SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3500-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Burlington County.
CORTNEY BELL,	:	
		Indictment No. 21-07-634-I
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Christopher J. Garrenger, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: January 10, 2024

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Cortney Bell was convicted of armed robbery after a trial riddled with constitutional errors. The evidence established that a man entered a bank and told the tellers to give him money. When only one of the two tellers reacted, the man threatened to shoot. He left the bank with $600 of the $1000 he stole, having dropped the remainder of the money on the floor. The evidence suggested that he also dropped a dirty beer bottle, which was later determined to contain Mr. Bell's DNA. No one was hurt during the incident, and a gun was never used or seen.

Mr. Bell's conviction must be vacated or, at a minimum, reversed. First, the trial court improperly deprived him of the rights to self-representation and to confront the witnesses against him by refusing to rule on Mr. Bell's request to represent himself and then permanently excluding him from the courtroom for the rest of the trial. What's more, the State failed to introduce enough evidence to prove that an armed robbery occurred. The perpetrator did not use or threaten any force against one of the two potential robbery victims and did not use a simulated weapon to further the theft from that potential victim. As for the other potential victim, there is no evidence that she had any subjective belief that the perpetrator was armed. Finally, the jury instructions failed to communicate the critical legal framework needed for a competent verdict. The court omitted an instruction on the force element of robbery and improperly conflated the force and armed-with-a-deadly-weapon

elements, making it nearly impossible for the jury to have returned a valid verdict on either degree of robbery. The court also failed to instruct the jury that they had to unanimously agree as to the identity of the persons against whom Mr. Bell committed various acts.

Because Mr. Bell's due process and Sixth Amendment rights were violated during the course of the trial, his conviction must be reversed. Additionally, given the gaps in the evidence presented by the State, this Court should reverse in part the denial of Mr. Bell's motion for a judgment of acquittal.

PROCEDURAL HISTORY

On July 9, 2021, a Burlington County Grand Jury returned Indictment Number 21-07-634, charging defendant Cortney Bell with one count of first-degree robbery, N.J.S.A. 2C:15-1a(2), and two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3b. (Da 1-3)[2] Before trial, the Honorable Christopher J. Garrenger, J.S.C. granted the State's motion to dismiss as redundant one of the terroristic threats charges. (1T 4-3 to 5-11)

[2] Da — Defendant's appendix
1T – Transcript of January 19, 2023 jury trial
2T – Transcript of January 24, 2023 jury trial
3T – Transcript of January 25, 2023 jury trial
4T – Transcript of January 26, 2023 jury trial
5T – Transcript of January 31, 2023 jury trial
6T – Transcript of June 9, 2023 sentencing
7T – Transcript of March 22, 2021 hearing on motion for self-representation in Burlington County Indictment No. 20-02-187

Trial began on January 19, 2023, before Judge Garrenger and a jury. After the State rested, defense counsel moved for a judgment of acquittal on all charges, which the court denied. (4T 96-21 to 97-13) On January 31, the jury found Mr. Bell guilty of first-degree robbery and not guilty of terroristic threats. (5T 6-7 to 21; Da 4)

On June 9, 2023, Judge Garrenger sentenced Mr. Bell to a 17-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and imposed all appropriate fines and fees. (6T 14-10 to 14, 15-1 to 4; Da 5-7) Judge Garrenger ordered that the sentence run consecutively to a 10-year term on an unrelated offense.[3] (6T 14-15 to 19; Da 5)

A notice of appeal was filed on July 19, 2023. (Da 8-10)

STATEMENT OF FACTS

On July 23, 2019, police responded to a reported robbery at the TD Bank in Pemberton. (3T 38-2 to 13) Three witnesses who were inside the bank at the time of the incident testified at trial. (3T 51-23 to 84-22, 85-16 to 112-5, 112-16 to 123-6)

Rosemary Colon, the bank manager, testified that there were three employees working that morning in addition to herself: Kushal Shah and Lacey Joseph, both of whom worked as tellers, and Larry Rahn, the financial services representative. (3T 53-3 to 4, 53-15 to 17, 54-11 to 55-4) According to Colon, at some point during the

[3] Mr. Bell is appealing his conviction and sentence on this other offense. The docket number is A-3978-21.

morning a man walked into the bank dressed entirely in black. (3T 56-20 to 24) The man was wearing a hood and sunglasses, a handkerchief around his face, and dirty white socks on his hands. (3T 56-24 to 57-1) Colon heard the man say to the tellers, "Give me your money." (3T 58-8 to 15) The tellers each handed over $500 in "bait money" in response. (3T 59-2 to 22, 76-19 to 21) Colon recalled telling police that at some point the man also said, "I have a gun." (3T 77-18 to 22) Colon did not specify to whom this statement was directed, nor did she ever see a gun.

