SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2248-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Gloucester County.
ARTESTE RUFFIN,	:	
		Indictment No. 18-08-682-I
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Kevin T. Smith, J.S.C.
		Hon. John C. Eastlack, J.S.C.
	:	and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
(973) 877-1200

MARGARET MCLANE
Assistant Deputy
Public Defender
Margaret.McLane@opd.nj.gov
Attorney ID: 060532014

Of Counsel and
On the Brief

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D.)

PAGE NOS.

INDEX TO APPENDIX

PAGE NOS.

[1] The sentencing memoranda are submitted because the question of whether an issue was raised in the trial court is germane to the appeal. R. 2:6-1(a)(2).

JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

PAGE NOS.

CASES

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

CASES (CONT'D.)

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

CASES (CONT'D.)

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (CONT'D.)

PAGE NOS.

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The State charged Arteste Ruffin with murder and conspiracy to commit aggravated assault as a result of his alleged conspiracy with Aaron and Archie Hickox and Kishon Pierce after Pierce stabbed Amir Tarpley during a fight. During a pretrial hearing, Ruffin clearly and unequivocally asked to represent himself. The court ignored his request, failing to engage in the required inquiry. This summary denial of Ruffin's right to self-representation was structural error, requiring reversal of his conviction.

Moreover, at the close of the State's case at trial, the court entered a directed acquittal on the murder and second-degree conspiracy charges, only permitting the third-degree conspiracy charge to go to the jury. But three critical errors affected the jury's guilty verdict on this charge and also require reversal of Ruffin's conviction.

First, police interrogated Ruffin without reading him his Miranda rights, failed to scrupulously honor his invocation of his right to counsel, and contradicted the later-read Miranda warnings. These errors, both together and separately require suppression of Ruffin's two statements and reversal of his conviction.

Second, the court failed to correctly instruct the jury on the elements of conspiracy. To find Ruffin guilty of conspiracy to commit aggravated assault,

the jury had to find that Ruffin acted purposely with respect to the agreement and the result of that agreement: significant bodily injury. But the court failed to provide this crucial instruction to the jury, instead instructing that Ruffin could be found guilty if he acted purposely, knowingly, or even recklessly with respect to the result of the aggravated assault. Incorrectly instructing the jury on the necessary mens rea for conspiracy prevented the jury from being able to return a competent verdict and requires reversal.

Third, the court failed to ensure that the jury returned a unanimous verdict on the necessary third element of conspiracy — that a co-conspirator commit an overt act in furtherance of the conspiracy. The court instead provided an instruction on at least six possible overt acts committed by any of four different people. In light of this lengthy and confusing instruction on this essential element, there was a clear risk of a fragmented, non-unanimous jury verdict. These errors also require reversal of Ruffin's conviction.

PROCEDURAL HISTORY

Gloucester Indictment 18-08-682-I charged Arteste Ruffin with third-degree conspiracy to commit aggravated assault, significant bodily injury, N.J.S.A. 2C:5-2 and 2C:12-1(b)(7) (Count 16); second-degree conspiracy to commit aggravated assault, serious bodily injury, N.J.S.A. 2C:5-2 and 2C:12-1(b)(1) (Count 17); and first-degree murder, N.J.S.A. 2C:2-6(a) and 2C:11-3(a)

(Count 18). (Da 9-10)[2] Kishon Pierce, Aaron Hickox, and Archie Hickox were also charged in various counts of the indictment. (Da 1-8) All co-defendants pleaded guilty before Ruffin's trial. (10T 31-6 to 11, 90-2 to 16; 11T 109-21 to 110-18)

On June 3, 2019, after the Honorable Kevin T. Smith, J.S.C., denied Ruffin's motion to dismiss the indictment, (1T 29-6 to 20) Ruffin unequivocally told the court that he wanted to represent himself. The court ignored his request and never ruled on the motion. (1T 33-13 to 34-5)

On August 25 and 31, 2022, the Honorable John C. Eastlack, J.S.C., addressed the admissibility of four recorded statements by Ruffin. (5T; 8T) Judge Eastlack ruled that Ruffin's statements on a responding officer's body-

---

[2] Da — Defendant's appendix
1T — June 3, 2019 — Motion
2T — June 26, 2020 — Motion
3T — August 19, 2022 — Conference
4T — August 24, 2022 — Jury Selection
5T — August 25, 2022 — Motion
6T — August 29, 2022 — Jury Selection
7T — August 30, 2022 — Jury Selection
8T — August 31, 2022 — Jury Selection, Motion
9T — September 7, 2022 — Trial
10T — September 8, 2022 — Trial
11T — September 12, 2022 (vol. 1) — Trial
12T — September 12, 2022 (vol. 2) — Trial
13T — September 13, 2022 — Trial
14T — September 14, 2022 — Trial
15T — March 13, 2023 — Sentence

worn camera, in a May 20, 2018 interrogation, and during the booking procedure for his May 22, 2018 arrest were admissible. (5T 106-23 to 114-18; 8T 64-18 to 79-16, 118-22 to 126-9) Judge Eastlack suppressed part of Ruffin's May 22 interrogation, ruling that Ruffin unambiguously invoked his right to counsel, but admitted the statements preceding the invocation. (5T 56-17 to 63-13)

Trial was held between September 7 and 14, 2022, before Judge Eastlack and a jury. At the close of the State's case, Judge Eastlack partially granted the defense Reyes[3] motion and dismissed the murder and second-degree conspiracy counts. (13T 49-10 to 60-25) The jury convicted Ruffin of the sole remaining count: third-degree conspiracy to commit aggravated assault. (14T 5-6 to 20; Da 11)

On March 13, 2023, Judge Eastlack sentenced Ruffin to four years in prison. (15T 16-23 to 36-18; Da 12-14) A Notice of Appeal was filed on March 30, 2023. (Da 15-18)

STATEMENT OF FACTS

Ruffin's charges arose from a fight between Amir Tarpley, Aaron and Archie Hickox, and Kishon Pierce, in which Pierce stabbed Tarpley, killing him. Ruffin's defense at trial focused on challenging Aaron and Archie's credibility to show the absence of any conspiracy at all, and arguing in the alternative that

[3] State v. Reyes, 50 N.J. 454 (1967).

even if there were a conspiracy, there was no agreement to cause significant bodily injury. (See 13T 106-22 to 25, 129-22 to 130-6)

Anthony Harden, one of Tarpley's friends, testified for the State that on the day of the fight, Kelly McCormick, Ruffin's girlfriend, had gotten into an argument with Tarpley, struck Tarpley with a skateboard and her keys, and that Tarpley retaliated by hitting McCormick. (10T 107-6 to 25) According to Harden, McCormick "was mad" when she left and said she was going to return. (10T 108-14 to 23, 109-1)

Co-defendants and twin brothers Aaron and Archie Hickox testified for the State after having been charged with assault and weapons possession charges. (Da 4-8; 10T 17-9 to 23-12) They both pleaded guilty to simple assault in exchange for their "truthful" testimony at Ruffin's trial. (10T 31-6 to 11, 31-12 to 19, 90-2 to 16) They explained that "truthful" meant inconsistent with what they initially told the police that did not implicate Ruffin, but consistent with their statements made months after the incident, after they had been charged and spent time in jail. (10T 31-24 to 32-4, 32-8 to 13, 90-2 to 16)

Aaron testified that on May 20, 2018, Ruffin called him, told him that McCormick "got beat up[,] and he needed somebody to handle it." (9T 75-12 to 20, 75-21 to 23; see also 10T 57-2 to 8) Aaron testified that "handle it mean[s] fighting." (9T 76-1) He testified that after getting the phone call from Ruffin, he

walked over to his mother's house where he met up with Ruffin and McCormick. (9T 76-8 to 77-24) Aaron testified that McCormick had a "big red mark on her face," and her cheek was swollen. (9T 78-7 to 9, 79-13 to 14)

According to Aaron, Ruffin told him that he would pay him $40 if he went to Tarpley's house to "mess him up" or "[b]eat him up." (9T 79-16 to 19, 80-2 to 6, 80-12 to 16; 10T 64-24 to 65-1) Aaron called his twin brother, Archie, "for backup" because Aaron did not want anybody "jumping in" on the fight. (9T 81-23 to 82-2; see also 10T 64-18 to 21) At the time, Archie was with Kishon Pierce, and they both met up with Aaron and Ruffin shortly thereafter. (9T 79-21 to 24, 80-17 to 81-1; 10T 58-11 to 19, 59-11 to 14)

Aaron and Archie testified that they, Pierce, and Ruffin walked to Tarpley's house together. (9T 82-8 to 19, 83-12 to 13; 10T 60-24) They testified that Ruffin knocked on Tarpley's door and told him to come outside to fight Aaron. (9T 84-5 to 13, 84-14 to 16; 10T 70-23 to 71-4, 109-10 to 17) According to Aaron, Aaron then taunted Tarpley, saying things like, "you like hitting women? Are you tough? Come here. . . . No, don't run." Then, Aaron and Tarpley fought for about ten seconds. (9T 87-24 to 88-4, 88-13 to 14)

Archie testified that his role was "[m]ore like a referee of sorts" – "[t]o, like, make sure it was like a fair fight." (10T 73-3 to 8) Archie testified that as part of this role, during the fight, he chased Harden away from Tarpley and

Aaron. (10T 75-4 to 16, 76-16 to 19) In contrast, Harden testified that he was trying to break up the fight but was hit by Ruffin and then chased and punched by Pierce and Archie. (10T 115-8 to 10, 115-19 to 22, 116-1 to 6)

Aaron testified that after the fight ended, he saw a neighbor watching from across the street and he wanted "to make it seem like [they weren't] the bad guys" so he told Tarpley, "next time you touch another girl like that, I'm going to do it again." (9T 92-1 to 8) Tarpley ran back into his house, and Aaron began walking away. (9T 92-13 to 22; 10T 78-12 to 21)

A short time later, Tarpley ran back out of his house wielding a knife and another knife-like object and began chasing Aaron. (9T 94-21 to 95-5; 10T 78-12 to 21, 79-4 to 5) Archie and Pierce began fighting Tarpley, trying "[t]o get him away from" Aaron because Tarpley had a knife. (10T 79-10 to 15) Aaron grabbed a stick and hit Tarpley, causing him to drop either the knife or the other object he had been holding. (9T 95-7 to 17; 10T 79-18 to 80-2, 80-10 to 13) Aaron got Tarpley to the ground, and Tarpley "was about to stab [him] in [his] stomach," but then Pierce and Archie got on top of Tarpley. (9T 95-18 to 96-2; 10T 80-19 to 81-8) Archie testified that Pierce got Tarpley to drop the knife he was holding, then "leaned across and punched" Tarpley in the chest. (10T 81-9 to 12) Aaron testified that he then kicked Tarpley and ran away, followed by Archie and Pierce. (9T 96-3 to 5; 10T 81-21 to 24) Aaron and Archie both

testified that Tarpley also got up and went about five steps before turning back to the house. (9T 96-5 to 7; 10T 82-4 to 6) Tarpley in fact had been stabbed and died from his injuries.

According to Aaron, another man, CJ, who had been on the porch of Tarpley's home, then chased after him holding "a knife or something." (9T 96-10 to 13) Aaron testified that he was "so exhausted" that he "didn't feel like fighting" anymore, so he "just gave [CJ] a hug" and told him, "we can fight tomorrow." (9T 96-14 to 18)

Paulsboro Police Officer Nicole Greener responded to the scene. (11T 7-8, 7-12 to 17) Her body-worn camera captured her arrival and initial investigation at the scene and was introduced at trial. (11T 10-7 to 16, 13-22 to 15-12, 17-15 to 18-10, 18-25 to 19-4, 20-14 to 25, 22-7 to 23-6, 24-10 to 19, 25-1 to 26-25, 28-6 to 39-4) Officer Greener provided medical aid to Tarpley until he was taken away in an ambulance. (11T 7-23 to 8-1, 8-4 to 7, 8-10 to 16) Officer Greener then began to secure and process the scene and speak to anyone who may have witnessed anything. (11T 21-25 to 22-3) Harden testified that when the police arrived, Ruffin told them that "he had nothing to do with it," (see 11T 28-6 to 30-22) which Harden testified was false as Ruffin was "the one who brought the people here to do it." (10T 119-12 to 24)

According to Archie, about five minutes after the altercation, he and Aaron saw Ruffin again, who said he was going to call McCormick. (10T 84-5 to 16, 85-19) McCormick picked up Aaron and Archie up in a car and dropped them off at their mother's house. (9T 96-19 to 22, 99-21 to 100-4; 10T 85-24 to 86-10, 86-18 to 19) Aaron testified that McCormick gave him only $20, while Archie testified that she gave Aaron $40. (9T 96-19 to 22, 99-21 to 100-4; 10T 88-1)

Although Aaron initially did not think Tarpley had been hurt, after he arrived home and received a lot of text messages about the altercation, he believed that he must have killed Tarpley. (9T 97-6 to 16, 102-3 to 10) Aaron turned himself in to the police and gave a statement. (9T 99-5 to 15) In this initial statement, Aaron provided a general explanation of what happened — that he fought Tarpley because Tarpley had "hit a girl." (9T 138-12 to 16) However, Aaron did not implicate Ruffin in his statement; he "didn't say nothing about nobody." (9T 136-1 to 4) Archie similarly gave a statement the day of the fight in which he did not fully implicate Ruffin. (10T 94-19 to 21, 96-19 to 24)

Much later, after Aaron had been in jail, he learned that Pierce admitted to stabbing Tarpley and pleaded guilty to killing Tarpley. (9T 102-17 to 19, 103-2 to 5; see also 10T 81-16 to 18) In September 2018, after Aaron had been charged with assault and weapons possession charges related to Tarpley's death

(Da 4-7; 10T 17-9 to 23-12), he gave another statement to police in which he said that Ruffin had called him and offered to pay him to fight Tarpley. (9T 163-12 to 15, 164-3 to 6; 10T 16-9 to 12) On cross-examination, Aaron agreed that "things started getting better" with his pending case as soon as he gave this second statement to police. (10T 27-10 to 14, 28-1 to 4) For example, Aaron had been on home detention, but the day after his second statement, his attorney successfully moved for that condition to be lifted. (10T 28-5 to 16)

In October 2019, Aaron pleaded guilty to simple assault with a maximum possible sentence of six months in jail for his involvement in Tarpley's death. (10T 31-6 to 11, 31-12 to 19) As a condition of his guilty plea, Aaron was required to testify "truthfully" against Ruffin, which meant that Aaron was supposed to testify consistently with his second statement to police in which he implicated Ruffin. (10T 31-24 to 32-4, 32-8 to 13) Archie received a similar plea agreement which also required him to testify "truthfully" against Ruffin. (10T 90-2 to 16)

Following the altercation, Ruffin made several statements to police. He first spoke to Detective Anthony Garbarino at the Woodbury police station, telling him that Aaron and Tarpley were fighting because of a "girl" whom Ruffin had "never seen," that Tarpley tried to stab Aaron, and that Tarpley was stabbed. (11T 61-1 to 2, 61-23 to 62-4, 71-17 to 72-6, 76-12 to 18, 77-20 to 78-

13) A few days later, Ruffin was arrested and made statements both during the booking process and after being read his Miranda rights in which he maintained he was not involved in the fight. (11T 118-24 to 119-5, 121-6 to 137-11, 143-20 to 146-25, 163-22 to 193-14)

After the State presented its case, the court granted the defense motion for an acquittal on the murder and second-degree conspiracy charges. (13T 49-10 to 60-25)

LEGAL ARGUMENT

POINT I

DEFENDANT'S REQUEST TO REPRESENT HIMSELF WAS IMPROPERLY DISMISSED WITHOUT THE APPROPRIATE INQUIRY. HIS CONVICTIONS MUST BE REVERSED. (1T 33-13 to 34-5)

Following an unsuccessful motion to dismiss the indictment (1T 29-6 to 20), Ruffin unequivocally asked to represent himself:

> You didn't present him my letter I asked you to give him. Like, no one's doing nothing they're supposed to do here, and I'm supposed to just be quiet and let everyone lie on me, right? Yeah, right. It's not going to happen. I would like to represent myself from here on out, Your Honor. [(1T 33-13 to 18) (emphasis added)]

The court entirely ignored his request, failing to hold the required hearing or to even rule on Ruffin's request. (1T 33-19 to 34-5) The court's summary, implicit denial of Ruffin's request to go pro se violated his constitutional rights under

the Sixth Amendment and Article I, Paragraph 10. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10.

The right to defend oneself is premised on "respecting defendant's capacity to make choices for himself, whether to his benefit or to his detriment," and is thus "a natural embodiment of a defendant's personal autonomy." State v. Reddish, 181 N.J. 553, 594 (2004). "The language and spirit of the Sixth Amendment contemplate that counsel. . . shall be an aid to a willing defendant — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." Faretta v. California, 422 U.S. 806, 820 (1975). Because it is the defendant who will bear the personal consequences of a conviction, he "must be free personally to decide whether in his particular case counsel is to his advantage." Id. at 834. "To force a lawyer on a defendant can only lead him to believe that the law contrives against him," ibid., and makes counsel "not an assistant, but a master." Id. at 820. Due to the risks attendant to self-representation, if a defendant requests to represent himself, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. at 835 (quoting Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942)).

As this Court has explained, a "two-step process has emerged" when assessing a defendant's request to proceed pro se. State v. Rose, 458 N.J. Super. 610, 626 (App. Div. 2019). First, a defendant must "clearly and unequivocally" request to represent himself in a timely manner. Ibid. In making the request, a defendant need not "recite some talismanic formula." Ibid. (internal quotation marks omitted). A defendant need only make the request in a manner clear enough that "no reasonable person can say that the request was not made." Ibid. (internal quotation marks omitted). Second, "once a defendant asserts the self-representation right, the trial court must ascertain. . . whether the waiver is indeed knowing, voluntary, and intelligent after a searching inquiry that involves advising the defendant of the risks and pitfalls of self-representation." Id. at 627. See also Reddish, 181 N.J. at 593-95 (describing the inquiry); State v. Crisafi, 128 N.J. 499, 510-12 (2019) (same).

