36T48-6 to 49-14). Combined with defendant's unjustified "anger" and "animosity" expressed against one of the victims, whom defendant did not otherwise know, the court had ample grounds on which to find defendant lacked remorse beyond simply that defendant did not confess his guilt. (36T49-5 to 14).

Defendant additionally argues that it was error for the court to cite to pending charges during the sentencing hearing. For example, the court noted that defendant had pending charges related to smuggling controlled-dangerous substances into the jail. (36T65-13 to 22). The court's reference to the charges was proper, as this Court has reasoned that picking up new charges during the pendency of a criminal proceeding may be germane to aggravating and mitigating factors at sentencing upon conviction. See State v. Cambrelen, 473 N.J. Super. 70, 85 (App. Div. 2022) (reasoning that "[t]he State may argue a defendant's arrest on new charges while released pending sentencing should be considered by the trial court when weighing the aggravating and mitigating factors for the crimes to which defendant pled guilty").

What is more, the comments about the pending charges were at the conclusion of the hearing after the court had already imposed the sentence and weighed the aggravating and mitigating factors. The court explained that it "only cite[d] [the pending charges] for the record as giving [it] even greater concern about the risk that [defendant] will commit another offense." (36T65-19 to 22). There is thus no indication that the pending charges had any meaningful impact on the court's sentencing decision.

Defendant's reliance on State v. K.S., 220 N.J. 190, 199 (2015), is inapposite. In that case, the Court addressed whether a prosecutor, in rejecting an application for pretrial intervention (PTI), may consider a defendant's prior dismissed charges, which were not "supported by undisputed facts of record or facts found at a hearing." Id. This cases does not involve PTI, and the pending charges were not dismissed at the time defendant was sentenced in this matter. Defendant's reliance on information outside the record about the subsequent dismissal of these charges contravenes proper appellate practice and should not be considered by this Court. See R. 2:5-4(a); see also Liberty Surplus Ins. Corp. v. Nowell Amoroso, 189 N.J. 436, 452 (2007).

Defendant raises additional claims regarding the court's Yarbough analysis. The Court here correctly found that two of the Yarbough factors – multiple victims and separate acts of violence or threats of violence –

warranted consecutive sentences based on a qualitative weighing of the factors. (36T54-19 to 56-16). The sentencing court did not abuse its discretion in so finding. See State v. Roach, 146 N.J. 208, 230 (1996) ("Consecutive sentences are not an abuse of discretion when the crimes involve multiple victims and separate acts of violence."); State v. Molina, 168 N.J. 436, 442 (2001) ("[C]rimes involving multiple victims represent an especially suitable circumstance for the imposition of consecutive sentences.").

Defendant's argument that the court's sentence violated the Yarbough guideline that "successive terms for the same offense should not ordinarily be equal to punishment for the first offense" misapprehends the law in this area. This so-called Yarbough cap was superseded by statute thirty years ago. See N.J.S.A. 2C:44-5(a); State v. Cuff, 239 N.J. 321, 348 n.4 (2019).

Finally, as to State v. Torres, 246 N.J. 246 (2021), the sentencing court assessed the overall fairness of the sentence, albeit without using the words "fair" or "fairness." The sentencing court noted that it had been deliberating on the "ultimate sentence" for defendant since his conviction and after the submission of each item for his consideration. (36T56-17 to 24). The court later stressed that it was "imposing the midrange on both [c]ounts 2 and 3, but consecutive to one another, keeping in mind the overall outer limit of the sentence[.]" (36T58-17 to 19). The court thus took into account the fairness

of defendant's overall sentence without explicitly invoking that term. For all these reasons, the State submits that defendant's sentence should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully requests that the judgment below be affirmed.

Respectfully submitted,

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