Lacey Joseph, one of the tellers, testified that the man first approached Kushal Shah, the other teller. (3T 95-1 to 8) Shah was assisting a customer at the time and did not "put[] two and two together" when the man said, "give me all your money." (3T 95-8 to 11) Joseph, on the other hand, quickly placed her "bait money" on the counter and stepped back. (3T 95-11 to 14) When Shah still had not placed any money on the counter, the man said, "give me all of your money or I'll shoot." (3T 95-14 to 16) As he said this, the man had one hand in his sweatshirt pocket, and Joseph noticed an object protruding from his pocket that looked like it could be the tip of a gun. (3T 95-16 to 19, 97-7 to 14) Joseph did not see a gun at any time. (3T 97-4 to 6) Shah did not testify at trial.

The only other eyewitness to testify was Eric Segars, a customer who was inside the bank with his mother that morning. (3T 114-19 to 24) Segars recalled hearing the man say, "I'm here to rob the bank, I'm coming to steal the money." (3T

117-22 to 25) Segars did not hear the man say anything else and did not see a weapon at any point. (3T 116-23 to 24, 118-1 to 2)

After taking the money from the tellers, the man ran out the back door of the bank lobby, which leads to a vestibule. (3T 60-2 to 5) Colon waited several minutes and then went to the vestibule to lock the exterior door. (3T 60-15 to 19) When she got there, however, the man was still inside the vestibule, attempting to pick up money from the floor. (3T 60-20 to 21) She noticed "a few dropped bills" on the floor, as well as a "dirty Corona bottle." (3T 61-11 to 19) The man eventually exited the bank through the front door, which Colon unlocked for him after he tried and failed to exit through the back door. (3T 62-10 to 22, 95-20 to 96-5)

Neither Colon nor Joseph saw the man drop a beer bottle in the vestibule, though they testified that they had not seen a bottle in the vestibule before the man entered the bank that morning. (3T 60-22 to 25, 82-5 to 8, 103-5 to 8, 109-1 to 3) Segars testified that he did see the man drop a bottle while leaving the bank, but despite giving a statement to police on the day of the incident, Segars did not tell police about this observation. (3T 118-13 to 18, 120-19 to 121-3)

State Police Detective John Andrew Hannan was among the officers who responded to the bank. (4T 17-9 to 10, 18-12 to 18) Hannan testified that he saw a beer bottle and money on the floor of the vestibule, and police collected both, gathering $400 in total. (4T 19-6 to 22, 23-6 to 11, 26-9 to 12) The money was tested

for fingerprints, but none were detected. (4T 26-15 to 23) Police recovered surveillance videos of the incident, though no camera captures the exact area where the bottle was found inside the vestibule. (3T 46-15 to 47-7, 70-14 to 20; 4T 28-1 to 10)

The bottle was submitted to the State lab for DNA testing. (4T 35-1 to 4) Laura Cannon, the State's expert in DNA forensic analysis, analyzed two swabs that were taken from the bottle—one from the mouthpiece and one from the outside. (4T 72-1, 77-22 to 78-1, 82-21 to 84-3) She was unable to generate a DNA profile for the sample taken from the mouthpiece but generated a full, single-source profile for the sample from the outside of the bottle. (4T 83-23 to 84-3, 90-2 to 5, 91-23 to 25) She determined that the profile matched a profile generated from a buccal swab from Mr. Bell. (4T 86-14 to 24, 88-22 to 89-5)

LEGAL ARGUMENT

POINT I

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO SELF-REPRESENTATION WHEN THE TRIAL COURT DISMISSED HIS REQUEST TO REPRESENT HIMSELF OFFHAND WITHOUT ANY MEANINGFUL CONSIDERATION. (3T 75-4 to 15)