"Following the hearing," the court must make a ruling on whether the defendant can proceed pro se. Rose, 458 N.J. Super. at 627. "[T]he court generally must permit the defendant to proceed pro se if it finds on the record that the defendant has knowingly, voluntarily, and intelligently waived the right to counsel and decided instead to proceed pro se." Ibid. A court's failure to address a request to go pro se is a structural error that entitles him to a new trial. Id. at 638.

Rose demonstrates that the trial court's failure to address Ruffin's request to go pro se constitutes structural error requiring reversal. Here, as in Rose, "well in advance of trial," Ruffin "clear[ly] and unequivocal[ly]" indicated he was not satisfied with counsel's representation and requested to represent himself. Rose, 458 N.J. Super. at 621-22, 628. (See 1T 33-13 to 18) As in Rose, the trial court did not hold a hearing on Ruffin's request to go pro se, instead inappropriately "deflect[ing]" defendant's request by "requiring defendant to submit his request in writing." Id. at 628. (See 1T 33-19 to 24-5 ("We are done for today. . . . If you want to make an application to represent yourself, you do so. . . after consultation with [defense counsel]")).

In Rose, in an appeal from the denial of post-conviction relief, this Court held that the failure to conduct the proper inquiry and rule on defendant's request to represent himself was structural error. Id. at 628-29. "In response to defendant's request, the court was obliged to conduct a Faretta hearing," not to ignore the request and proceed to trial as though it was not made. Ibid. This Court further held that the failure to actually rule on the request does not shield the denial of the right to self-representation from scrutiny: "The failure to rule on a defendant's request has been treated the same as an explicit denial." Id. at 629.

Here, as in Rose, the court committed structural error when it failed to hold the required hearing, address Ruffin's request, or even rule on that request. As Rose makes clear, Ruffin is entitled to a new trial: "A defendant is entitled to a new trial when a court denies a defendant the right to self-representation without determining whether a timely and unequivocal request was knowingly, voluntarily, and intelligently made." Rose, 458 N.J. at 628. See also id. at 630 ("Although the record does not clearly demonstrate that defendant's assertion of the right to represent himself was knowingly, voluntarily, and intelligently made, that lack of clarity results from the trial court's failure to engage in the searching inquiry our case law requires. The trial court did not explicitly deny defendant's request. Nonetheless. . . . defendant should not be 'penalized' for the court's error in failing to address defendant's request in a Faretta hearing."). The failure to respect Ruffin's request to represent himself is structural error that requires reversal of his conviction.

POINT II

DEFENDANT'S TWO STATEMENTS FOLLOWING HIS ARREST SHOULD HAVE BEEN SUPPRESSED. THEIR IMPROPER ADMISSION REQUIRES REVERSAL OF HIS CONVICTION. (8T 64-18 to 79-16; 5T 56-23 to 61-19; 11T 139-11 to 141-10, 160-2 to 22)

The State moved to admit two statements by Ruffin following his arrest: an un-Mirandized "booking" statement, followed by a Mirandized statement.[4] (8T 49-13 to 50-15) Both statements should have been suppressed for several reasons. First, detectives exceeded the scope of the limited "booking" exception to Miranda[5] by interrogating Ruffin about the offense for which he had been arrested. Second, Ruffin unambiguously invoked his right to counsel during the booking video such that both the booking statement and subsequent interrogation should have been suppressed. At minimum, the repeated references to Ruffin contacting a lawyer should not have been played for the jury. Finally, the detectives impermissibly contradicted the Miranda warnings during Ruffin's interrogation, rendering his statement involuntary and requiring suppression of

[4] The State also moved to admit Ruffin's statements on the body worn camera recording as well as an earlier interrogation; both of those statements were ruled admissible. (5T 106-23 to 114-18; 8T 64-18 to 79-16, 118-22 to 126-9) In addition, because Ruffin unambiguously invoked his right to counsel partway through the Mirandized statement, the court suppressed everything that followed the invocation. (5T 54-20 to 63-8)

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

that statement. The improper admission of one or both of these statements was harmful error because the State exploited inconsistencies in the statements to undermine Ruffin's version of events and because the jury repeatedly heard about Ruffin invocation of his right to counsel. Ruffin's conviction must be reversed. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The Detectives' Questions Exceeded The Scope Of The Limited Booking Exception To Miranda.

Ruffin's statements during the booking video should have been suppressed because the detectives interrogated him without first reading him his Miranda rights. The State argued that none of these statements were induced through any interrogation by the detectives and that the only questions posed by the detectives dealt with "magisterial procedures," such that there was no requirement to Mirandize Ruffin. (8T 51-19 to 54-5) The court accepted the State's argument, ruling that, though Ruffin was in custody, there was no need to read him his Miranda rights as there was no interrogation. (8T 64-18 to 79-16) The court's ruling was in error. The detectives did interrogate Ruffin. Their failure to secure a valid Miranda waiver before this custodial interrogation requires suppression of Ruffin's statement.

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are

reasonably likely to elicit an incriminating response from the suspect." State v. Hubbard, 222 N.J. 249, 267 (2015) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). However, an "innocent inquiry" stemming from ministerial "booking procedures and the routine questions associated therewith" do not implicate this right. State v. M.L., 253 N.J. Super. 13, 21 (App. Div. 1991). Accordingly, police are permitted to ask a defendant for "routine pedigree information, including his name and address, for purposes of completing [an] arrest report" even when a defendant is in custody. State v. Melendez, 454 N.J. Super. 445, 457 (App. Div. 2018), aff'd as modified, 240 N.J. 268 (2020). Questioning that goes beyond the "[r]outine questions asked during the booking process or for bail purposes," falls within the privilege against self-incrimination. State v. Cunningham, 153 N.J. Super. 350, 352 (App. Div. 1977). "Without obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." Pennsylvania v. Muniz, 496 U.S. 582, 602 n.14 (1990).

Here, the detectives far exceeded this limited "booking" exception to Miranda. For example, after Ruffin began trying to explain what happened, Detectives Ferris and Minniti engaged with Ruffin, challenging what he said to keep him talking. Specifically, Detective Minniti expressed disbelief at what Ruffin said, saying, "Arteste, come on man, let's be real here," and "Let's be

real bro." (Da 45) In response, Ruffin told the detectives, "I'[ve] got a lawyer coming cause I ain't do nothing bro,"[6] (Da 45) after which Detective Minniti encouraged him to continue speaking by asking, "Haven't I always been straight with you?," telling him "some things aren't, aren't jiving bro," and asking "Do you want to give us a statement?" (Da 46)

At this point, Detective Bielski interrupted, and while he began by trying to stop Ruffin from speaking without being apprised of his rights, (Da 46-51) he too engaged in impermissible interrogation. For example, Detective Bielski directly asked Ruffin, "You're, you're friends with Jimmy, right?", to which Ruffin responded that "they got me caught up in this bullshit." (Da 51) Detective Bielski then continued to encourage Ruffin, saying, "Arteste, I'm gonna be straight with you, I, I don't think you had anything to do with Amir's death with the stabbing part." (Da 52) Later, Detective Bielski again tried to keep Ruffin talking, telling him: "Arteste, like I just said to you a little bit ago, since we talked to you the first time, a lot more evidence has come to light." (Da 57) When Ruffin responded that this "evidence" is "a lot more lies," Detective Bielski continued, saying, "Lies, evidence that's why I want to talk to you and

[6] This unambiguous invocation of the right to counsel will be addressed in Subpoint B.

you keep talking to us then you're saying you want to call your lawyer. . . ." (Da 57)

All of this conversation amounted to express questioning or its functional equivalent; none of it was related to the booking procedure. As such, it was custodial interrogation conducted without Miranda warnings that should have been suppressed.

B. Defendant Unambiguously Invoked His Right To Counsel.

Ruffin repeatedly invoked his right to counsel, requiring suppression of the booking video and subsequent interrogation. (11T 138-17 to 139-10, 141-22 to 142-9 (defense counsel's argument); 11T 139-11 to 141-10, 160-2 to 22 (trial court's denial of suppression)) Near the beginning of the booking video, Ruffin unambiguously invoked his right to counsel, telling the detectives, "I'm [sic] got a lawyer coming cause I ain't do nothing bro." (Da 45) Rather than halting any subsequent interrogation, either in the booking room or in the interrogation room, Detective Bielski instead told Ruffin that they will continue to talk to him:

> I'm gonna bring you upstairs and throw you in the interview room. I know you said something about a lawyer. . . . If you want to talk to us about it, we'll advise you of your rights again like that and you can talk to us and then we'll air it all out. I'll let you know where we're at with this case cause since we talked to you the last time, a lot more things have come to light. [(Da 47) (emphasis added]

A little while later, Ruffin again invoked his right to counsel, asking the detectives,

> Could I use my cell phone so I can see, see what's up with my um, my girlfriend and get the number to call this lawyer or something cause I don't know how, if, if you guys aren't charging me with nothing, then I'll cooperate but if not, I'll, I better get a lawyer because I think you guys are (INAUDIBLE) [(Da 55) (emphasis added)]

All these statements were clear invocations of Ruffin's right to counsel.

If an "individual states that he wants an attorney, the interrogation must cease until an attorney is present." State v. Gonzalez, 249 N.J. 612, 628 (2022) (citing Miranda, 384 U.S. at 474). A suspect who has expressed his desire to deal with the police only through counsel may not be interrogated further until counsel is present, "unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). The police are required to "scrupulously honor[ ]" a suspect's invocation of the right to counsel. Michigan v. Mosley, 423 U.S. 96, 104 (1975); State v. Hartley, 103 N.J. 252, 262-67 (1986). If a suspect's invocation of his rights is not scrupulously honored, an inculpatory statement must be suppressed notwithstanding its voluntariness. Mosley, 423 U.S. at 104.

There are no particular words that a suspect must use to invoke his rights. Rather, any words that are susceptible of being interpreted as a desire to remain silent or to have counsel present will suffice to stop the interrogation. Because the right to counsel "is fundamental, courts interpret equivocal requests for counsel in the light most favorable to the defendant." State v. Alston, 204 N.J.

614, 621 (2011) (quoting State v. McCloskey, 90 N.J. 18, 26 n.1 (1982)). "[A] suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel." Gonzalez, 249 N.J. at 630 (citing Alston, 204 N.J. at 253 and State v. Reed, 133 N.J. 237, 253 (1993)).

If a "'suspect's statement "arguably" amount[s] to an assertion of Miranda rights,' conducting a follow-up inquiry is the only way to ensure that a suspect's waiver of their right was knowing and voluntary." Gonzalez, 249 N.J. at 630 (quoting Alston, 204 N.J. at 621-23) (alterations in Gonzalez). In fact, where "the suspect's 'statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed.'" Ibid. (quoting Alston, 204 N.J. at 624). Substantive questioning can only resume after "the suspect makes clear that he is not invoking his Miranda rights." Ibid. (citing State v. Johnson, 120 N.J. 263, 283 (1990)) (emphasis added). Any questions that do not clarify, but instead "serve to keep the suspect talking. . . constitute unlawful interrogation." Johnson, 120 N.J. at 283.

Here, Ruffin unambiguously asserted his right to counsel when he told police "I'm [sic] got a lawyer coming cause I ain't do nothing bro," (Da 45) that he wanted to use his cell phone to "get the number to call this lawyer," and that

he "better get a lawyer." (Da 55) These assertions of Ruffin's right to counsel should have immediately ended any interrogation.

Rather than stop questioning Ruffin, the detectives continued to interrogate him during the booking procedure (See Da 45-63) and then brought him to the interrogation room for further questioning. (See Da 65-102) The detectives were not allowed to continue to question Ruffin, either in the booking room or in the interrogation room. Reading Ruffin his Miranda rights in the interrogation room was equally impermissible given Ruffin's unambiguous invocation. See Edwards, 451 U.S. at 487 (holding that after defendant had invoked his right to counsel, his statement a day later also had to be suppressed notwithstanding the fact that the police re-read the Miranda warnings and defendant stated he would talk); State v. Wint, 236 N.J. 174, 204–05 (2018) ("When police have not honored an earlier commitment to provide a detainee with a lawyer, the detainee likely will 'understan[d] his (expressed) wishes to have been ignored' and 'may well see further objection as futile and confession (true or not) as the only way to end his interrogation.'" (quoting Maryland v. Shatzer, 559 U.S. 98, 121-22 (2010) (Stevens, J., concurring)).

But even if Ruffin's assertions that he had "a lawyer coming" and that he "better get a lawyer" (Da 45, 55) were ambiguous, the booking statement and subsequent interrogation must still be suppressed because his interrogators did

not immediately ask Ruffin to clarify what he meant. Ruffin's statements must "be interpreted in a light most favorable to the defendant." State v. Chew, 150 N.J. 30, 63 (1997); Alston, 204 N.J. at 621. The officers here failed to satisfy their obligation to "clarify the meaning of [a] defendant's remark before proceeding with further questioning." State v. Wright, 97 N.J. 113, 120 (1984).

The interrogators never directly asked Ruffin to clarify whether his statements about a lawyer meant that he wanted to have an attorney present during questioning. Instead, the detectives told Ruffin that they would advise him of his rights and then "air it all out" and let him "know where we're at with this case" because "a lot more things have come to light." (Da 47) These statements by the detectives successfully sought to "delay," "confuse," and "burden" Ruffin's assertions of his rights. Johnson, 120 N.J. at 283. Although Ruffin had repeatedly told the detectives that he wanted to call his lawyer, the detectives continued to speak with him, even bringing him into an interrogation room so he could give a more formal statement. The interrogation should have ended when Ruffin invoked his right to counsel in the booking room. At a minimum, the detectives should have stopped asking Ruffin any questions and instead clarified whether he wanted to speak with them without an attorney. Because the detectives did not honor Ruffin's invocation of his rights in the

booking room, his booking statement and subsequent interrogation were inadmissible at trial.

C. At Minimum, Repeated References To Defendant Contacting A Lawyer Should Not Have Been Played For The Jury.

Whether or not Ruffin's repeated statements to the detectives about calling a lawyer require suppression of the entirety of both statements, references about Ruffin contacting a lawyer should not have been played for the jury. It is well-established that "trial courts should endeavor to excise any reference to a criminal defendant's invocation." State v. Feaster, 156 N.J. 1, 75 (1998). Excision "avoid[s] prejudice to or unfair inference against either party," and may be accomplished "without making the narrative stilted." Ibid. When a trial court fails to excise a defendant's request for a lawyer, as in Ruffin's trial, jurors may impermissibly infer guilt. Id. at 76-77.

In State v. Tung, "the prosecutor played the unabridged recording of defendant's statement, which included, at the very end, his request for counsel." 460 N.J. Super. 75, 94 (App. Div. 2019) (internal quotation marks omitted). The trial court failed to provide any cautionary instruction. Id. at 95. This Court held that, "[g]iven the longstanding standard of Feaster and the constitutional dimension of defendant's right to counsel, the trial court should have addressed this issue regardless of whether defense counsel objected." Ibid. Thus, notwithstanding defense counsel's failure to object in Tung, this Court held that

the error "had the clear capacity to undermine the verdict" and thus reversed the defendant's convictions.

Here, as in Tung, the jury heard Ruffin himself talk about calling a lawyer, (11T 131-1 to 67) as well as the detectives' references to Ruffin's request for counsel. (11T 124-21 to 125-3, 132-25 to 133-3) The court failed to provide any cautionary instruction. Ruffin's repeated attempts to secure counsel easily could have led the jury to the impermissible inference that Ruffin was more likely to be guilty of something given his unwillingness to cooperate fully with police. Thus, even if Ruffin's statements are not suppressed, the failure to excise the portions of the booking video in which Ruffin requests counsel provide independent grounds to reverse his conviction.

D. Detectives Improperly Contradicted The Miranda Warnings During The Formal Interrogation.

If Ruffin's formal interrogation is not suppressed because of his invocations of his right to counsel during the booking process, then his interrogation must be suppressed because the detectives contradicted the Miranda warnings, rendering Ruffin's statement involuntary. As our Supreme Court has repeatedly held, law enforcement "cannot directly or by implication tell a suspect that his statements will not be used against him because to do so is in clear contravention of the Miranda warnings." State v. L.H., 239 N.J. 22, 44 (2019). "Telling suspects that confessing 'could not hurt' and 'could only

help'" contradicts Miranda and can render a statement involuntary. State v. O.D.A.-C., 250 N.J. 408, 423 (2022) (citing State v. Puryear, 441 N.J. Super. 280 (App. Div. 2015); State ex rel. A.S., 203 N.J. 131, 140, 151 (2010)).

Here, the detectives violated this clear rule. Shortly after reading Ruffin his Miranda rights, Ruffin asked, "[w]hat do you need from me to make this go away?" (Da 72) In response, Detective Bielski contradicted the Miranda warnings he had just read, telling Ruffin: "I can't make any promises or [sic] with you with your charges but all I can say is the truth is what it is and. . . the truth can only help your case." (Da 73) Detective Bielski returned to this theme throughout the interrogation, telling Ruffin three more times, "[c]ooperation gives you consideration." (Da 94-95, 99)

Contrary to the trial court ruling that Detective Bielski did not mislead Ruffin by promising leniency (5T 56-23 to 61-19), the detective's lie that "the truth can only help your case" was wholly improper. This false statement is indistinguishable from the false statements in L.H. that "the truth would be helpful," and in O.D.A.-C. that defendant's words were "not going to work against you" but instead, "[a]nything you say. . . is only going to help you; it's not going to hurt you" that required suppression in those cases. L.H., 239 N.J. at 47; O.D.A.-C., 250 N.J. at 423. These comments impermissibly "countered and diminished the significance of the Miranda warnings." O.D.A.-C., 250 N.J.

at 423. In light of these false assurances from Detective Bielski that speaking to police would "only help" Ruffin's case, the trial court erred in finding Ruffin's formal interrogation admissible.

E. The Improper Admission Of Defendant's Statements Was Harmful Error.

The improper admission of Ruffin's booking statement and interrogation was harmful error that requires reversal of his conviction. Although Ruffin maintained that he did not instigate the fight and instead tried to deescalate the situation in his statements, (see, e.g., Da 43, 45, 48, 50, 52, 73, 74-92) the State pointed to inconsistencies between the statements to discredit Ruffin's claims of innocence. The State returned again and again to the theme that Ruffin should not be believed because he "gave four remarkably different versions of what happened." (13T 134-20 to 24) The State cited Ruffin's four "wildly different" versions of events to try to convince the jury that Ruffin must have lied to police when he told them he was not involved. (13T 143-8 to 149-17) Ruffin's inconsistent statements to police meant that he lied, and he lied because he must be guilty: "He knew he was responsible. . . that's why, not only did he lie with different versions every time, to try to throw officers off. That's why, eventually he tried to shift the blame to Amir Tarpley." (13T 154-11 to 15)

The State's use of the inconsistencies between Ruffin's statements as evidence of his guilt, combined with the jury repeatedly hearing that Ruffin

requested a lawyer, unfairly bolstered the State's case. Without the booking video and the invocations and without Ruffin's formal interrogation, the State would not have been able to argue as persuasively that Ruffin must be guilty because he must have lied to the police. Thus, the improper admission of the booking video and interrogation, either separately or together, was harmful error. The improper admission of these statements deprived Ruffin of his rights to due process and a fair trial and requires reversal of his conviction. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

POINT III

THE COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON THE NECESSARY PURPOSEFUL MENS REA OF CONSPIRACY. (Not Raised Below)

Conspiracy, N.J.S.A. 2C:5-2, like a criminal attempt, N.J.S.A. 2C:5-1, is an inchoate offense. Unlike a completed substantive offense that can be committed with a purposeful, knowing, or reckless state of mind, an attempt or conspiracy to commit that same crime can only be committed purposely. Thus, there is no such thing as a conspiracy to commit aggravated assault with any mental state less than a specific purpose to cause significant bodily injury. The jury instructions here failed to convey this specific intent requirement, instead permitting the jury to return a guilty verdict even if it found Ruffin had acted only knowingly or recklessly with respect to the result of his actions. The failure

to properly instruct the jury prevented the jury from returning a valid verdict, so Ruffin's conviction must be reversed. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Inchoate offenses — attempt, conspiracy, and solicitation — can only be committed purposely. See State v. Harmon, 104 N.J. 189, 203 (1986) (noting that inchoate offenses "always presuppose a purpose to commit another crime") (emphasis added). The purposeful mens rea requirement applies to the conduct itself as well as the result of that conduct. See Model Penal Code, § 5.03, "Criminal Conspiracy" ("The purpose requirement is meant to extend to result and conduct elements of the offense that is the object of the conspiracy.").

Thus, for example, the inchoate offenses of attempted murder and conspiracy to murder require that a defendant act with the specific purpose to cause the prohibited result. As the Model Penal Code, on which New Jersey's conspiracy statute is modeled, explains "if two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion, they are nevertheless guilty only of a conspiracy to destroy the building and not of a conspiracy to kill the inhabitants." Model Penal Code Commentaries, § 5.03 at 407-08. Knowledge of the result is insufficient; a defendant must specifically intend the prohibited result. See State v. Abrams, 256 N.J. Super. 390, 399-401 (App. Div. 1992)

("There must be intentional participation in the activity with a goal of furthering the common purpose"); State v. Madden, 61 N.J. 377, 395 (1972) (equating a conspiracy to murder with a "conspiracy to kill") (emphasis added); State v. Rhett, 127 N.J. 3, 7 (1992) ("[T]o be guilty of attempted murder, a defendant must have purposely intended to cause the particular result that is the necessary element of the underlying offense — death."). The lesser mens reas that could sustain a conviction for the completed offense are insufficient for the inchoate offenses of conspiracy or attempt. The failure to communicate this specific purpose requirement to the jury is "fatal to the conviction." Ibid.

Aggravated assault, like murder, is a crime that prohibits causing a particular result: death, in the case of murder; serious or significant bodily injury, in the case of aggravated assault. Just as an attempt or conspiracy to commit murder requires the specific purpose to cause death, an attempt or conspiracy to commit aggravated assault requires the specific purpose to cause serious or significant bodily injury. See State v. Green, 318 N.J. Super. 361, 371 (App. Div. 1999) ("In order to convict a defendant of attempted aggravated assault, the State must prove beyond a reasonable doubt. . . that defendant acted with the purpose of causing the result that is an element of aggravated assault, namely, serious bodily injury of another."); Model Criminal Jury Charge, "Attempt", at 1 n.3 (rev. June 16, 2009) (noting that jurors must be specifically

instructed that the lesser mens reas of knowledge or recklessness that are sufficient for the substantive offense are insufficient for an attempt because "all attempts must be purposeful"). Thus, "it would not be sufficient" for a conspiracy conviction "if the actor only believed that the result would be produced but did not consciously plan or desire to produce it." Model Penal Code Commentaries, § 5.03 at 407-08.

Yet the jury here was repeatedly told that lesser mens reas were sufficient to convict Ruffin of conspiracy to commit aggravated assault. The court told the jury that, so long as Ruffin purposely entered into an agreement to promote or facilitate the "crime of aggravated assault," he could be found guilty. (See, e.g., 13T 191-6 to 8, 192-19 to 193-1, 195-1 to 3) The court then went on to define aggravated assault as causing significant bodily injury purposely, knowingly, or recklessly with extreme indifference. (13T 196-19 to 25, 197-5 to 9, 197-16 to 198-12, 198-20 to 24, 199-5 to 24, 200-10 to 18, 201-8 to 11)

This instruction flatly violates the law on conspiracy. It was not a conspiracy to commit aggravated assault if Ruffin purposely agreed to promote the fight yet only acted knowingly as to the result of the fight. See Model Penal Code Commentaries, § 5.03 at 407-08. It was even more nonsensical to instruct the jury that Ruffin could have purposely entered into an agreement to facilitate recklessly causing a particular result. "An actor cannot intend an unintended

result." Rhett, 127 N.J. at 7. But the instructions here included that "logical impossibility." Ibid. In short, the court's instructions on conspiracy to commit aggravated assault failed to communicate the elements of that offense: that Ruffin purposely agreed to promote or facilitate aggravated assault and specifically intended that significant bodily injury result.

This faulty jury instruction that permitted the jury to convict without a finding of the requisite purposeful mens rea was particularly harmful in this case because of the dearth of evidence that Ruffin specifically intended to cause significant bodily injury. Aaron's testimony about the alleged agreement was that Ruffin simply asked him to fight Tarpley, (9T 76-1) and Archie testified that his role was to act as a referee to ensure that the fight was "fair." (10T 73-3 to 8) Thus, as defense counsel argued in summation, even if the jury found that there was an agreement, that agreement was not to cause significant bodily injury: "Even according to the star witness, Aaron Hickox, I went there to fight to cause injury, bodily injury. Absolutely nothing in this case about significant injury." (13T 130-2 to 13) Yet the jurors here were told specifically the wrong law, which prevented them from having the legal framework necessary to credit this defense. Conspiracy to commit aggravated assault requires both a purposeful agreement and a purpose to cause significant bodily injury. Instead, the jury here was told that they could convict on less than that — if they found

there was a purposeful agreement to promote a fight, but only knowledge or conscious disregard of the risk that significant bodily injury would result.

Proper and comprehensive jury instructions are critical to preserving a defendant's right to due process and a fair trial, even when no objection is lodged. State v. McKinney, 223 N.J. 475, 495 (2015) (reversing for plain error in the robbery instruction). One of the most basic principles of New Jersey criminal law is that "[a]n essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." Ibid. (quoting State v. Afanador, 151 N.J. 41, 54 (1997)); State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). It is "structural error," irremediable by harmless-error analysis, for a jury to deliberate under the wrong burden of proof, Sullivan v. Louisiana, 508 U.S. 275, 277-278 (1993), or the wrong elements. State v. Vick, 117 N.J. 288, 292 (1989). The jury here was not instructed on the correct elements of conspiracy to commit aggravated assault. Ruffin's conviction must therefore be reversed.

POINT IV

THE COURT IMPROPERLY FAILED TO INSTRUCT THE JURY THAT THEY HAD TO UNANIMOUSLY AGREE ON ALL ESSENTIAL ELEMENTS OF CONSPIRACY. (Not Raised Below)

Unlike first- and second-degree conspiracies, third-degree conspiracies, like third-degree conspiracy to commit aggravated assault, include an additional essential element: that a co-conspirator commit an overt act to further the conspiracy. N.J.S.A. 2C:5-2(d). Here, the State alleged six distinct acts by four possible co-conspirators. (Da 32; 13T 194-5 to 17) Worse still, one of the alleged overt acts — that Ruffin solicited Aaron to cause bodily injury to Tarpley (Da 32; 13T 194-6 to 8) — was indistinguishable from the conspiratorial agreement itself, thus allowing the jury to convict Ruffin without finding the necessary additional overt act element. Overall, the at least fifteen possible overt acts by Ruffin, Aaron, Archie, "and/or" McCormick created a serious risk that the jury did not unanimously agree on this essential element of the conspiracy charge. The court's failure to instruct the jury that they needed to unanimously agree on all essential elements of the offense before they could return a guilty verdict on this count was plain error that requires reversal of Ruffin's conviction. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

In addition to the requirement that the State prove every element of the offense beyond a reasonable doubt, our constitution requires that the jury unanimously reach a "subjective state of certitude on the facts in issue." State v. Frisby, 174 N.J. 583, 596 (2002); In re Winship, 397 U.S. 358, 364 (1970); see also State v. Parker, 124 N.J. 628, 633 (1991) (recognizing that the unanimous jury requirement is "an indispensable element in all criminal trials"). Although the unanimity rule does not require jurors to agree on every detail in the State's case, it does mandate unanimous agreement on all the elements of the offense. State v. Gentry, 183 N.J. 30, 33 (2005). The failure to properly instruct jurors as to unanimity leaves the door open for an unacceptable "patchwork verdict" and requires reversal of a defendant's convictions. State v. Tindell, 417 N.J. Super. 530, 551 (App. Div. 2011).

Although a general unanimity instruction is usually sufficient to ensure a unanimous jury verdict, in certain cases a more-specific instruction on unanimity is required. For example, in Frisby, the general unanimity instruction was deficient because "[d]ifferent theories were advanced based on different acts and entirely different events" in the State's case for endangering the welfare of a child. Frisby, 174 N.J. at 599. A "more specific instruction was required in order to avert the possibility of a fragmented verdict." Id. at 598. In contrast, in State v. Parker, 124 N.J. 628 (1991), a specific unanimity instruction was not

required at defendant's trial for official misconduct based on a series of alleged sexual assaults because the specific acts of sexual assault "formed a core of conceptually[ ]similar acts relating to the students' educational relationship with the [defendant] and her abuse of that relationship." Id. at 639.

Though holding that no specific unanimity instruction was required, the Parker Court held that specific unanimity instructions are required when "a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." Frisby, 174 N.J. at 597 (citing Parker, 124 N.J. at 635-36). In Parker, all of the allegations of inappropriate behavior were of a single type, and all constituted the crime of official misconduct via an abuse of a public office. Parker, 124 N.J. at 639. In contrast, in Frisby, the theories of guilt were independent of one another; in one, the defendant was accused of physically assaulting the child, while in the other, defendant was accused of neglect, and the jury well could have been split on which theory was proven. Frisby, 174 N.J. at 596-600. Thus, a unanimity instruction was required in Frisby, but not in Parker.

The case law follows this distinction. Courts reverse convictions in cases where the jury could have been split on the theories of guilt and affirm in cases

where such confusion in the verdict was not possible. See, e.g., State v. Jackson, 326 N.J. Super. 276, 279, 282 (App. Div. 1999) (reversing drug convictions because of the possible lack of jury unanimity as to whether defendant possessed the cocaine in a dresser drawer or in a pair of pants); State v. Bzura, 261 N.J. Super. 602, 614-15 (App. Div. 1993) (reversing false swearing conviction because the jury "could have returned a guilty verdict without all its members agreeing either that any two statements or sets of statements were inconsistent with each other or that any particular statement was false," and holding that the State "cannot rely on a composite theory of guilt, producing twelve jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict"); Gentry, 183 N.J. at 32-33 (reversing robbery conviction where jury could have disagreed on the identity of the victim); State v. Gandhi, 201 N.J. 161, 191 (2010) (affirming stalking conviction because there was no realistic chance that the jury was split as to which no-contact order the defendant violated when those orders were overlapping).

This case falls squarely into a category of cases that the Court in Parker recognized requires a specific unanimity charge: a case in which "a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and the circumstances demonstrate a

reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." Parker, 124 N.J. at 635.

The jury instructions here, like the instructions in Jackson and Bzura, did not specify that the jury had to be unanimous on alleged act or acts that formed the basis for the conviction. The State alleged six possible overt acts:

1. Soliciting Aaron to cause bodily injury to Tarpley;
2. Traveling to confront Tarpley;
3. Demanding Tarpley come out of his home to be assaulted;
4. Assaulting Tarpley;
5. Picking up Aaron and/or Archie;
6. Paying Aaron and/or Archie. [(Da 32; 13T 194-5 to 17)]

These alleged overt acts could have been committed by any of the four alleged co-conspirators, or any combination of co-conspirators: Ruffin and/or Aaron and/or Archie and/or McCormick. (See Da 32; 13T 194-5 to 17) Thus, the instructions permitted the jurors to return a verdict even if they completely disagreed over which of the four possible co-conspirators committed which of this multitude of acts.

Worst of all, the first of the possible overt acts in furtherance of the conspiracy — that "defendant, Arteste Ruffin, is alleged to have solicited Aaron Hickox to cause bodily injury upon Amir Tarpley" (Da 32; 13T 194-6 to 8) —

is indistinguishable from the conspiracy itself. The alleged agreement forming the basis for the conspiracy occurred when Ruffin asked, i.e. solicited, Aaron to fight Tarpley. By instructing the jury that the conduct underlying the agreement could be the exact same conduct that constitutes the overt act in furtherance of the conspiracy, the court provided a path to a verdict that eliminated the necessary third element of a third-degree conspiracy: that the co-conspirators actually commit an act in the conspiracy beyond merely agreeing to commit a crime. When jury instructions include a legally inappropriate path to a verdict, a defendant's conviction must be reversed. The need for reversal is in no way lessened simply because the jury instructions also include a legally viable path to conviction. See State v. Condon, 391 N.J. Super. 609, 618 (App. Div. 2007) (reversing defendant's conviction when the jury was instructed it could convict on the applicable substantial step attempt theory and the inapplicable impossibility attempt theory because "there is no assurance that the jurors understood and applied the correct legal principles in reaching their verdict").

In short, the jury instructions in this case were hopelessly confusing and failed to ensure that the jurors were "in substantial agreement as to just what a defendant did before determining his. . . guilt or innocence." Frisby, 174 N.J. at 596. With six possible alleged acts, one of which was indistinguishable from the conspiracy agreement itself, and four possible actors, there was a real risk that

the jurors did not agree as to who did what. With so many possibilities, the risk of a patchwork verdict was simply too high. A specific unanimity instruction, rather than the repeated and confusing use of "and/or," was required. The absence of such an instruction was plain error, requiring reversal of Ruffin's conviction. R. 2:10-2.

POINT V

THE NEAR-MAXIMUM CUSTODIAL SENTENCE IS EXCESSIVE FOR A FIRST-TIME OFFENDER LIKE DEFENDANT. (15T 16-23 to 36-18)

Prior to imposing this four-year sentence, the court found aggravating factors (1), the nature and circumstances of the offense and the role of the actor, including whether it was committed in an especially heinous, cruel, or depraved manner; (3) the risk that defendant will commit another offense; (6), the extent of defendant's prior criminal record and the seriousness of this offense; (7), the defendant committed the offense pursuant to an agreement to pay; and (9) the need for deterring defendant and others from violating the law. N.J.S.A. 2C:44-1(a). (15T 16-23 to 36-18) The court did not find any mitigating factors. (15T 16-23 to 36-18) The court made several mistakes with regard to these findings, and further erred by imposing this near-maximum custodial sentence for Ruffin, who had no prior felony convictions. Accordingly, the matter should be remanded for resentencing.

When imposing a sentence, a court must consider the applicability of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1 to determine the length of a defendant's prison term within the available range. This step requires a court to "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). In order to ensure proper balancing of the relevant factors, at the time of sentencing, a court must "state the reasons for imposing such sentence, including . . . the factual basis supporting a finding of particular aggravating and mitigating factors affecting sentence." State v. Fuentes, 217 N.J. 57, 73 (2012). A clear explanation of the balancing process is "particularly important," and that explanation "should thoroughly address the factors at issue." Ibid. (internal citations omitted).

A remand for resentencing is required when the trial court considers an improper aggravating factor, State v. Carey, 168 N.J. 413, 424 (2001), fails to find mitigating factors supported by the evidence, State v. Dalziel, 182 N.J. 494, 504 (2005), or if the trial court's reasoning in finding aggravating and mitigating factors is not based on factual findings "supported by substantial evidence in the record." State v. O'Donnell, 117 N.J. 210, 216 (1989).

Here, the court erred in finding and weighing aggravating factors (1), (3), (6), and (9), and erred in rejecting mitigating factors (3), (7), (9), and (10).

Individually and together, these errors render Ruffin's four-year custodial sentence excessive and require a remand for resentencing.