On the first day of trial, Mr. Bell requested to fire his attorney and exercise his constitutional right to represent himself. (3T 75-4 to 11) The court dismissed the request outright without any substantive consideration. (3T 75-7 to 9) A request to

proceed pro se, even if asserted mid-trial, must be taken seriously. See Faretta v. California, 422 U.S. 806, 819-20 (1975); Buhl v. Cooksey, 233 F.3d 783, 798 n.16 (3d Cir. 2000). The court's failure to afford any consideration to Mr. Bell's request constitutes an abuse of discretion and violated Mr. Bell's rights under the federal and state constitutions. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10. Reversal of his conviction is required. See State v. King, 210 N.J. 2, 22 (2012) (reversing defendant's conviction based on the trial court's unsupported denial of his request to represent himself).

During Colon's testimony, the prosecutor played a portion of the surveillance video of the incident. (3T 71-15 to 21) In reaction to the video, Mr. Bell commented, "You can't see where the bottle is dropped." (3T 71-22 to 23) The prosecutor objected to this disruption, and the trial court dismissed the jury. (3T 71-24 to 72-7) The court admonished Mr. Bell for speaking, and Mr. Bell responded, "My attorney is not helping me. He's not." (3T 72-8 to 20) The court instructed Mr. Bell to tell defense counsel if he had questions for counsel to ask on cross-examination. (3T 72-25 to 73-18) The court also warned Mr. Bell that if he disrupted trial again, the court had the authority to "have [him] either gagged or bound or removed from the courtroom for [his] trial." (3T 73-7 to 23) The following exchange then occurred:

> **MR. BELL:** He's telling me he's not going to ask what I want to ask.
> **THE COURT:** Pardon me.

> **MR. BELL:** He's telling me he's not going to ask -- he's not going to cross-examine --
>
> **THE COURT:** Hold on. [Defense counsel] is an experienced attorney. Okay. Mr. Bell, I don't know your experience in the courtrooms but --
>
> **MR. BELL:** It's my life.
>
> **THE COURT:** I understand that these are your liberty interests at stake. We've taken great pains and measures to ensure that you're going to get a fair trial. I think counsel would tell you the same thing that I'm going to tell you; you're not helping yourself in any way, shape, or form by yelling out, shouting, interrupting the court proceedings. Okay.
>
> If you have a question, an issue, a concern, write it down. Give it to [defense counsel]. Okay. If he thinks it's relevant, germane, appropriate, and within parameters of the court rules and the rules of evidence, then he will ask it. Okay. And if he doesn't believe that what you're saying is either permissible before the court or the jury for varied reasons, [defense counsel] is the attorney. Okay. So if you have issues you talk to him. But I'm telling you --
>
> **MR. BELL:** <u>Can I be my own attorney? I would like to fire this attorney and be my -- represent myself.</u>
>
> **THE COURT:** No, Mr. Bell, that's not happening. We've canvassed those issues before, too, some year-plus ago.
>
> **MR. BELL:** <u>I would like to represent myself, Your Honor.</u>
>
> **THE COURT:** Mr. Bell, if you continue to continue with your outbursts, I'm going to have you removed from the courtroom. Okay. Sit. Thank you very much.
>
> [(3T 74-3 to 75-15) (emphasis added)]

Notwithstanding the court's statement to the contrary, the court never "canvassed" the issue of Mr. Bell representing himself in this case. Instead, in an unrelated, prior matter before Judge Garrenger, Mr. Bell requested to represent himself post-trial, and the court granted his request on March 22, 2021. (7T 7-23 to 8-6, 14-13 to 14) The court specifically clarified that the ruling "was only related to

the instant matter," did not carry over to Mr. Bell's other pending charges, "[a]nd if those matters are still outstanding, the Court would address any individual application to represent himself at any future dates once those matters are ripe for adjudication, meaning once they're indicted." (7T 20-5 to 10; see also 7T 19-24 to 20-4) At best, it appears that the court was referring to this discussion—which occurred at a motion hearing in an entirely separate matter nearly two years prior—when it stated that it had "canvassed" the issue of self-representation with Mr. Bell "some year-plus ago." (3T 75-8 to 9)