A. Aggravating Factor (1)

The court first erred in finding aggravating factor (1) — the nature and circumstances of the offense and the role of the actor, including whether the crime was committed in an especially heinous, cruel, or depraved manner — and giving it substantial weight. The court found this factor by pointing to what it asserted were facts "unique to this case:" that Ruffin offered to pay Aaron, that Ruffin was substantially older than Aaron and Archie, and that Ruffin sought to avoid culpability after-the-fact. (15T 25-17 to 17-22)

In finding this factor, a sentencing court may consider "aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior." State v. Fuentes, 217 N.J. 57, 75 (2014). Here, the conduct alleged by the State is nowhere near the "extreme reaches" of the criminal behavior. The State's evidence at trial in support of this conviction established that Ruffin offered Aaron $40 to fight Tarpley, who had attacked Ruffin's girlfriend earlier that day. The agreement did not include the use of any weapons or the participation of anyone other than Aaron; as Archie testified, he and Pierce were there to act as referees, rather than to participate. (10T 73-3 to 8) While the evidence presented by the State is certainly sufficient to sustain a conviction

for third-degree conspiracy, it does not demonstrate that this conspiracy is one of the worst of its kind. Cf. Fuentes, 217 N.J. at 75 (noting that this factor can be properly found "by reference to the extraordinary brutality involved in an offense"). The court thus erred in finding aggravating factor (1) and in giving it substantial weight.

B. Aggravating Factor (3) and Mitigating Factor (9)

The court erred in finding and giving moderate weight to aggravating factor (3) (the risk that defendant will commit another offense) while rejecting mitigating factor (9) (defendant is unlikely to reoffend). (15T 28-11 to 29-24, 33-23 to 34-13) In making these findings, the court primarily relied on Ruffin's "history of contacts with the criminal justice system." (15T 28-11 to 29-24, 31-15 to 32-2) However, this "history" involved only municipal court offenses, with no prior felony convictions, providing an insufficient basis for finding that it was likely that 46-year-old Ruffin would reoffend.

Moreover, the court improperly discounted the fact that Ruffin had successfully been on pretrial release for approximately four years during the pendency of the case. The court reasoned that "being on pre-trial services is not a punishment" and that Ruffin's compliance "is really not of any great moment." (15T 28-11 to 29-24) Yet compliance with pre-trial services for four years provides concrete, credible evidence that Ruffin is unlikely to reoffend,

particularly if he received the probationary sentence requested by defense counsel. (15T, 13-13 to 14-1, 15-11 to 16) The court should not have ignored this competent, credible evidence, and should have used this evidence to support finding mitigating factor (9).

C. <u>Aggravating Factor (6) and Mitigating Factor (7)</u>

The court improperly found aggravating factor (6) (defendant's criminal history) while rejecting mitigating factor (7) (defendant has led a law-abiding life for a substantial period of time). (15T 31-15 to 32-2, 33-10 to 22) Although the court acknowledged that this represented 46-year-old Ruffin's very first felony conviction, the court nonetheless cited Ruffin's prior municipal court offenses as sufficient to find aggravating factor (6). However, contrary to the court's finding, the absence of any prior criminal convictions fully supported mitigating factor (7) rather than aggravating factor (6). As even the State conceded in their sentencing brief, mitigating factor (7) applied and should have been given moderate weight. (Da 132) The court erred in failing to find this mitigating factor and instead finding that Ruffin's criminal history was an aggravating factor. (15T 33-10 to 22)

In addition to improperly placing a high reliance on Ruffin's prior municipal court offenses, the court engaged in impermissible double counting by relying on the agreement "to engage in assaultive conduct." (15T 31-15 to

32-2) The existence of that agreement is the exact basis for Ruffin's conspiracy conviction — the jury found that he entered into an agreement to commit a third-degree aggravated assault. As such, it was improper double counting for the court to rely on this "assaultive conduct" as a basis to find that this offense was worse than others of its kind. See State v. Kromphold, 162 N.J. 345, 353 (2000) (reaffirming that "facts that established elements of a crime for which a defendant is being sentenced should not be considered as aggravating circumstances" because "the Legislature had already considered the elements of an offense in the gradation of a crime," and to do so would mean that "every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating circumstances"). The court erred in finding aggravating factor (6) instead of mitigating factor (7).

D. Aggravating Factor (9)

As with the other aggravating factors it found, the court here found aggravating factor (9) (the need to deter) and gave it "substantial weight" by relying on Ruffin's prior municipal court offenses as its sole explanation for the need for specific deterrence. (15T 31-6 to 13) Insofar as the court here considered general deterrence as an aggravating factor, "general deterrence has relatively insignificant penal value." Fuentes, 217 N.J. at 79. Moreover, the

court entirely failed to explain why there was a particular need to deter Ruffin, who had never before been convicted of a felony offense and was 46 years old at the time of sentencing. This lack of adequate explanation requires a remand for resentencing.

In addition, the court stated that "[t]his is a factor that certainly applies in every case." (15T 31-6 to 13) Finding aggravating factor (9) and giving it substantial weight on this basis was clear error. Finding an aggravating factor "in every case" is a clear violation of our sentencing law. State v. McFarlane, 224 N.J. 458, 465 (2016) ("each '[d]efendant is entitled to [an] individualized consideration during sentencing.'") (quoting State v. Jaffe, 220 N.J. 114, 122 (2014)) (alterations in McFarlane). The court here did not provide a valid reason for finding this aggravating factor, requiring a remand for resentencing.

E. Mitigating Factor (3)

Defense counsel requested mitigating factor (3) — that defendant acted under a strong provocation — because Ruffin's agreement with Aaron was provoked by Tarpley's attack on McCormick. (15T 14-2 to 20) The court rejected this factor because Ruffin "was in control of his own conduct" and that Tarpley's assault on McCormick "doesn't excuse" Ruffin's conduct. (15T 32-16 to 33-8) Neither of these reasons was adequate to reject this mitigating factor. If Ruffin had not been in control of his own conduct, as the court apparently suggested he

would need to be for this factor to apply, then Ruffin could not have been convicted of conspiracy in the first instance, as conspiracy required him to act with purpose. Similarly, provocation is not an excuse for criminal behavior. It is, however, a mitigating factor that renders this offense less severe than a conspiracy to commit assault that was not provoked by the victim's assault on a third-party. As Aaron testified, McCormick had visible injuries to her face, and there was no dispute that Tarpley caused those injuries. (9T 76-8 to 77-24, 78-7 to 9, 79-13 to 14; 10T 107-6 to 25) While Tarpley's conduct certainly does not relieve Ruffin of responsibility for his actions, it does constitute strong provocation such that the court should have found mitigating factor (3).

F. <u>Mitigating Factor (10)</u>

Defense counsel asked the court to find mitigating factor (10) — that Ruffin was likely to respond affirmatively to probationary treatment — given that he was 46 years old, had no prior felony convictions, and had succeeded on pretrial release for the four years his case was pending. (15T 15-6 to 10) The court rejected these arguments, concluding that pretrial release "certainly isn't probation," and finding that the fact that Ruffin committed the instant warranted a rejection of this factor. (15T 34-14 to 23) The court's rejection of this mitigating factor was error. Ruffin's success on pretrial release for the many years that this case was pending provided concrete proof that Ruffin would be

able to comply with the terms of a probationary sentence. The court should have found mitigating factor (10).

CONCLUSION

For the reasons set forth in Points I-IV, defendant's convictions must be reversed and remanded for a new trial. Alternatively for the reasons set forth in Point V, defendant's sentence should be vacated and remanded for resentencing.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: /s/ Margaret McLane
Assistant Deputy Public Defender
Attorney ID: 060532014

Dated: August 7, 2023

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2248-22T1

		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.	:	Gloucester County.
ARTESTE RUFFIN,	:	Sat Below: Hon. Kevin T. Smith, J.S.C.
Defendant-Appellant.	:	Hon. John C. Eastlack, J.S.C. and a jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

THOMAS M. CAROCCIA
ATTORNEY NO. 306012019
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE UNIT
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
carocciat@njdcj.org

OF COUNSEL AND ON THE BRIEF

December 19, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

RULES

TABLE OF APPENDIX

TABLE OF CITATIONS

Db – Defendant's brief
Da – Defendant's appendix
Sa – State's appendix
1T – June 3, 2019 pre-trial conference transcript
2T – June 26, 2020 motion hearing transcript
3T – August 19, 2022 pre-trial conference transcript
4T – August 24, 2022 jury selection transcript
5T – August 25, 2022 motion hearing transcript
6T – August 29, 2022 jury selection transcript
7T – August 30, 2022 jury selection transcript
8T – August 31, 2022 jury selection transcript
9T – September 7, 2022 trial transcript
10T – September 8, 2022 trial transcript
11T – September 12, 2022 trial transcript (vol. 1)

12T – September 12, 2022 trial transcript (vol. 2)
13T – September 13, 2022 trial transcript
14T – September 14, 2022 trial transcript
15T – March 13, 2023 sentencing transcript
PSR – Pre-sentencing report

PRELIMINARY STATEMENT

Five years ago, defendant—then forty-two years old—rallied teenagers to issue vigilante justice against eighteen-year-old Amir Tarpley, ultimately resulting in his death. A jury found defendant guilty of conspiracy to commit aggravated assault and the court sentenced him to a four-year prison term. Defendant's last-ditch effort to overturn his conviction recycles the conduct that got him into trouble: a persistent attempt to blame others for his own conspiratorial actions. But each of his claims are flawed.

First, defendant's Sixth Amendment self-representation right was not violated because he did not clearly and unequivocally invoke the right, and even if he did, his demonstrated cooperation with his attorney and failure to submit an application constituted a waiver.

Defendant's Miranda argument fails because he had acknowledged and waived his rights just two days prior, and even if the warnings lapsed, his statements at booking were voluntary and in response to permissible booking questions; nor did he unambiguously invoke his right to counsel during booking. When he mentioned a lawyer, the detectives either stopped talking or attempted to clarify, but defendant continued to talk. And the Miranda warnings were not contradicted because the detectives repeatedly explained that they could not promise leniency. Any other error in admitting defendant's statements was

nonetheless harmless because the weight of the evidence proved beyond a reasonable doubt that defendant committed the crime.

Defendant's remaining arguments regarding the conspiracy charge and his sentence likewise lack merit. The conspiracy charge complied with New Jersey law and his sentence followed sentencing guidelines. This Court should affirm.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On August 15, 2018, a Gloucester County Grand Jury returned Indictment No. 18-08-682-I, charging defendant with third-degree conspiracy to commit aggravated assault, attempting to cause significant bodily injury, N.J.S.A. 2C:5-2/2C:12-1(b)(7) (count sixteen), second-degree conspiracy to commit aggravated assault, attempting to cause serious bodily injury, N.J.S.A. 2C:5-2/2C:12-1(b)(1) (count seventeen), and first-degree conspiracy to commit murder (cause serious bodily injury resulting in death), N.J.S.A. 2C:2-6(a)/2C:11-3(a) (count eighteen). (Da10 to Da11).[1]

On June 3, 2019, the trial court denied defendant's motion to dismiss the indictment. (1T). Shortly before trial, the court issued rulings on the

[1] The Hickoxes and Pierce were charged with fifteen other crimes in the same indictment. (Da1 to Da8). All three pleaded guilty before trial. (10T31-6 to 11, 90-2 to 16; 11T108-19 to 110-15).

admissibility of defendant's statements to police. It admitted statements made by defendant at the scene, at a formal interview the day of the events, at booking two days later, and at a formal interview following defendant's booking until he invoked his Sixth Amendment right to counsel. (5T; 8T; 11T). Following a four-day trial, the jury found defendant guilty of third-degree conspiracy to commit aggravated assault. (14T5-6 to 10; Da11).[2] Defendant was sentenced to a four-year prison term with attendant fines. (15T35-17 to 15T36-18).

Defendant filed a Notice of Appeal on March 30, 2023. (Da15 to Da18).

COUNTERSTATEMENT OF FACTS

On May 20, 2018, defendant, then-forty-two years old, and teenaged co-defendants Aaron Hickox, Archie Hickox, and Kishon Pierce, carried out a plan for Aaron to fight eighteen-year-old Amir Tarpley, which resulted in Tarpley's death. That day, defendant called Aaron, an accomplished high school wrestler, because Tarpley allegedly hit defendant's girlfriend, Kelly McCormick, and defendant "needed somebody to handle" Tarpley, urging Aaron "to go fuck [Tarpley] up." (9T75-12 to 76-1; 10T63-20 to 25). Aaron agreed because

[2] At the close of the State's case, the court granted the portion of defendant's motion to dismiss pertaining to counts seventeen (second-degree conspiracy to commit aggravated assault) and eighteen (first-degree conspiracy to commit SBI murder), leaving only count sixteen (third-degree conspiracy to commit aggravated assault) for the jury. (13T49-10 to 60-25).

defendant offered to pay him forty dollars. (9T101-15 to 20; 10T64-18 to 65-1). Aaron called his brother Archie for backup, and Archie brought Pierce. (9T81-22 to 82-2; 10T59-11 to 20). Defendant led the group to Tarpley's house, splitting up partway to avoid suspicion. (9T83-14 to 84-2). Although Archie believed that it would be a "fair fight," he did not think Tarpley "had a chance of beating Aaron," because Aaron was a better fighter. (10T77-2 to 78-2).

After leading the group to Tarpley's house, defendant knocked on the door to call him outside. (9T84-3 to 16; 10T70-23 to 71-14). Tarpley walked out and then fought Aaron. (9T87-21 to 88-4). Nearby, defendant punched Tarpley's friend, Anthony Harden, who yelled to break up the fight. (10T114-18 to 115-17). Aaron won the fight quickly and decisively. (9T188-13 to 14). Afterward, Tarpley ran into his house and emerged with a knife and another weapon, chasing the teenagers down the street. (9T94-21 to 24). Amid a scuffle, Pierce stabbed Tarpley and the trio fled. (9T95-7 to 96-2; 102-2 to 103-7; 81-9 to 24). McCormick picked them up and paid Aaron twenty dollars. (9T96-14 to 22). Tarpley died as a result of his wound. (10T103-6 to 7).

At the scene, defendant gave the first of his four statements to police. He interrupted Harden's conversation with Paulsboro Patrolman Nicole Greener, telling her that he knew "the whole story." (11T26-16 to 25). Defendant told Greener that: Tarpley beat up "a girl"; "[h]er friend defend[ed] her"; defendant

broke up the fight; Tarpley chased Aaron with a screwdriver and a butcher knife; and when defendant caught up, Tarpley was bleeding. Defendant also said that he did not know if Tarpley "fell on the knife" and that he did not know the Hickoxes well. (11T29-9 to 11, 30-3 to 11).

Later that day, Paulsboro Detectives Anthony Garbarino and Mike Minniti interviewed defendant at the Woodbury Police Department. (11T61-22 to 62-4). Garbarino testified that he issued Miranda[3] warnings because he did not know whether defendant was involved in Tarpley's death. (11T67-6 to 67-16). Defendant signed the Miranda forms and verbally acknowledged each of his rights in turn, expressly declining counsel. (11T68-4 to to 69-17).

In that interview, defendant again claimed that he broke up the fight and did not know Aaron well. (11T69-20 to 70-20, 73-6 to 74-25, 89-12 to 25). He claimed that Tarpley "beat up a girl," whom Aaron "was defending." (11T77-18 to 23). Defendant insisted that he "just happened to be going" to Tarpley's house. (11T81-16 to 19). He stated that when he knocked, Tarpley came outside to fight, lost, and then got himself hurt by chasing Aaron with the knife. (11T83-3 to 13). Defendant said that he never entered Tarpley's home. (11T83-3 to 7).

Days later, defendant was arrested and processed at the Gloucester County

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Prosecutor's Office. (11T121-6 to 137-9; Sa1; Da42 to Da63). While awaiting booking, defendant told a detective that he broke up the fight, took Aaron and Tarpley into the house, admonished them, and sent Aaron away before Tarpley ran after Aaron with the knife. (11T121-14 to 122-20; Sa1 at 10:48:52 to 10:44:29; Da43 to Da44). As Minniti and Gloucester County Detective Michael Bielski entered the booking room, defendant asked why he was at the station, and then stated, "I'[ve] got a lawyer coming. I [did]n't do nothing bro," to which Minniti responded, "[t]hat's fine. Alright. That's fine." (11T123-4 to 15; Sa1 at 10:44:50 to 10:45:03; Da45). Defendant added, "I didn't do anything wrong. You know me, bro." (11T123-16 to 18; Sa1 at 10:45:03 to 10:45:07; Da45). After saying defendant's story contradicted other evidence, Minniti asked defendant if he wanted to give a statement. (Sa1 at 10:45:08 to 10:45:21; Da46).

At that point, Bielski began to book defendant. (11T124-2 to 7; Sa1 at 10:45:23; Da46). As Bielski attempted to explain the process, defendant repeatedly interjected to profess his innocence and offer cooperation. (11T124-8 to17; Sa1 at 10:45:32 to 10:45:38; Da47). Bielski stated that before defendant told them anything, he had to fingerprint him. (11T124-15 to 22; Sa1 at 10:45:38 to 10:45:40; Da47). Bielski acknowledged that defendant "said something about a lawyer," and explained that once they were in the interview room, the detectives would reread his rights and he would have the opportunity

to talk to them if he so chose. (11T124-22 to 125-5; Sa1 at 10:45:40 to 10:45:53; Da47). Defendant nevertheless provided two more explanations over reminders from Bielski and Minniti that they would talk with him after booking was completed. (11T125-6 to 126-18; Sa1 at 10:46:10 to 10:46:56; Da48 to Da49).

Rather than engaging defendant, Bielski asked defendant his height, weight, and place of birth. (11T126-19 to 127-2; Sa1 at 10:46:56 to 10:47:21; Da49 to Da50). In between and over Bielski's booking questions, defendant provided yet another extended account of the fight. (11T127-3 to 128-11; Sa1 at 10:47:21 to 10:49:09; Da50 to Da51). Bielski asked if defendant knew Tarpley's brother, and defendant said he did. (11T128-14 to 16; Sa1 at 10:49:09 to 10:49:11; Da51). Defendant then launched into another description over repeated requests by Bielski to stop. (11T128-16 to 129-4; Sa1 at 10:49:11 to 10:50:21; Da51 to Da52). As defendant continued to talk over Bielski, Gloucester County Detective John Petroski asked defendant to listen to Bielski's instruction. (11T130-1 to 2; Sa1 at 10:50:09 to 10:50:11; Da52 to Da53). Bielski noted that he did not "think [defendant] had anything to do with" stabbing Tarpley. (11T129-5 to 8; Sa1 at 10:49:41 to 10:49:46; Da52).

Defendant then asked Bielski and Petroski if he could call his girlfriend and "get the number to call this lawyer or something," bargaining that he would cooperate without being charged, "but if not," that he "better get a lawyer."

(11T131-1 to 7; Sa1 at 10:51:08 to 10:51:26; Da55). Neither detective answered immediately as they were attending to a technical error with the photography software. (11T131-8 to 132-11; Sa1 at 10:51:26 to 10:52:40; Da55 to Da57).

During fingerprinting, defendant again claimed innocence. (11T132-18 to 20; Sa1 at 10:53:13 to 33; Da57). Bielski, while rolling defendant's fingers for prints, explained that "a lot more evidence ha[d] come to light" since defendant's interview with Garbarino two days prior, and Bielski again acknowledged that defendant was "saying [he] wanted to call [his] lawyer." (11T132-21 to 133-3; Sa1 at 10:53:35 to 10:53:48; Da57). Defendant called the evidence "lies." (11T132-24; Da58; Sa1 at 10:53:41 to 10:54:05; Da57).

After a few moments of banter, defendant again professed his innocence and said he defused the fight. (11T133-15 to 134-14; Sa1 at 10:54:05 to 10:55:37). In response, the detectives asked no substantive questions. (11T134-10 to 14; Sa1 at 10:55:37 to 10:55:41; Da58 to Da59). After troubleshooting the fingerprinting software, a few silent moments passed before defendant volunteered more statements about how "Aaron and them [are] always fighting and shit," disclaiming involvement. (11T134-15 to 136-1; Sa1 at 10:57:45 to 10:58:03; Da60 to Da62). Bielski then asked defendant to sign and verify that he was fingerprinted. (11T136-2 to 4; Sa1 at 10:58:03 to 10:58:05; Da62). After fingerprinting, defendant emphatically offered cooperation, telling the officers

to "just fucking ask" him what the they "need[ed] to know," asking what they were "missing," and stating: "[t]alk to me." (11T136-12 to 19; Sa1 at 10:58:12 to 10:58:46; Da62). Petroski replied that the detectives would take him upstairs for an interview. (11T136-20 to 21; Sa1 at 10:58:46 to 10:58:49; Da62).

When booking was completed, defendant made a fourth statement. (11T144-4 to 146-1, 165-17 to 193-14; Sa2; Da64 to Da125). Bielski and Minniti entered the interview room to inform defendant of his charges. (11T165-18 to 167-6; Sa2 at 11:02:22 to 11:03:42; Da67 to Da68). Bielski interrupted yet another account of the fight to re-read defendant his Miranda rights. (11T167-7 to 169-8; Sa2 at 11:03:42 to 11:04:52; Da68 to Da71). Defendant acknowledged and initialed next to each right that was read from the form. (11T167-22 to 169-8; Sa2 at 11:04:05 to 11:04:52; Da69 to Da71). When Bielski asked defendant if he wanted to talk, defendant replied "[y]es" and signed the form. (11T169-9 to 13; Sa2 at 11:04:50 to 11:05:08; Da71).

Defendant quickly asked whether his charges would "go away" if he told the detectives what he knew. (11T170-10 to 19; Sa2 at 11:05:39 to 11:05:51; Da72 to 73). Bielski responded by informing defendant that any statement would not instantly change his charges, but that the truth could help lead the investigators to other defendants in the case. (11T170-21 to 171-4; Sa2 at 11:05:58 to 11:06:19; Da73). Bielski summarized: "I can't make any promises

. . . but all I can say is the truth is what it is and the truth can only help your case." (11T171-4 to 6; Sa2 at 11:06:19 to 11:06:29; Da73).

A few minutes later, when defendant responded with an offer to testify against other defendants if Bielski "[p]ut it in writing that I get to leave today and just go free," Bielski reminded him multiple times that he could not make promises, but that "cooperation gives you consideration." (11T188-23 to 189-22; 11T192-14 to 18; Sa2 at 11:21:40 to 11:24:18; Da94 to Da95; Da99). Moments after, defendant again sought a deal: "[I]f you want the fucking truth, I'm telling you two that I'll give you the fucking truth. It goes away. I go home." (11T193-8 to 13; Sa2 at 11:24:48 to 11:25:05; Da100). Bielski reiterated that it was "impossible" for him to offer defendant leniency in exchange for a statement. (Sa2 at 11:25:37; Da101). In response, defendant stated, "[w]ell I want a lawyer then." (Sa2 at 11:25:27 to 11:25:37; Da101).[4]

The jury convicted defendant of third-degree conspiracy to commit aggravated assault and the court sentenced him to four years in prison. (14T5-6 to 20; 15T16-23 to 36-18).[5] This appeal follows.

---

[4] Despite defendant's apparent invocation of his right to counsel, the interview continued. Before trial, the court granted defendant's motion in limine and suppressed the remainder of defendant's interview. (5T56-17 to 64-1).

[5] As of September 14, 2023, defendant has been released from prison pursuant to the New Jersey Intensive Supervision Program. (Sa3 to Sa6).

LEGAL ARGUMENT

POINT I

DEFENDANT'S SIXTH AMENDMENT RIGHT TO PROCEED PRO SE WAS NOT VIOLATED BY THE LACK OF A FARETTA HEARING.

When defendant—for the single time during the nearly five years of trial proceedings—expressed frustration about his attorney in open court after he lost on a motion to dismiss the indictment, the court was not required to hold a hearing under Faretta v. California, 422 U.S. 806 (1975), to determine whether to allow defendant to proceed pro se. Here, the court did not abuse its discretion permitting defendant to submit an application if he chose to proceed pro se. Regardless, given that defense counsel went out of his way thereafter to indulge defendant's desired arguments, and defendant never again revived the issue, defendant waived any purported invocation of his right to appear pro se.

A. Advising defendant to apply for self-representation was proper.

The court below was not required to hold a Faretta hearing in response to defendant's last-ditch effort to prevail on his motion to dismiss the indictment after the proceeding had concluded. After the court denied defendant's motion and scheduled the next hearing, defendant addressed the court directly, claiming that his attorney refused to submit video evidence of a witness's inconsistent statements regarding the events. (1T30-10 to 32-2). After the court explained

that defendant's attorney may have strategically elected not to submit the video, defendant engaged his attorney and the court in the following exchange:

> THE DEFENDANT: You didn't present him my letter I asked you to give him. Like, no one's doing nothing they're supposed to do here, and I'm supposed to just be quiet and let everyone lie on me, right? Yeah, right. It's not going to happen. I would like to represent myself from here on out, Your Honor.
>
> [DEFENSE COUNSEL]: Your Honor, I'll discuss with him that.
>
> THE DEFENDANT: I would like to –
>
> THE COURT: Please do.
>
> THE DEFENDANT: – represent myself here, Your Honor, from now on out.
>
> THE COURT: We are done for today, Mr. Ruffin. If you want to make an application to represent yourself, you do so –
>
> THE DEFENDANT: I am.
>
> THE COURT: – after consultation with [defense counsel].
>
> [(1T33-13 to 34-5)].

No application was made. The court did not abuse its discretion by advising defendant that to proceed pro se he would have to file an application.

A criminal defendant has the right to proceed to trial with or without counsel under the Sixth Amendment to the United States Constitution, so long

as they "voluntarily and intelligently elect to do so." State v. DuBois, 189 N.J. 454, 465 (2007) (citing Faretta, 422 U.S. at 818); see also State v. Davenport, 177 N.J. 288, 301-02 (2003). It is within the trial court's discretion whether to permit a defendant to represent himself. DuBois, 189 N.J. at 475.

Trial courts "indulge every reasonable presumption against waiver of counsel and are discouraged from broaching the subject absent an explicit request from the defendant . . . ." State v. Taylor, 350 N.J. Super. 20, 42 (App. Div. 2002). A defendant must "clearly and unequivocally" ask to proceed pro se. Id. at 41; see State v. Figueroa, 186 N.J. 589, 593 n.1 (2006) (explaining that an unequivocal request for self-representation is necessary to determine that a defendant is knowingly and intelligently waiving his right to counsel). "Whether 'orally or in writing,' a defendant [must] make the request 'unambiguously . . . so that no reasonable person can say that the request was not made.'" State v. Rose, 458 N.J. Super. 610, 626-27 (App. Div. 2019) (citation omitted). Because defendant's request to proceed pro se was not "clearly and unequivocally" made, the Faretta right did not attach.

Defendant's reliance on Rose is misplaced. There, Rose raised the issue of representation four times over six weeks to multiple judges. Id. at 621-23. He first wrote a letter seeking removal of his attorney for failing to "me[e]t with him or request[] information about witnesses." Id. at 621. The following week,

receiving no response, Rose wrote the court again. Id. at 621-22. In front of another judge at a hearing the next month, Rose stated on the record that he wanted counsel removed from his case and that he would "put in a motion to go pro se." Id. at 622. The judge encouraged him to do so, and the defendant quickly wrote a third letter, to which the judge neither responded nor forwarded to the judge who presided over the trial. Id. at 622-23. This Court ruled that a Faretta hearing was required, but it remanded to determine whether defendant waived by conduct his assertion of his self-representation right. Id. at 629, 639.

The circumstances here fall far short of Rose's unequivocal desire and repeated attempts to appear pro se. Contrary to Rose, defendant's sole reference to self-representation—in the emotional heat following a ruling against him—should not suffice as a clear and unequivocal invocation of the right to appear pro se. Nor did the court abuse its discretion in declining to entertain defendant's off-hand solitary remark of wanting to represent himself, instead of proceeding with a hearing. The court acted well within its discretion to allow defendant to first consult with his attorney, and if he chose to proceed pro se, submit an application to the court to address his request at a hearing.

B. Defendant waived any purported invocation of his right to represent himself.

Any invocation of defendant's right to self-representation—which the State does not concede occurred—lapsed over the five incident-free years of

proceedings that followed the first motion hearing. As noted in Rose, while a defendant need not "persist in asserting the right to proceed pro se . . . absent a clear denial," inaction may constitute waiver under the circumstances. 458 N.J. Super. at 633. "The critical question here is whether," under the totality of the circumstances, "defendant clearly intended to relinquish a known right." Id. at 637 (citation omitted). This Court in Rose remanded for a hearing on whether defendant waived his right to represent himself after several timely written and oral attempts to invoke that right went unanswered by the trial court. Id. at 638.

Here, a remand would be unnecessary because defendant relinquished any right to self-representation. Defendant and his attorney evidently resolved any issue to which he referred at the motion to dismiss hearing. As soon as three weeks later, defense counsel asked the court to allow him to meet privately with defendant at the close of oral argument to present any additional arguments defendant wanted. (2T5-1 to 20). Indeed, after conferring with defendant, counsel expressed to the court defendant's account of the events and that the State described the video shown to the grand jury as "grainy," at defendant's request, although he had already included same in his brief. (2T15-4 to 16-24).

The record contains no evidence, outside of a heat-of-the-moment exchange after the very first motion hearing, that defendant had any issue with his counsel. To the contrary, defendant's conduct revealed a client who had a

productive conversation with his attorney, and his attorney responded to his anxieties by adapting to defendant's wishes for the duration of his representation. This is unlike Rose, where there were questions about whether defendant resolved his issues or believed the court's inaction after his four requests constituted a denial. 458 N.J. Super. at 637-38. A remand is therefore unnecessary. By his conduct, defendant waived his right to self-representation.

POINT II

THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S POST-ARREST STATEMENTS.

Defendant mistakenly claims that his two post-arrest statements made at the Gloucester County Prosecutor's Office should have been suppressed. First, defendant's statements during processing were properly admitted for two reasons: (1) he had already waived his Miranda rights; and (2) his statements were volunteered. As for defendant's interview room statements, he again waived his rights, the police did not contradict the warnings, and any alleged invocations of the right to counsel were ambiguous. This Court should thus affirm the trial court's ruling admitting defendant's post-arrest statements.

Defendant made four separate videotaped statements to police which were played for the jury. First, as captured at the scene on Patrolman Greener's body-worn camera, defendant interrupted her conversation with Harden to provide his

own account. Second, later that day, Detectives Garbarino and Minniti interviewed defendant at Woodbury Police Station. Third, two days later, after defendant's arrest, he volunteered statements during booking by Detectives Bielski and Minniti at the Gloucester County Prosecutor's Office. Finally, after booking, Bielski and Minniti formally interviewed him in the same building.

The trial court's admissibility rulings arose through a series of Rule 104(c) hearings and an objection by defense counsel at trial.[6] First, after a Rule 104(c) hearing, the judge admitted defendant's post-arrest formal interview with Bielski until defendant's invocation of counsel. The judge credited Bielski's repeated, clear explanations to defendant—that he could not trade a statement for dismissal of his charges—toward a conclusion that defendant knowingly, intelligently, and voluntarily waived his Miranda rights. (5T59-1 to 60-19). The judge ruled that defendant unequivocally invoked his right to counsel and suppressed that portion of the interview. (5T60-20 to 63-13).

At the same hearing, the court admitted defendant's statements made at the scene to Patrolman Greener. Defendant challenged the admissibility of the entire statement, but specifically, the portion of the video prior to defendant's arrival which showed redacted images of Tarpley receiving medical attention at

[6] The trial court did not address the admissibility of these statements chronologically, i.e., when defendant made them to police.

the scene. (5T102-9 to 103-13). The judge first ruled that defendant's statements were voluntary because defendant approached and interrupted Greener to speak with her. (5T109-4 to 18). The judge further concluded that the footage of Tarpley was relevant and probative because it provided context to defendant's believability and credibility. The judge reasoned that the jury should have the benefit of seeing defendant's proximity to the scene, how long he was nearby, and where he emerged from. The judge found that the recording was not unduly prejudicial because to prove a conspiracy to commit murder, the State had to prove that Tarpley died. (5T109-19 to 114-15).

The following week, the court held a Rule 104(c) hearing on the remaining two statements. First, regarding the post-arrest statements made at booking, defendant argued that he was subject to interrogation and the detectives were required to re-read him his Miranda rights. (8T63-11 to 64-17). However, the judge found that defendant had been apprised of his Miranda rights two days prior and never invoked his right to counsel; but regardless, throughout booking, defendant was not interrogated. (8T74-2 to 75-1). The judge noted that the detectives' body language indicated that they tried to ignore defendant and did not attempt to question him. (8T75-2 to 13). The judge likewise credited Bielski's interruptions informing defendant that he would be able to give a statement after booking. (8T75-14 to 76-3). In sum, the court ruled that, under

the totality of the circumstances, defendant's statements at booking were "voluntary in every way that [they] possibly can be." (8T76-25 to 79-16).

The court also admitted defendant's pre-arrest interview with Detectives Garbarino and Minniti in full. (8T119-5 to 126-9). Defendant argued only that "the Court needs to make a finding that [the interview] was voluntary beyond a reasonable doubt." (8T118-18 to 21). The judge found that defendant specifically declined an attorney, was not pressured, spoke casually, and explained the events chronologically and added detail in response to Garbarino's questions without any hostility. (8T121-22 to 123-24). The judge ruled that defendant's pre-arrest statement was "voluntary in every sense of that word" and that he validly waived his Miranda rights. (8T124-21 to 126-9).

Later, when defendant's statements during booking were admitted and played at trial, defense counsel objected at sidebar on the grounds that defendant mentioned a lawyer three times. (11T138-17 to 139-10). The court nevertheless reaffirmed its logic from the prior hearing, finding that defendant's statements at booking were freely made in the face of Detective Bielski reminding him that after booking, he would re-read defendant his rights. (11T139-11 to 140-11). It ruled that because the detectives were not interrogating defendant and that he was instead volunteering statements, they were not required to stop and read his Miranda rights the moment he referenced a lawyer. (11T140-11 to 141-12).

On appeal, defendant challenges only the admissibility of the statements made after his arrest at booking and in the formal interview immediately thereafter. He claims that: 1) the detectives exceeded the booking exception to Miranda; 2) defendant unambiguously invoked his right to counsel during booking; 3) defendant's references to an attorney played for the jury risked an impermissible inference of guilt; 4) the detectives contradicted the Miranda warnings at the post-arrest formal interview; and 5) the court's admission of his statements constituted harmful error. Contrary to defendant's arguments, the trial court's admissibility rulings were correct and should be affirmed.

So long as a trial court's factual findings at a suppression hearing are supported by sufficient credible evidence in the record, appellate courts review the decision deferentially. State v. Scriven, 226 N.J. 20, 32-33 (2016) (citing State v. Elders, 192 N.J. 224, 243-44 (2007)). Such deference is especially appropriate when those findings "are substantially influenced by [an] opportunity to hear and see the witnesses and to have the 'feel' of the case . . . ." State v. Gamble, 218 N.J. 412, 424-25 (2014) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). However, appellate courts review de novo the trial court's ruling on an issue of law. State v. Watts, 223 N.J. 503, 516 (2015).

To determine the voluntariness of a custodial statement, courts assess the "totality of all the surrounding circumstances." State v. Roach, 146 N.J. 208,

227 (1996) (citations omitted). In doing so, the trial court considers a suspect's age, education, intelligence, prior contacts with the criminal justice system, length of detention, advisement of constitutional rights, the nature of the questioning, and whether physical punishment or mental exhaustion were involved in the interrogation process. State ex rel. A.S., 203 N.J. 131, 146 (2010) (quoting State v. Presha, 163 N.J. 304, 313 (2000)); see also State v. Tillery, 238 N.J. 293, 317 (2019) (reaffirming factors).