Both the United States and New Jersey constitutions grant defendants the right to represent themselves in criminal proceedings. Faretta, 422 U.S. at 819-20; U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10. This right is premised on "respecting a defendant's capacity to make choices for himself." State v. Reddish, 181 N.J. 553, 585 (2004). Because it is the defendant who will bear the consequences of a conviction, he "must be free personally to decide whether in his particular case counsel is to his advantage." Faretta, 422 U.S. at 834. "And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" Ibid., (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (J. Brennan, concurring)).[4]

[4] Due to the risks attendant to self-representation, a defendant who requests to represent himself must be made aware of the dangers and disadvantages of doing so. Faretta, 422 U.S. at 835. The trial court is required to engage in a "searching inquiry"

While a defendant should strive to exercise his right to represent himself in a timely manner, the right does not disappear the moment that trial commences. See Williams v. State, 56 A.3d 1053, 1056 (Del. 2012) ("Starting a trial with counsel, without more, is not a basis to deny a defendant's right to self-representation."). Rather, a judge considering a mid-trial request to proceed pro se "'must weigh the prejudice to the legitimate interests of the defendant against the potential disruption of proceedings already in progress.'" Cooksey, 233 F.3d at 798 n.16 (quoting United States v. Stevens, 83 F.3d 60, 66–67 (2d Cir. 1996)).[5] "How this balance should be struck is ultimately within the sound discretion of the [trial] court." Stevens, 83 F.3d at 67. To ensure that the right is respected, however, "the record must reflect either the factual findings or the legal reasoning underlying the trial judge's denial." Williams, 56 A.3d at 1056 (quotation omitted).

The timeliness of the defendant's request is an appropriate consideration, but it is not dispositive, as timeliness "is only one factor that a court must consider in ruling on a motion to proceed pro se." State v. Thomas, 362 N.J. Super. 229, 241 (App. Div. 2003). See U.S. v. Cocivera, 104 F.3d 566, 570 (3d Cir. 1996) (district

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with a defendant to ensure that his waiver of the right to counsel is knowing and intelligent. State v. Buhl, 269 N.J. Super. 344, 358-59 (App. Div. 1994). See State v. Outland, 245 N.J. 494, 506 (outlining topic areas a trial court must explore).

[5] In Buhl v. Cooksey, the Third Circuit granted habeas relief on the ground that the trial court had violated the defendant's right to self-representation. 233 F.3d at 797-98, 807. In so doing, the Court explicitly disagreed with this Court's resolution of the issue on appeal in State v. Buhl, 269 N.J. Super. 344.

court had discretion to allow defendant to proceed pro se on the second day of trial after four witnesses had testified); Gov't of Virgin Islands v. James, 934 F.2d 468, 470-72 (3d Cir. 1991) (affirming district court's grant of defendant's request to proceed pro se asserted on the day of trial). Moreover, the court cannot assume that there would be a significant disruption of the proceedings without inquiring of the defendant if he would need additional time to prepare.

Here, the trial court refused Mr. Bell's request to represent himself without any explanation. Although the request was made after trial had begun, the court did not indicate that it was denying the request as untimely. Instead, the court dismissed the request offhand, stating simply that it had addressed the issue of self-representation with Mr. Bell before. (3T 75-7 to 9) In fact, the court had never addressed this issue with Mr. Bell as it pertained to the case at bar. The court seems to have inappropriately relied on the fact that it granted Mr. Bell the right to represent himself in an entirely different case as grounds for denying this request.

In addition, the court did not ask Mr. Bell whether he would require an adjournment should his request to represent himself be granted. It is entirely possible that Mr. Bell was willing and prepared to proceed without any delay. If that were so, and assuming Mr. Bell's decision was determined to be knowing and intelligent, there would be no legitimate reason to deny the request.

To be sure, this Court has affirmed the denial of a defendant's request to proceed pro se where it appeared that the request was made solely for the purpose of postponing trial. In State v. Pessolano, for instance, the defendant expressed dissatisfaction with his lawyer for four to five months leading up to trial and had consulted with other attorneys. 343 N.J. Super. 464, 473 n.4 (App. Div. 2001). Yet, the defendant did not seek to obtain new counsel until the day trial commenced, at which point he moved for an adjournment. Id. at 473. When the judge ruled that counsel could be substituted only if immediately ready to proceed, the defendant requested to proceed pro se. Ibid. The judge denied the request, concluding that it was made "simply for purposes of delay," and this Court affirmed. Id. at 473 n.4. See also State v. Roth, 289 N.J. Super. 152, 164-165 (App. Div. 1996) (trial judge properly denied defendant's application to proceed pro se where defendant indicated he would seek an adjournment and the application "may have been nothing more than an attempt to postpone trial").