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and [New Jersey]'s common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, [Rule] 503." State v. S.S., 229 N.J. 360, 381 (2017) (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). In Miranda, the Supreme Court "determined that a custodial interrogation by law enforcement officers is inherently coercive, [and] automatically trigger[s] the Fifth Amendment privilege against self-incrimination." State v. P.Z., 152 N.J. 86, 102 (1997). To this end, Miranda established specific warnings that must be given to the suspect to render admissible the suspect's statement made during custodial interrogation. State v. Carlucci, 217 N.J. 129, 143, 144 (2014) (citations omitted).

A defendant may waive their Miranda right so long as waiver is "'knowing, intelligent, and voluntary' based upon an evaluation of the totality

of the circumstances," State v. Yohnnson, 204 N.J. 43, 59 (2010), and is not "the product of police coercion," Presha, 163 N.J. at 313. A trial court must determine whether the party "understood that [they] did not have to speak, the consequences of speaking, and that [they] had the right to counsel before doing so if [they] wished." State v. A.M., 237 N.J. 384, 397 (2019). Miranda's protections extend only to words or actions of law enforcement officers "reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). Because these constitutional guidelines were met, this Court should uphold the admission of defendant's challenged statements.

A. Defendant's statements during booking were made after knowingly and voluntarily waiving his Miranda rights.

Defendant's statements at booking were properly admitted because he had waived his Miranda rights two days prior. Generally, police need not re-administer Miranda warnings after a defendant has waived his rights. State v. Abrams, 256 N.J. Super. 390, 396 (App. Div. 1992) (citing State v. Melvin, 65 N.J. 1, 14 (1974)). A valid waiver continues until the defendant revokes it. See State v. Perez, 334 N.J. Super. 296, 302-03 (App. Div. 2000) (affirming admission of statements where defendant validly waived his rights and did not request counsel). As noted, a totality of the circumstances approach is the proper analysis where police do not repeat a suspect's Miranda rights. See Nyhammer, 197 N.J. at 402 (explaining that the Court has rejected automatic suppression

"whenever the police do not repeat Miranda rights—initially given in the pre-custodial stage—to a defendant after he is taken into custody").

Here, it is undisputed that defendant acknowledged and waived his Miranda rights two days before his arrest prior to his interview with Detective Garbarino. After Garbarino read defendant his rights, defendant initialed and signed the Miranda form. When Garbarino read the portion regarding defendant's right to counsel, he responded "I don't need one, I don't think." (11T68-21 to 25). After being informed that he could withdraw his waiver at any time, defendant provided a statement to Garbarino in which he claimed that he broke the fight up, that he "just happened" to be going to Tarpley's separately, that he knew the Hickoxes from coaching them in football but did not know their names, and admitted for the first time that he punched Harden—none of which he told Patrolman Greener—and did not invoke his Miranda rights. (11T69-1 to 7, 70-12 to 20, 75-16 to 25, 81-16 to 19, 92-8 to 10).

Two days later, when defendant was arrested and while being processed at the Gloucester County Prosecutor's Office, defendant continued volunteering statements and attempting to distance himself from the fight. He added more—and some different—details, telling officers that he was in the house when Tarpley went out to fight Aaron, that Tarpley engaged Aaron and not the other way around, and that he broke up the fight by saying "Aaron, get the fuck out of

here" although he previously said he did not know the twins' names. (11T126-21 to 24, 127-3 to 4, 127-14; Da43). Even when defendant said that he had "a lawyer coming," and Detective Minniti ceased talking to him, defendant reopened the conversation by stating that he "didn't do anything wrong." In response, Minniti told him about how his story contradicted other evidence the detectives had gathered and asked if defendant wanted to give a formal statement, but Detective Bielski began to book him before defendant answered.

Bielski's initiation of booking changed nothing about defendant's demeanor, as defendant continued to claim innocence despite the lack of questioning by police. Defendant thrice acknowledged or interrupted Bielski's explanation that he could speak to the detectives in the interview room after processing. Bielski first acknowledged that defendant "said something about a lawyer," and after fingerprinting, they would bring him to the interview room, re-read him his Miranda rights, and allow him to tell his side of the story if he elected to waive those rights. Defendant immediately offered another explanation, but Bielski stated again that he would re-read defendant's Miranda rights in the interview room after fingerprinting. Defendant said he understood, but then quickly stated he "didn't do a fucking thing bro but talking." (11T126-10 to 11; Sa1 at 10:46:37 to 10:46:42; Da49). He then spoke over Minniti's request not to discuss at that time, replying, "I don't care because I ain't do

nothing wrong." (11T126-13 to 16; Sa2 at 10:46:44 to 10:46:48; Da49)

Defendant continued to voluntarily talk throughout the booking process. During his mugshot, he asked for his cell phone to call McCormick to "get the number to call this lawyer or something," and that if they were charging him with a crime, "[he'd] better get a lawyer." After Bielski acknowledged that defendant was "saying [he] wanted to call [his] lawyer," defendant continued to volunteer statements. Finally, after booking, defendant made his knowing and voluntary waiver of Miranda clearer than ever, telling the detectives to "just fucking ask" him about what they "need[ed] to know" and were "missing," and to "[t]alk to" him. Defendant was fully aware of his Miranda rights during booking and yet continued offering statements about the fight. The court below thus correctly ruled that the statements made at booking were admissible.[7]

B. Defendant's statements made at booking were voluntary and made in spite of repeated explanations that the police were not yet interviewing him.

If this Court finds that his Miranda warnings lapsed before booking, those statements were still properly admitted because as the trial court concluded, defendant repeatedly volunteered them while the detectives tried to complete the

[7] In the only case defendant cites, where a court suppressed a statement made a day or more after the defendant had received Miranda warnings, that defendant had invoked his right to counsel and not received it. See Edwards v. Arizona, 451 U.S. 477, 487 (1981). Defendant did not do so here. See infra Part II.C.

booking process. "[B]ooking procedures and the routine questions associated therewith are ministerial in nature and beyond the right to remain silent. Even unexpected incriminating statements made by in-custody defendants in response to non-investigative questions by the police without prior Miranda warnings are admissible." State v. M.L., 253 N.J. Super. 13, 21 (App. Div. 1991).

In State v. Mallozzi, 246 N.J. Super. 509, 511 (App. Div. 1991), the defendant made incriminating statements during the booking process prior to being read the Miranda warnings. Ibid. On appeal from the trial court's denial of defendant's motion to suppress, this Court held "there was clearly no questioning, nor can it be fairly concluded that [the] defendant was subjected to the functional equivalent of questioning." Id. at 516. It further concluded that "informing [the] defendant of the charges against him was not designed or done to elicit any type of response from defendant . . . ." Ibid.

Here, the only questions defendant challenges at booking in the Gloucester County Prosecutor's Office were: (1) Detective Minniti asked, "[h]aven't I always been straight with you?"; (2) Minniti asked if defendant "want[ed] to give [the detectives] a statement"; and (3) Bielski asked if defendant was "friends with Jimmy, right?" But each of these questions came as a result of defendant's repeated, volunteered diatribes. Also, Minniti, who was present at defendant's pre-arrest interview with Detective Garbarino just

two days prior, had witnessed defendant acknowledge and waive his Miranda rights at the outset of that interview. The remainder of the detectives' statements that defendant alleges constituted "the functional equivalent of questioning" were not "reasonably likely to elicit an incriminating response" under Innis and Mallozzi. When Minniti walked in the booking room, defendant asked him why he was "caught up in this," to which Minniti responded "let's be real." Rather than encouraging defendant to keep talking, Minniti's response was intended to shut down what he perceived to be an unnecessary question.

Defendant also removes the context from Bielski's allegedly impermissible conduct during the booking process. First, defendant claims that Bielski "continued to encourage" him when Bielski expressed that he did not believe defendant stabbed Tarpley. (Db19). Yet the transcript and video footage clearly reveal that Bielski's comment clarified defendant's statement that he was being blamed for Tarpley "chas[ing] somebody and [getting] himself hurt." (11T128-24 to 129-2; Sa1 at 10:49:27 to 10:49:46; Da52). And Bielski's statement led directly into an explanation that after fingerprinting defendant, Bielski would interview him "for five hours if you want to . . . ." (Sa1 at 10:49:47 to 10:50:20; Da53) (emphasis added). Finally, Bielski's statement that, "a lot more evidence has come to light," led to a clarification as to whether defendant wanted to call his lawyer. These statements are neither "the

functional equivalent of interrogation" nor "reasonably likely to elicit an incriminating response" and were thus properly admitted at trial.

C. Any alleged invocation of the right to counsel at booking was ambiguous and when police tried to clarify, defendant volunteered more statements.

Each time defendant referenced his right to counsel during booking, the detectives either stopped talking to him or asked him to confirm whether he wanted a lawyer, and defendant continued to offer statements about the events. His statements were therefore admissible on those grounds as well.

If a suspect requests counsel during an interview, "the interrogation must cease until an attorney is present." Miranda, 384 U.S. at 474. Questioning may not resume "until counsel has been made available" or if the suspect "initiates further communication, exchanges, or conversations with police." State v. Chew, 150 N.J. 30, 61 (1997) (quoting Edwards, 451 U.S. at 484-85). If a suspect makes an ambiguous assertion that is "susceptible to two different meanings, the interrogating officer must cease questioning and 'inquire of the suspect as to the correct interpretation.'" S.S., 229 N.J. at 382-83 (citation omitted); see also State v. Gonzalez, 249 N.J. 612, 629 (2022). "[A] suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel." Gonzalez, 249 N.J. at 630 (quoting State v. Reed, 133 N.J. 237, 253 (1993)). However, "[n]ot every reference to a lawyer . . . requires a halt to questioning."

State v. Dorff, 468 N.J. Super. 633, 647 (App. Div. 2021). The totality of the circumstances, "including all of the suspect's words and conduct," must show that he invoked the right to counsel. Ibid.

The police must "'scrupulously honor' the invocation of the right to counsel." State v. Melendez, 423 N.J. Super. 1, 29 (App. Div. 2011). However, "[i]f an accused does initiate a conversation after invoking his rights, that conversation may be admissible if the initiation constitutes a knowing, intelligent, and voluntary waiver of the accused's rights." Chew, 150 N.J. at 61. The inquiry is whether the suspect "was inviting discussion of the crimes for which he was being held." Id. at 64. The suspect need not make an "'explicit statement'" indicating a willingness to reinitiate conversation; rather, "'[a]ny clear manifestation of a desire to waive is sufficient,' and . . . we look for a 'showing of knowing intent.'" A.M., 237 N.J. at 397 (citation omitted).

Each time defendant mentioned a lawyer at booking, the detectives either stopped talking or attempted to clarify his request, but he continued to volunteer statements. First, defendant stated that he had "a lawyer coming." Minniti replied, "[t]hat's fine." Defendant then said he "didn't do anything wrong," that Minniti "kn[e]w him," and that he "stand[s] up for what [he] believe[s] in." Given defendant's re-initiation, Minniti had no duty to stop speaking. Shortly thereafter, Bielski acknowledged that defendant "said something about a

lawyer" and assured him that he would re-read his Miranda rights after booking.

Defendant then asked for a cell phone to call his girlfriend "and get the number to call this lawyer," and said that he "better get a lawyer" if he was getting charged. As the detectives resolved a technical issue with the mugshot software, but before they responded to defendant's request, defendant continued to claim that he was innocent; however, Bielski cut him off to explain that he wanted defendant to provide a statement—a simple fact of which every suspect would be aware—but also to clarify whether he wanted an attorney. None of Bielski's statements risked eliciting an incriminating response or constituted a failure to adhere to an invocation of the right to counsel.

D. The detectives did not contradict the Miranda warnings.

As discussed, defendant's repeated explanations attempting to distance himself from the fight between Aaron and Tarpley were voluntary. None of the detectives undermined defendant's constitutional rights. Because none of the Miranda warnings were contradicted, defendant's statements were admissible.

"Beyond the issue of waiver, there are separate due process concerns related to the voluntariness of a confession." State v. O.D.A.-C., 250 N.J. 408, 422 (2022). The State must "prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne." Ibid. (quoting State v. L.H., 239 N.J. 22, 42 (2019)). In assessing

voluntariness, the totality-of-the-circumstances test also applies and "[t]here is a substantial overlap [with] the factors that apply to a waiver analysis." The Court declined "to adopt a bright-line rule that would require suppression any time an officer makes an improper comment during an interrogation" and reaffirmed its commitment to a totality-of-the-circumstances test. Id. at 422-23.

"An involuntary confession can result from physical or psychological coercion." State v. Cook, 179 N.J. 533, 562 (2004). "However, . . . [the] use of psychologically oriented interrogation techniques is not inherently coercive." Ibid. Because our courts have acknowledged a suspect's "'natural reluctance' to furnish details implicating [themselves] in a crime," officers are permitted to engage in certain interrogation tactics to overcome this reluctance. L.H., 239 N.J. at 43-44 (citation omitted). Accordingly, interrogating officers are permitted to "[a]ppeal[] to [the suspect's] sense of decency and urg[e the suspect] to tell the truth for [their] own sake." Id. at 44.

Moreover, police have "leeway to tell some lies during an interrogation." Ibid. Therefore, "[t]he fact that the police lie to a suspect does not, by itself, render a confession involuntary." State v. Galloway, 133 N.J. 631, 655 (1993). However, "[c]ertain lies . . . may have the capacity to overbear the suspect's will and to render a confession involuntary." L.H., 239 N.J. at 44. An example of such impermissible lies "are false promises of leniency." Ibid. Officers also are

not permitted to minimize the severity of a crime under investigation or falsely promise help "as a substitute for jail." Id. at 52.

Here, contrary to the cases defendant cites, the detectives never promised leniency to defendant. In L.H., after the defendant waived his Miranda rights, the detectives integrated a theme of "promises of 'help' and 'counseling'" if he cooperated. 239 N.J. at 31-33. They reassured L.H. that, if he told the truth about his crimes, he would stay out of jail, "remain free to raise his child," and that "the truth would set him free." Id. at 32. The Supreme Court held that the defendant's will was overborne by the detectives because they "undermined the Miranda warning that defendant's words could be used against him [in part] by telling him the truth would set him free . . . ." Id. at 51-52.

Similarly, in O.D.A.-C., the Court ruled that a defendant's will was overborne. There, the detectives told the defendant that the Miranda warnings were "[j]ust a formality" and that defendant's discussions would remain "confidential" between them. Id. at 414, 415, 416. As the defendant continued to express his unease in talking to the officers, one detective responded by telling him that "[a]nything you say, like I said, is only going to help you, it's not going to hurt you." Id. at 417. Suppressing his statement, the Court concluded that "each of the[se] comments . . . was at odds with Miranda's safeguards" and "call[ed] into question defendant's understanding of his rights." Id. at 424.

Bielski's comments at the formal interview after defendant's arrest and processing did not undermine Miranda at all, let alone enough to overcome defendant's will and render his statements involuntary. Not once did Bielski make a single promise to defendant. To the contrary, when defendant asked if his charges would "go away" if he cooperated and asked what the detectives "need from [him] to make this go away," Bielski explained:

> So, whatever you say today, does that change th[ose] charges right this second? No[,] it doesn't . . . . [Y]ou still have these charges. There's still a complaint[.] [B]ut what I can say is that if you give us the truth and the whole truth, there's questions that we still have with the investigation[,] and you might be able to answer those questions[,] and those questions might lead us to other defendants or what I just read in there might help us with those cases. So I can't make any promises . . . with you with your charges[,] but all I can say is the truth is what it is and the truth can only help your case.[8]
>
> [(11T170-10 to 171-6; Sa2 at 11:05:57 to 11:06:24; Da72 to Da73) (emphasis added)].

Later, when defendant tried to bargain for his immediate unconditional freedom, stating that he would be the prosecution's "key witness," Bielski referred to the Miranda form defendant signed, and he reiterated that he could

[8] A review of the video, the trial transcript, and the transcription in defendant's appendix further reveals that defendant spoke over Bielski's statement that "the truth can only help your case," so it is not clear whether defendant even heard Bielski's comment. (11T171-4 to 10; Sa2 at 11:06:22 to 11:06:24; Da73).

make no promises, but that "cooperation gives you consideration." (11T189-11 to 22; Sa2 at 11:22:00 to 11:22:25; Da95).

A few minutes later, defendant offered a final ultimatum, telling the detectives that "if you want the fucking truth, . . . I'll give you the fucking truth. It goes away. I go home." Bielski again rejected the bait, stating that it would be "impossible" for him to "talk to [his] bosses" and have them release defendant in exchange for a statement. (Sa2 at 11:24:25 to 11:25:36; Da101). Only then, when told for a third time that Bielski could not promise him leniency, did defendant assert his right to counsel. (Sa2 at 11:25:36 to 11:25:44; Da101).

Defendant was fully aware of his Miranda rights and attempted to use them as a bargaining chip to escape prosecution. Any assertion that defendant's will was overborne is flatly contradicted by the fact that defendant—over and over—asked for leniency, and Bielski repeatedly told him that leniency was not in his power. Contrary to defendant's claim, Bielski's theme during the interview was not leniency, but rather that if defendant cooperated, it would help mitigate his charges and a potential sentence. Such a tactic does not conflict with Miranda warnings. Cf. L.H., 239 N.J. at 44 (explaining that "[c]ertain lies" directly contradicting Miranda warnings may render a confession involuntary).

Defendant's interview sharply contrasts with L.H. and O.D.A.-C, where police made false promises of leniency and confidentiality, and pre-emptively

minimized the importance of Miranda warnings. Instead, Bielski directly referred to the Miranda form as a reason why he could not make promises. Defendant's will was not overborne, and his statements were voluntary.

E. Defendant was not prejudiced when the jury heard his references to contacting a lawyer at trial.[9]

Because the jury heard only fleeting references to counsel—to which defendant did not object—defendant was not unduly prejudiced and thus received a fair trial.[10] Admission of testimony that defendant "desire[d] or request[ed] . . . a lawyer is impermissible." United States v. Williams, 556 F.2d 65, 67 (D.C. Cir. 1977). "[T]rial courts should endeavor to excise any reference to a criminal defendant's invocation of his right to counsel." State v. Feaster, 156 N.J. 1, 75 (1998). Jurors may view such references as suggestive of guilt. State v. Tilghman, 345 N.J. Super. 571, 576-77 (App. Div. 2001).

But not every reference to counsel in front of a jury constitutes plain error.

---

[9] As defendant did not raise this issue at trial, it should be deemed waived. See State v. Holland, 423 N.J. Super. 309, 319 (App. Div. 2011).

[10] Defendant, in a letter to this Court dated October 20, 2023, submitted along with his amended brief in light of the corrected trial transcript, noted that the new transcript "includes a reference to [defendant] hiring a lawyer that was not in the original transcript" and incorporated that statement, "I've got a lawyer coming. I didn't do nothing, bro," into his brief. For clarity, that is not a newly revealed reference, and was already cited by defendant in his original brief. Compare (11T123-13 to 14) with (Da45).

In Feaster, the Court found an invocation of the right to counsel was erroneously heard by the jury, but it determined that its admission was not plain error because: (1) reference to the invocation was "fleeting"; (2) the prosecutor did not comment on it during his summation; (3) jury instructions barred them from drawing negative inferences based on the invocation; and (4) defense counsel did not request further jury instructions. Feaster, 156 N.J. at 77.

Defendant misplaces his reliance on State v. Tung, 460 N.J. Super. 75 (App. Div. 2019). There, this Court ruled that the trial court's failure to excise two references to invocation of the right to counsel and provide a cautionary instruction risked confusing the jury. Id. at 94-95. But that case contained live testimony from a detective, who stated that "defendant refused consent to search his computer, saying 'words to the effect of, I think I'd talk to my lawyer first,'" and that he responded the same way when asked for consent to search his car. Id. at 88. Those references were an integral part of the detective's testimony to show that the detective "did not believe [defendant] was being truthful." Ibid.

Defendant does not allege—and the record does not show—that his references to an attorney heard by the jury were anything more than the type of "fleeting" reference in Feaster. Unlike in Tung, there was no allusion to defendant mentioning a lawyer during opening statements, testimony of any of the six witnesses, or closing statements. Cf. Tilghman, 345 N.J. Super. at 577

(holding prosecutor invited the jury to infer guilt by suggesting in summation that the defendant requested an attorney when he perceived that his "alibi didn't work"). And the judge issued an instruction that the jury "must not consider for any purpose or in any manner in arriving [at] your verdict the fact that defendant did not testify." (13T188-20 to 190-5); see Feaster, 156 N.J. at 77 (holding that although it did not explicitly cover the right to counsel, a similar instruction sufficed to "impart to the jury the respect to be accorded defendant's decision to remain silent"). Thus, these passing references to which counsel did not object typified "fleeting" references to counsel that do not constitute plain error.

F. Any impropriety in the admission of defendant's statements constitutes harmless error.

Even if this Court concludes that defendant's Miranda rights were violated as to his post-arrest statements, any error was harmless due to the unchallenged admissibility of the statements to Greener and Garbarino and the testimonies of Aaron, Archie, and Harden, all pointing to defendant as the "pied piper" of the plan for Aaron to fight Tarpley. Defendant's conviction should thus be affirmed regardless of the admissibility of his post-arrest statements.

As our Supreme Court recognized in Tillery, a Miranda violation may nevertheless constitute harmless error. 238 N.J. at 302. The proper analysis is whether the violation of a defendant's constitutional right is harmless beyond a reasonable doubt. See State v. W.B., 205 N.J. 588, 614 n.12 (2011). More

recently, the Court explained that "[i]f a defendant's un-Mirandized statement is admitted in error, an appellate court will not reverse the conviction unless the error was 'of such a nature as to have been clearly capable of producing an unjust result.'" State v. Ahmad, 246 N.J. 592, 612 (2021); see also State v. Marshall, 123 N.J. 1, 121 (1991) (applying harmless-error analysis to violations of defendant's constitutional privilege against self-incrimination).

Here, a wealth of testimony from a handful of witnesses, as well as two unchallenged videotaped statements by defendant to Greener and Garbarino, implicated defendant as the ringleader of the conspiracy to assault Tarpley. Phone records also indicated that defendant called Aaron shortly before the fight, confirming Aaron's testimony. Moreover, the jury saw surveillance footage showing defendant leading the group to Tarpley's house as well as a cell phone video of the fight which corroborated Harden's testimony—and contradicted defendant's version—that defendant punched him for trying to stop the fight. Accordingly, even if the admission of defendant's statements were erroneous, it was harmless beyond a reasonable doubt and should be affirmed.

POINT III

THE CONSPIRACY CHARGE COMPLIED WITH NEW JERSEY LAW.

Defendant's challenges to the court's jury instructions on conspiracy are unfounded. First, defendant waived his challenge to the charges on appeal by

failing to object. R. 1:7-2. "Where there is a failure to object, it may be presumed that the instructions were adequate." State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div. 2003). "The absence of an objection to a charge is also indicative that trial counsel perceived no prejudice would result." Id. at 135.

Regardless, the instruction regarding conspiracy to commit aggravated assault was correct because the judge explained, consistent with the Model Jury Charge, that a guilty verdict for conspiracy was contingent on whether "the defendant's purpose was to promote or facilitate the commission of the crime of aggravated assault." Further, a specific unanimity instruction was not required because the overt acts left no room for jury confusion and the judge informed the jury repeatedly that their verdict had to be unanimous.

Jury instructions to which defendant failed to object at trial are reviewed for plain error. See R. 1:7-2; State v. Singleton, 211 N.J. 157, 182 (2012). The key inquiry is whether a charge "possess[ed] the clear capacity to bring about an unjust result." State v. Koskovich, 168 N.J. 448, 529 (2001); see also R. 2:10-2. Courts must view any alleged error "in the totality of the entire charge." State v. Chapland, 187 N.J. 275, 289 (2006). Model jury charges are presumed valid because the process in which they are "reviewed and refined by experienced jurists and lawyers" is "comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005); see also Mogull v. CB Com. Real Est. Grp., Inc.,

162 N.J. 449, 466 (2000) ("It is difficult to find that a charge that follows the Model Charge so closely constitutes plain error.").

A. Because the purposeful nature of conspiracy refers to the agreement, not to the underlying offense, the trial court's jury instruction complied with prevailing law.

Defendant's contention that the trial court incorrectly instructed the jury on the mens rea for conspiracy fails. Other than factual tailoring, the court read verbatim Model Jury Charges (Criminal), "Conspiracy (N.J.S.A. 2C:5-2)," to the jury, which is presumptively valid. See R.B., 183 N.J. at 325. There was nevertheless no risk for jury confusion because the judge made clear that conspiracy required a purpose to further an aggravated assault and that the inchoate crime of conspiracy is separate and distinct from the substantive crime of aggravated assault. There is no plain error in such an instruction.

The judge charged that conspiracy is an agreement with the "purpose of promoting or facilitating" the commission of a crime. (13T190-6 to 16). He further stated that a defendant can be convicted of conspiracy to commit aggravated assault regardless of whether he is guilty of aggravated assault itself. (13T190-17 to 23). The judge defined "purpose" as a "conscious object to engage in conduct of that nature or cause such result." (13T191-9 to 12). He then clarified that awareness, "association, acquaintance, or family relationship with an alleged conspirator" would not suffice to satisfy a conspiracy

conviction. (13T192-9 to 11). The jury thus knew that a conviction based on knowledge of the conspiracy would be improper.

As the court made clear to the jury, conspiracy to commit aggravated assault and aggravated assault are two separate charges, and consequently, must be considered separately. Compare N.J.S.A. 2C:5-2(c) with N.J.S.A. 2C:12-1(b). The purposeful nature of conspiracy applies to the agreement itself, and not to the underlying offense. See State v. Samuels, 189 N.J. 236, 245 (2007) ("[T]he agreement to commit a specific crime is at the heart of a conspiracy charge."); State v. Lavary, 152 N.J. Super. 413, 418 (App. Div. 1977) ("A conspiracy is not the commission of the crime which it contemplates, and the conspiracy neither violates nor 'arises under' the statute whose violation is its object."); State v. Scherzer, 301 N.J. Super. 363, 401 (App. Div. 1997). While aggravated assault carries a mens rea of purposeful, knowing, or reckless, conspiracy requires purpose to promote or facilitate a crime. The court's instruction, tracking the model jury charge, carries no "clear capacity to bring about an unjust result." Koskovich, 168 N.J. at 529.

B. Because there was neither potential for, nor evidence of, jury confusion, and the court made clear the verdict had to be unanimous, the overt-act jury instruction was proper.

Defendant's argument that the court should have issued a specific unanimity instruction regarding the overt-act element is likewise unfounded.

Jurors must "'be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002). A general instruction should adequately inform the jury "that it must be unanimous on whatever specifications it finds to be the predicate of the guilty verdict." State v. Parker, 124 N.J. 628, 641 (1991). When there is a single theory of the case and the alleged acts are "conceptually similar," no specific unanimity instruction is required. Frisby, 174 N.J. at 600. Because all the possible overt acts arose from the same nucleus of facts, the charge was proper.

The Supreme Court in Parker found general unanimity instructions insufficient in certain scenarios, including when:

> (1) a single crime could be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or marginally related to each other; (4) the indictment and proof at trial varies; or (5) there is strong evidence of jury confusion.
>
> [124 N.J. at 635-36).]

"The general rule is that 'in cases where there is a danger of a fragmented verdict the trial court must upon request offer a specific unanimity instruction.'" State v. Cagno, 211 N.J. 488, 516-18 (2012) (quoting Frisby, 174 N.J. at 597-98).

First, as defendant concedes, he did not request such an instruction at trial.

Further, as noted, the court instructed the jury pursuant to the presumptively proper Model Jury Charge on conspiracy. See R.B., 183 N.J. at 325. Nonetheless, the self-evident nature and linear timeline of the events allowed no danger of a fragmented verdict. The court enumerated six possible overt acts in furtherance of the conspiracy: (1) defendant solicited Aaron to fight Tarpley; (2) defendant, Aaron, and/or Archie went to confront Tarpley together; (3) defendant called Tarpley out of the house to be assaulted; (4) Aaron and/or Archie assaulted Tarpley and caused significant bodily injury to him; (5) defendant told McCormick to pick up Aaron and/or Archie after the fight; and (6) defendant paid Aaron and/or Archie to assault Tarpley. (13T194-5 to 17).

The events in this case do not resemble the "very complex" set of facts Parker sought to clarify for the jury. See Frisby, 174 N.J. at 197 (quoting Parker, 124 N.J. at 635-36). Nor does the record contain competing theories of guilt, contradictory evidence, or differences between the indictment and trial proofs. See ibid. This case deals with a simple set of facts which the jury accepted. The court thoroughly explained its role and the option for the jury to submit any clarifying questions, yet no such questions ever came. In under two hours, the jury returned a guilty verdict. Thus, there is no evidence of jury confusion at all, let alone the "strong evidence" which Parker cautioned against. See ibid. The overt act instruction, drawn directly from the Model Jury Charge, risked no

jury confusion and did not require a specific unanimity instruction.

POINT IV

BECAUSE THE JUDGE PROPERLY ASSESSED EACH SENTENCING FACTOR, DEFENDANT'S SENTENCE IS FAIR AND NOT EXCESSIVE.

Recognizing that defendant acted as a "pied piper" in leading teenagers to fight Tarpley and that he "should have foreseen . . . that this could go sideways," his four-year sentence—which this court should affirm—is proper and fair.

An appellate court's "review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). It considers whether the trial court's fact-finding was grounded in "reasonably credible evidence," whether it applied "correct legal principles," and whether "application of the facts to the law [has resulted in] such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363-64 (1984). "[W]hen the aggravating factors preponderate, sentences will tend toward the higher end of the range." State v. Case, 220 N.J. 49, 64-65 (2014).

At sentencing, the court applied five aggravating factors—N.J.S.A. 2C:44-1(a)(1), (3), (6), (7), and (9)—and found no mitigating factors. In finding aggravating factor one, the nature and circumstances of the offense, the judge noted that defendant "was in . . . a position of great influence" as a forty-two-

year-old man whom the Hickoxes "looked up to" as "kind of a father figure, or an older brother," and that he "exerted that influence" to use Aaron to fight Tarpley. The judge also considered that defendant: (1) paid Aaron to fight Tarpley; (2) led the group to Tarpley's house; and (3) attempted to "distance himself" although he "set it in motion." (15T27-9 to 16).

In applying aggravating factor three, the risk that defendant will commit another offense, the judge found that defendant's "fairly substantial" history of municipal offenses outweighed his compliance with the pre-trial release order. (15T28-10 to 29-24). The judge likewise concluded that defendant's municipal court history and the need for general deterrence supported aggravating factor nine. (15T31-4 to 12). Regarding aggravating factor seven, whether defendant committed the offense pursuant to a payment agreement, the judge found that defendant paid Aaron to fight Tarpley. (15T30-11 to 31-3). The judge also found aggravating factor six, the defendant's criminal record and the seriousness of those offenses, which was not argued by the State, because of the seriousness of the conduct for which defendant led the conspiracy. (15T31-15 to 2).

The court found no mitigating factors, rejecting defendant's arguments concerning factors three, seven, nine, ten, and twelve. Mitigating factor three, whether defendant acted under a strong provocation, did not apply because defendant "had the ability to sit down, contemplate, call people, [and] get them

to come to his house to help engage in the conduct . . . ." (15T33-2 to 5). As for mitigating factor seven, whether defendant had "no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time" prior to the offense, the judge again referenced defendant's municipal court history. (15T33-9 to 21). He also rejected mitigating factor nine because defendant exploited the Hickoxes' trust to influence Aaron to fight Tarpley, failing to "demonstrate that he's unlikely to commit another offense." (15T33-23 to 13). On mitigating factor ten, the judge found that defendant "still engaged in this offense" despite prior probation. (15T34-14 to 23). Finally, regarding mitigating factor twelve, the judge observed that defendant cooperated with police solely "to exonerate his involvement" in Tarpley's death and "to make himself out to be the hero." (15T23-8 to 24-20; 34-25 to 35-1).

Defendant overstates the standard for a finding of aggravating factor one by referring to the "extreme reaches of the prohibited behavior" described in State v. Fuentes, 217 N.J. 57, 75 (2014). The proper consideration is outlined in N.J.S.A. 2C:44-1(a)(1) itself: "[t]he nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner." Here, defendant raised the temperature before, during, and after the conspiracy began. The judge explained that defendant was in a "unique position" allowing him to

influence Aaron to fight Tarpley. He led Aaron to Tarpley and "egg[ed] things on" by punching Harden for trying to end the fight. And he arranged payment and a ride home. (15T26-2 to 5; 26-9 to 10). This was not a conspiracy among equals; defendant was the mastermind at the beginning, middle, end, and epilogue, supporting aggravating factor one. See State v. DeRoxtro, 327 N.J. Super. 212, 226 (App. Div. 2000) (finding aggravating factor one for second-degree aggravated assault where defendant hatched a plan to beat up a targeted victim and had her roommate attack him, resulting in the victim's death).

Regarding aggravating factor three and mitigating factor nine, defendant incorrectly argues that his four years of pretrial release compliance outweighed his municipal offense history and showed that he was unlikely to reoffend. "[I]t cannot be disputed" that a sentencing court can base aggravating factor three "on assessment of a defendant beyond the mere fact of a prior conviction, or even in the absence of a criminal conviction." State v. Thomas, 188 N.J. 137, 154 (2006); see also State v. Varona, 242 N.J. Super. 474, 491 (App. Div. 1990) (finding aggravating factor three where the defendant had no criminal record). The court's reliance on defendant's "fairly substantial" municipal record, and its analysis that defendant organized the fight by using his "gravitas" with the Hickoxes, therefore constituted a "qualitative assessment" of defendant's history. See Thomas, 188 N.J. at 153. And the court did not abuse its discretion

when explaining that compliance with a court order for pre-trial services did not undermine a finding of aggravating factor three. (15T29-7 to 8).

The court also properly exercised its discretion in finding aggravating factor six and not finding mitigating factor seven. N.J.S.A. 2C:44-1(a)(6) refers not only to a defendant's "prior criminal record" but also to "the seriousness of the offenses of which defendant has been convicted." The definition of "offense" under N.J.S.A. 2C:1-14(k) includes "a disorderly persons offense or a petty disorderly persons offense . . . ." See State v. Ross, 335 N.J. Super. 536, 542 (App. Div. 2000) (finding that "four disorderly persons convictions" contributed to application of aggravating factor six). Municipal court convictions may also be a basis for rejecting mitigating factor seven. See State v. Buckner, 437 N.J. Super. 8, 38 (App. Div. 2014) (holding that a "long history of convictions for disorderly persons" offenses was properly considered). Thus, the court properly considered defendant's municipal court record when finding aggravating factor six and rejecting mitigating factor seven.[11]

[11] Further, defendant's prior municipal record contains multiple simple assaults, thus establishing that "assaultive conduct" is not new to defendant. Even if, as defendant argues, the judge double-counted defendant's current conviction for purposes of aggravating factor six, there is sufficient support in the record to accord that factor "moderate weight," as the judge did, given defendant's lengthy record in municipal court. And even without aggravating factor six, imposition of the base four-year term lies at the middle of the sentencing range, which remains proper due to the factual record in this case.

The court also did not abuse its discretion in applying aggravating factor nine. Even where a defendant has no criminal record, a sentencing court may seek to deter future criminal behavior. See Fuentes, 217 N.J. at 80 ("Neither the statutory language nor the case law suggest that a sentencing court can find a need for deterrence under N.J.S.A. 2C:44-1(a)(9) only when the defendant has a prior criminal record."). Defendant's history of simple assaults thus provided the "valid reason" for the court to find aggravating factor nine.