Unlike in Pessolano, Mr. Bell's request to represent himself was not a delay tactic. There is no indication that Mr. Bell was dissatisfied with defense counsel long before trial but sat on his constitutional right, invoking it solely for the purpose of delay. Instead, his comments reveal his frustration with counsel's performance at trial itself. And even if there were some indication that Mr. Bell sought to postpone trial, the court did not deny the request on that basis, nor could it have done so

without first inquiring into whether Mr. Bell would seek an adjournment if his request were granted.

At bottom, even mid-trial requests to proceed pro se must be taken seriously. Presented with such a request, the court was required to balance Mr. Bell's constitutional interest in representing himself with the government's legitimate interest in judicial economy. See Cooksey, 233 F.3d 798 n.16; Thomas, 362 N.J. Super. at 241. The court's utter failure to do so constitutes an abuse of discretion. See Slutsky v. Slutsky, 451 N.J. Super. 332, 356 (App. Div. 2017) (a trial judge abuses his or her discretion by failing to consider all of the controlling legal principles) (quotation omitted). Cf. Stevens, 83 F.3d at 67 (district court did not abuse its discretion in denying defendant's mid-trial request to represent himself after careful consideration).

Because the right to represent oneself is of constitutional dimension, a violation of the right amounts to structural error. Thomas, 362 N.J. Super. at 244. In the words of the United States Supreme Court, "[t]he right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984). Accordingly, Mr. Bell's conviction must be reversed.

POINT II

DEFENDANT WAS DEPRIVED OF HIS DUE PROCESS AND CONFRONTATION RIGHTS WHEN THE TRIAL COURT REMOVED HIM FROM THE COURTROOM FOR THE REST OF TRIAL. (Ruling at: 4T 12-17 to 13-24)

Following a mid-trial outburst, the trial court barred Mr. Bell from the courtroom for the remainder of trial. (4T 12-17 to 13-24) As a result, Mr. Bell was not present in court when four of the State's witnesses testified, nor was he present for closing arguments or during the final jury charge. Although the court had the authority to remove Mr. Bell from the courtroom "until he promise[d] to conduct himself properly," it had no authority to banish him for the rest of trial. See Allen, 307 U.S. at 343-44. By failing to offer Mr. Bell the option of returning to the courtroom if he agreed to behave appropriately, the court deprived Mr. Bell of a fair trial and his right to confront the witnesses against him. U.S. Const. amend. VI and XIV; N.J. Const. art. I, ¶ 10. Mr. Bell's conviction must be reversed. R. 2:10-2.

On the second day of trial, before the State called its first witness for the day, Mr. Bell interrupted the proceedings by asserting that his lawyer had threatened him "with 15 years," that he wanted to "press charges" and that he was "in fear of [his] life." (4T 12-17 to 13-12) After dismissing the jury, the court admonished Mr. Bell for his behavior. The court stated, "Mr. Bell, you've chosen this path. You've been

warned repeatedly, and as such you are now going to be removed from the courtroom for the rest of the matter." (4T 13-21 to 24)

Trial continued after Mr. Bell was removed. Four witnesses testified for the State: two detectives from the State Police and two forensic scientists from the State lab. (4T 16-15 to 17, 17-7 to 10, 43-20 to 21, 44-9 to 12, 55-6 to 17, 71-25 to 72-1, 72-15 to 19) After the direct examination of each witness, the judge permitted defense counsel to confer with Mr. Bell, but each time Mr. Bell refused to speak to him. (4T 48-19 to 49-22, 69-10 to 24, 93-15 to 20, 95-1 to 4) Defense counsel and the prosecutor then made their closing arguments, and the judge read the final jury instructions. (4T 101-17 to 104-22, 105-1 to 112-9, 112-10 to 144-2)