The court properly rejected mitigating factors three and ten as well. Defendant reduces the court's analysis regarding mitigating factor three to his statements that defendant "was in control of his own conduct" and that Tarpley hitting McCormick "doesn't excuse" defendant's conduct. But as the judge explained, "[t]his wasn't a situation where something suddenly came upon" defendant since he was able to "sit down, contemplate, call people, [and] get them to come to his house to help" with the conspiracy. (15T32-25 to 33-5).

Further, it is well-established that for purposes of mitigating factor three, "provocation . . . 'relates to the conduct of the victim toward the actor.'" State v. Teat, 233 N.J. Super. 368, 372 (App. Div. 1989) (emphasis added) (citation omitted). Here, any alleged provocation was toward McCormick, not defendant, whom the judge found engaged in "vigilante justice . . . from the comfort of his own living room." The record contained a wealth of evidence to support the

conclusion that no "strong provocation" of defendant existed. (15T33-5 to 8).

Finally, the court did not abuse its discretion in rejecting mitigating factor ten. As noted, the judge correctly concluded that pre-trial services "certainly [are]n't probation" and that defendant previously failed to respond to probationary treatment. Here, the judge found the aggravating factors clearly outweighed the nonexistent mitigating factors. Therefore, a term in the higher range for the offenses was appropriate.

CONCLUSION

For these reasons, the State urges this Court to affirm defendant's judgment of conviction and sentence.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: /s/ *Thomas M. Caroccia*
Thomas M. Caroccia
Deputy Attorney General
carocciat@njdcj.org

THOMAS M. CAROCCIA – ATTY NO. 306012019
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE UNIT

OF COUNSEL AND ON THE BRIEF

DATED: December 19, 2023

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Assistant Public Defender
Appellate Deputy
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239

JOSEPH E. KRAKORA
Public Defender

January 2, 2024

MARGARET MCLANE
ID. NO. 060532014
Assistant Deputy
Public Defender

Of Counsel and
On the Letter-Brief

REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2248-22T1
INDICTMENT No. 18-08-0682-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Gloucester County.
ARTESTE RUFFIN,	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Kevin T. Smith, J.S.C.,
	:	Hon. John C. Eastlack, J.S.C.,
	:	and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Arteste Ruffin relies on the procedural history and statement of facts from his initial brief.

LEGAL ARGUMENT

Ruffin relies on the legal arguments from his initial brief and adds the following:

POINT I

DEFENDANT'S CONVICTIONS MUST BE REVERSED BECAUSE THE COURT IMPROPERLY IGNORED HIS UNAMBIGUOUS REQUEST TO REPRESENT HIMSELF.

In his initial brief, Ruffin argued that his convictions must be reversed because, long before trial, he unambiguously told the court that he wanted to represent himself, but the court refused to hold the necessary Faretta hearing or rule on Ruffin's request. (Db 11-15) In response, the State claims (1) that Ruffin twice telling the court, "I would like to represent myself from here on out, Your Honor," was not clear or unequivocal enough to constitute a request to go pro se; (Rb 12-14) and alternatively (2) that Ruffin waived his request to go pro se by not repeatedly bringing it up again after the court had implicitly denied that request. (Rb 14-16) Both arguments must be rejected because they defy well-established caselaw and common sense.

First, it is beyond question that Ruffin clearly, unequivocally, and unambiguously informed the court that he wanted to represent himself. Ruffin told the court twice, "I would like to represent myself from here on out." (1T 33-13 to 34-5) This request was clear — it told the court exactly what Ruffin

wanted to do. This request was unequivocal — Ruffin did not express any uncertainty in his decision or any caveats to his request. And this request was unambiguous — it left no doubt as to the nature of Ruffin's request. That is all caselaw requires of defendants seeking to waive their right to representation and go pro se.

Ruffin's statement here, "I would like to represent myself from here on out," is even clearer and more unequivocal than defendants' requests in other cases where our courts have found the right to have been sufficiently asserted. For example, in Rose, the defendant's requests were primarily focused on the defendant's desire for a different attorney. The defendant first asked the court to remove his assigned attorney from the case, then asked the court to appoint a different attorney to represent him, and only expressed a desire to represent himself as a last resort: "That's all I'm asking, your honor, that you remove him from my case. I'll go pro se. I'll put in a motion to go pro se. I'm not going to court with him purposely trying to sell me out." State v. Rose, 458 N.J. Super. 610, 622 (App. Div. 2019). This court recognized that the defendant's requests were "clear and unequivocal" and that the record "belie[d] the State's contention that defendant's request was 'vague.'" Id. at 628.

Similarly in Taylor, the defendant "sought the discharge of his attorney" and "the assistance of substitute counsel," but his motion papers cited Faretta and the "trial judge seemed to have interpreted" the request "to include an alternative request to proceed pro se." State v. Taylor, 350 N.J. Super. 20, 42 (App. Div. 2002). This Court held that "the proper course" was to "seek clarification from defendant," and if, as a result of seeking this clarification, an "express request to proceed pro se is made, the court must then determine whether defendant has made a knowing waiver of his right to counsel." Ibid. (emphasis added) (citing State v. Crisafi, 128 N.J. 499, 510-12 (1992)).

In Figueroa, the appellate record was "not sufficiently clear to determine precisely the scope of defendant's request: whether he was requesting the right of self-representation or, instead, the opportunity to engage in hybrid representation." State v. Figueroa, 186 N.J. 589, 595 (2006). In the trial court's ensuing colloquy with the defendant, "seeking to determine whether defendant's waiver of the right to counsel was knowing and voluntary," the focus of that inquiry "had an unintended consequence: defendant constantly modified the scope of his request to meet the questions asked of him and, in doing so, appeared to vacillate between a request for self-representation and a request for hybrid representation." Id. at 595-96. Yet even in light of a potentially ambiguous request by the defendant, the Supreme Court reversed

the defendant's convictions. The Court explained, "[t]o the extent the record does not disclose the true nature of defendant's request, we are compelled to conclude that a Faretta/Crisafi/Reddish violation is present." Id. at 596.

As these cases make clear, the State's claim that Ruffin's request to represent himself was not "clearly and unequivocally" made must be rejected. Contrary to the State's contention, defendants seeking to represent themselves do not need to "recite some talismanic formula" or make their requests over and over again just to have those requests be properly considered by a court. Rose, 458 N.J. Super. at 626. Here, Ruffin told the court exactly what he wanted: "to represent myself from here on out." The court summarily denied that request without holding the required hearing. See Rose, 458 N.J. Super. at 628 (holding that it was improper to "deflect[ ] defendant's oral request by inappropriately requiring defendant to submit his request in writing"). "The failure to rule on a defendant's request has been treated the same as an explicit denial." Id. at 629. This summary denial amounts to structural error that compels reversal of Ruffin's convictions.

The State's alternative argument — that Ruffin somehow "relinquished" his right to represent himself because he did not express continued dissatisfaction with appointed counsel — must also be rejected. Ruffin told the court what he wanted, and the court's refusal to rule on Ruffin's request

amounted to a denial of Ruffin's request. Ibid. Parties do not need to repeatedly renew objections following a court's denial in order to preserve that issue for appeal. Ruffin made an application. The court improperly denied that application without holding the required hearing. Ruffin is now appealing that improper, summary denial.

Moreover, while there are theoretically circumstances in which a defendant's conduct could demonstrate "an intentional relinquishment of a known right," that is not the case here. Id. at 636. As the court explained in Rose, "mere acquiescence through silence in representation by counsel is not proof enough." Ibid. The right to represent oneself is a fundamental constitutional right, and courts "must 'indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights." Ibid. (alterations in Rose).

Illustrating these principles, the Rose court found persuasive the Ninth Circuit's rejection of the government's argument that a defendant waived his motion for substitute counsel "because he did not reassert it after the court inadvertently failed to rule on it." Id. at 637 (citing Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (en banc)). The "the defendant 'did not voluntarily, knowingly and intelligently waive [his] motion that he reasonably believed was denied.'" Ibid. Similarly, as explained by the court in Rose, the same is

true "where a defendant does not reassert a request to proceed pro se after the trial court inadvertently failed to rule, especially if the defendant understood that the request was denied." Ibid.

Here, Ruffin understood that his application to represent himself was denied. He twice told the court that he wanted to represent himself. The court responded, "We are done for today, Mr. Ruffin. If you want to make an application to represent yourself, you do so. . . after consultation with" defense counsel." (1T 33-13 to 34-5) Ruffin then reiterated that he was making a request to represent himself. (Ibid.) The court again did not rule on Ruffin's clear and unequivocal request, instead demanding that Ruffin consult with the attorney he no longer wanted to represent him and renew his request with the court in a different form. The court's actions amounted to a denial of Ruffin's request, and Ruffin knew it. He had told the court what he wanted, and the court made clear that he could not have it. As this Court recognized in Rose, "[i]t takes some measure of temerity even for practicing attorneys to nudge a judge who has reserved decision on a motion. Here, the court insisted that defendant submit his request to proceed pro se in writing. If defendant reasonably believed his request was denied, he was not obliged to continually renew it." Id. at 638. Thus, the State's argument that Ruffin implicitly waived

his constitutional right by failing to renew a motion that had already been denied must be rejected.

"The language and spirit of the Sixth Amendment contemplate that counsel. . . shall be an aid to a willing defendant — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." Faretta v. California, 422 U.S. 806, 820 (1975). Ruffin had the constitutional right to represent himself. He asked the court to exercise that right. The court improperly denied that request by refusing to hold the necessary hearing on the motion. Thus, Ruffin's convictions must be reversed and his case remanded for a new trial. Figueroa, 186 N.J. at 596 ("[B]ecause the violation present is of constitutional dimension, defendant must be returned to the status quo ante and, hence, is entitled to exercise his constitutional rights anew.").

POINT II

DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED, OR ALTERNATIVELY, HIS INVOCATIONS OF HIS RIGHT TO COUNSEL SHOULD HAVE BEEN REDACTED. THE IMPROPER ADMISSIONS REQUIRE REVERSAL OF HIS CONVICTION.

In his initial brief, Ruffin argued that both his so-called "booking" statement and his subsequent Mirandized interrogation should have been suppressed. The booking statement should have been suppressed because (1)

Ruffin was in custody and subjected to express questioning by police without being informed of his Miranda rights; (Db 17-20) and (2) he unambiguously invoked his right to counsel. (Db 20-25) His Mirandized statement should have been suppressed because (1) Ruffin had unambiguously invoked his right to counsel; (Db 20-25) and (2) the detectives improperly contradicted the Miranda warnings. (Db 26-28) And alternatively, even if the statements were not suppressed, the jury should not have heard Ruffin repeatedly telling the police that he wanted to speak with a lawyer. (Db 25-26) In response, the State makes several arguments, all of which should be rejected. Ruffin relies on all of these arguments from his initial brief, adding the following comments.

First, regarding the so-called "booking" statement, the State argues that there was no need to read Ruffin his Miranda warnings because the police had informed him of his rights two days earlier. (Rb 22-25) It is well-established that "[b]efore the police can interrogate a suspect in custody, they must inform the person of his constitutional rights in accordance with Miranda." State v. O.D.A.-C., 250 N.J. 408, 420 (2022) (citing State v. Hreha, 217 N.J. 368, 382 (2014)). It is equally well-established that the State bears the burden of proving, beyond a reasonable doubt, that a defendant has knowingly, intelligently, and voluntarily waived his rights. Ibid. "That burden of proof is higher than under federal law, which requires the government to 'prove waiver

only by a preponderance of the evidence.'" Ibid. (quoting Colorado v. Connelly, 479 U.S. 157, 168 (1986)).

The State is asking this Court to conclude that they met their burden to prove beyond a reasonable doubt that Ruffin knowingly and voluntarily waived important constitutional rights without being reminded of those rights and without expressly waiving those rights, simply because Ruffin had, days earlier, been informed of his rights. It is true that there is no bright-line rule regarding re-administering Miranda warnings, and that courts instead consider the totality of the circumstances in determining whether the State has met its burden of proof. See State v. Tillery, 238 N.J. 293, 317 (2019) (holding that in determining whether a defendant has waived his Miranda rights, a court should consider "the time lapse between the reading of Miranda rights and the actual questioning or incriminating oral statement"); State v. Dispoto, 189 N.J. 108, 124 (2007) (holding that courts should consider the totality of the circumstances in determining whether pre-custody Miranda warnings could carry over to later custodial interrogation).

But to accept the State's argument here would make a mockery of their high burden of proof and eviscerate the protections of Miranda. If, as the State asserts, "[a] valid waiver continues until the defendant revokes it," (Rb 22) then there would be nothing stopping the police from declining to Mirandize

any defendant who has ever previously waived his Miranda rights. That "valid waiver" would "continue until the defendant revokes it," whether the subsequent interrogation took place two days, two weeks, or two years later. That simply does not comport with the greater protections New Jersey provides against un-warned custodial interrogations. This Court should reject the State's claim.

Second, the State argues that Ruffin's statements during the booking video were voluntary and thus admissible. (Rb 25-28) But police are required to obtain a valid Miranda waiver from an in-custody defendant before interrogating him — a requirement separate and apart from the voluntariness of a defendant's statements. The State does not dispute that Ruffin is in custody during the booking procedure. The State also correctly recognizes that the detectives expressly asked Ruffin questions during the booking procedure that were not related to booking. (See Rb 26) That's all that is required to trigger the need for Miranda warnings. The police's failure to do so means that Ruffin's statements must be suppressed.

The State attempts to avoid the need for suppression by arguing that the detectives only interrogated Ruffin "as a result of defendant's repeated, volunteered diatribes." (Rb 26) But the police had no need to respond to anything Ruffin was saying. They should have simply told Ruffin to stop

speaking, not asked any substantive questions, and not responded if Ruffin continued to talk. Instead, the police capitalized on Ruffin's apparent desire to tell his side of the story, without having been told he had the right to remain silent, the right to a lawyer, and being warned that anything he said would be used against him in court. This interrogation, beyond anything that was necessary to book Ruffin, was impermissible and requires suppression of Ruffin's statement. (See Db 17-20)

Third, the State claims that although Ruffin repeatedly told the police that he had a lawyer coming and wanted to call a lawyer, none of these invocations require suppression because Ruffin continued to volunteer statements. (Rb 29) This argument is belied by the record. For example, Ruffin unambiguously invoked his right to counsel, telling the detectives, "I'm [sic] got a lawyer coming cause I ain't do nothing bro." (Da 45) Detective Minniti first said "that's fine," and then said "okay," after Ruffin said, "I didn't do anything wrong." However, he then expressly asked Ruffin, "How long have you known me in town," and "Haven't I always been straight with you?", thereby continuing the impermissible interrogation. (Da 45)

Similarly, Ruffin asks if he could use his phone to "get the number to call this lawyer" because if the police are going to charge him, "I better get a lawyer." (Da 55) The detectives then continue with the booking process, taking

Ruffin's photograph and fingerprints. When Ruffin says that he did not do anything, Detective Bielski said, "Arteste, like I just said to you a little bit ago, since we talked to you the first time, a lot more evidence has come to light." (Da 57) By continually engaging with Ruffin by asking express questions and encouraging him to change his story in light of the new evidence that "has come to light," the police failed to scrupulously honor Ruffin's invocations of his right to counsel. See State v. Wright, 444 N.J. Super. 347, 366 (App. Div. 2016) (holding that police telling defendant that the victim was coming to identify him and that an officer had found a gun nearby constituted interrogation because it was reasonably likely to evoke an incriminating response). Thus, Ruffin's statements should have been suppressed.

POINT III

THE COURT IMPROPERLY FAILED TO INSTRUCT THE JURY THAT DEFENDANT NEEDED TO SPECIFICALLY INTEND THE RESULT OF THE CONSPIRACY.

In his initial brief, Ruffin argued that his conspiracy conviction must be reversed because the court failed to instruct the jury that a conspiracy requires that the defendant purposely enter into an agreement and specifically intend the result of the agreement. (Db 27-34) In response, the State asserts that the fact that the court read the model charges for conspiracy and aggravated assault means that there could be no plain error. (Rb 40-41)

But a conspiracy to commit aggravated assault requires the defendant to intend that significant bodily injury result. It was not a conspiracy to commit aggravated assault if Ruffin purposely agreed to promote the fight yet only acted knowingly as to the result of the fight. See Model Penal Code Commentaries, § 5.03 at 407-08; State v. Madden, 61 N.J. 377, 395 (1972) (equating a conspiracy to murder with a "conspiracy to kill") (emphasis added).

The model charge for conspiracy failed to communicate this to the jury. Compare Criminal Model Jury Charge, Attempt (rev. 6/15/09) (including an instruction that "Although it is possible to commit the crime of _____ with [knowledge/recklessness], to be guilty of an attempt the defendant must act with purpose. In other words, the defendant must have the purpose to commit the crime of _____, in order to be guilty of attempting it.") with Criminal Model Jury Charge, Conspiracy (rev. 4/12/10) (including no such additional language). The mere fact that the court read the jury the model charges for conspiracy and aggravated assault in sequence does not mean that the jury instructions were correct or sufficient. See State v. Bryant, 419 N.J. Super. 15, 28 (App. Div. 2011) (recognizing that the Model Jury Charges are "not binding authority").

In short, as explained in Ruffin's initial brief, conspiracy is a specific-intent crime that requires the defendant to specifically intend the result that occurs. The jury instructions did not explain this to the jury. Thus, Ruffin's conspiracy conviction must be reversed. State v. Vick, 117 N.J. 288, 292 (1989) (holding that the failure to instruct the jury on every element of an offense requires reversal).

CONCLUSION

For the reasons set forth in this brief and in defendant's initial brief, his convictions must be reversed. Alternatively, his sentence should be vacated and remanded for resentencing.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender

BY: /s/ Margaret McLane
Assistant Deputy Public Defender
Attorney ID: 060532014