Enshrined in both the United States and New Jersey Constitutions is the guarantee that a criminal defendant has the right to confront the witnesses called against him. U.S. Const. amend. VI and XIV; N.J. Const. art. I, ¶ 10. An essential element of that guarantee is the right of the accused to be present in the courtroom at every stage of the trial. Allen, 397 U.S. at 338; State v. Luna, 193 N.J. 202, 209 (2007). The presence of a defendant at his own trial is also a condition of due process under the Fourteenth Amendment. State v. Hudson, 119 N.J. 165, 171 (1990) (quoting Snyder v. Massachusetts, 291 U.S. 97, 108 (1934)). The right to be present ensures the defendant's ability to assist with cross-examination and the presentation of the defense. Hudson, 119 N.J. at 172.

"Deplorable as it is to remove a man from his own trial," the right to be present is not absolute. Allen, 397 U.S. at 347. In Illinois v. Allen, the United States Supreme Court held that where a trial judge is confronted with a "disruptive, contumacious, stubbornly defiant defendant[]," the judge has the discretion to "take him out of the courtroom until he promises to conduct himself properly." Id. at 343-44. The Allen Court upheld the trial judge's decision to remove the defendant from the courtroom in light of his disruptive and disrespectful behavior, which continued despite repeated warnings. Id. at 340.

The Allen Court's conclusion that no legal error occurred was buttressed by the fact that the defendant was "constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner." Id. at 345-46. The Court explained that, "[o]nce lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Id. at 343.

In line with the Allen decision, this Court has twice upheld a judge's decision to remove a defendant from the courtroom for disruptive behavior where the defendant was advised that he would be permitted to return whenever he agreed to comport himself with courtroom decorum. State v. Spivey, 122 N.J. Super. 249, 255-56 (App. Div. 1973), reversed on other grounds, 65 N.J. 21 (1974); State v. Reddy, 137 N.J. Super. 32, 36 (App. Div. 1975). In Spivey, the judge permitted the

defendant to return to the courtroom after removing him for moaning, kicking and singing, among other things, but upon his return he "continued his disruptive tactics." 122 N.J. Super. at 255. This Court held that the judge "clearly gave defendant every opportunity to be present in the courtroom." Id. at 256. Similarly, in Reddy, the defendant was removed from the courtroom after several warnings and repeated disruptive behavior. 137 N.J. Super. at 36. He was told that he could return if he agreed to behave himself. Ibid. This Court concluded that "the judge conducted this troublesome phase of the proceeding properly and in accordance with the guidelines set forth in Illinois v. Allen." Ibid.

Here, the court did not abide by the guidelines set forth in Allen. Unlike the judges in Spivey and Reddy, the court in this matter did not inform Mr. Bell that he would be allowed to return to the courtroom if agreed to conduct himself appropriately. Instead, the court told Mr. Bell that he would be barred from the courtroom "for the rest of the matter." (4T 13-21 to 24) This left Mr. Bell with the impression that he had lost his right to be present at trial permanently, which Allen does not permit. See State v. Stuart, No. A-5060-06T4, 2010 WL 1190538, at *8 (App. Div. Mar. 30, 2010) (holding that the trial judge erred by failing to bring the defendant back into the courtroom after removing him to inquire as to whether he was prepared to behave appropriately if allowed to return to trial).[6] (Da 11-20)

[6] Undersigned counsel is unaware of any contrary unpublished opinions. R. 1:36-3.

This error requires reversal of Mr. Bell's conviction. Where a defendant's absence from trial deprives him of his confrontation rights, prejudice is easily assessed. State v. A.R., 213 N.J. 542, 558 (2013). In this case, Mr. Bell was denied the opportunity to observe first-hand the testimony of four of the State's witnesses, as well as the opportunity to observe the closing arguments and the final jury charges. Although the court permitted defense counsel to consult with Mr. Bell following direct examination of each of the four witnesses, it is evident based on the content of Mr. Bell's final outburst that he had an issue with his attorney, and thus he refused to speak with counsel despite having the opportunity to do so. The fact that Mr. Bell requested to fire his attorney and represent himself the day before reinforces the conclusion that permitting Mr. Bell to speak with his attorney after each direct examination did not effectively enable Mr. Bell to participate in his defense. More critically, however, this solution was no remedy for being denied the right to see and hear the testimony of the witnesses against him. Given the obvious prejudice that Mr. Bell suffered due to his absence during critical portions of the trial, his conviction must be reversed. See Stuart, 2010 WL 1190538, at *10 (defendant's continued exclusion from the courtroom, without giving him the opportunity to return to trial if he was willing to behave, was plain error mandating reversal of his conviction). (Da 11-20)

POINT III

THE MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED AS THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF FIRST-DEGREE ROBBERY OF EITHER OF THE TELLERS AND INSUFFICIENT EVIDENCE TO CONVICT HIM OF SECOND-DEGREE ROBBERY OF ONE TELLER. (4T 96-21 to 97-13)

It is fundamental that in any criminal prosecution, the State must prove the defendant guilty of each and every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); State v. Vick, 117 N.J. 288, 293 (1989). Where the State fails to carry out its constitutionally mandated burden, a court must grant a motion for a judgment of acquittal. See R. 3:18-1. The standard for assessing a defendant's motion for a judgment of acquittal is "whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all favorable inferences which reasonably could be drawn there from, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458-59 (1967).

In this case, the State charged Mr. Bell with a single count of first-degree robbery of "[e]mployees and patrons of the TD Bank." (Da 1) The verdict sheet included the lesser offense of second-degree robbery. (Da 4) To support a conviction of either degree of robbery, the State had to prove beyond a reasonable doubt: (1) that Mr. Bell was in the course of committing a theft; and (2) that while in the course

of committing that theft he threatened another with or purposely put him or her in fear of immediate bodily injury. N.J.S.A. 2C:15-1. To support a conviction of first-degree robbery, the State was required to prove a third element: that while in the course of committing the theft Mr. Bell threatened the immediate use of a deadly weapon. Ibid. While the State did not need to prove that Mr. Bell in fact possessed a deadly weapon, it had to prove that he purposely led the victim to actually and reasonably believe that he possessed such a weapon. State v. Dekowski, 218 N.J. 596, 599 (2014).

From the evidence presented at trial, there were two potential victims to the single count of robbery — the two tellers, Joseph and Shah.[7] The State presented evidence that Mr. Bell committed theft against both tellers. However, with respect to Joseph, the State failed to present any evidence that in the course of committing a theft against her, Mr. Bell threatened or purposely put someone in fear of immediate bodily injury. Nor did the State present evidence that in the course of committing that theft, Mr. Bell threatened the immediate use of a deadly weapon by simulating possession of one. The State thus failed to prove elements two and three of the alleged first-degree robbery of Joseph. With respect to Shah, the State presented

[7] If this Court does not vacate the robbery conviction and enter a judgment of acquittal, then the robbery count must be reversed because of a lack of unanimity as to the identity of the victim and the failure to instruct the jury on the second element of robbery. See Point IV.

evidence that, in the course of committing a theft against her, Mr. Bell threatened or purposely put her in fear of immediate bodily injury, satisfying the second element of robbery. But the State failed to present any evidence of the third element: that Shah actually believed Mr. Bell possessed a deadly weapon. Accordingly, there was insufficient evidence from which a jury could find that Mr. Bell committed either degree of robbery against Joseph and insufficient evidence from which a jury could find that Mr. Bell committed first-degree robbery against Shah. The motion for a judgment of acquittal should have been granted as to those offenses.

A. The State Failed To Present Any Evidence From Which A Jury Could Find That Mr. Bell Committed Either Degree Of Robbery Against Joseph.

To support a conviction of robbery, the State was required to prove that in the course of committing a theft, Mr. Bell threatened or purposely put someone in fear of immediate bodily injury. N.J.S.A. 2C:15-1a(2). Because the State failed to prove that Mr. Bell threatened or put someone in fear of immediate bodily injury in the course of committing a theft against Joseph, the motion for a judgment of acquittal should have been granted as to robbery of Joseph.

An act is considered to be "in the course of committing a theft" if it occurs in an attempt to commit the theft, during the commission of the theft itself, or in immediate flight after the attempt or commission. Model Jury Charges (Criminal), "Robbery in the First-Degree (N.J.S.A. 2C:15-1)" (rev. Sep. 10, 2012). Where a defendant threatens a victim with injury if the victim does not relinquish money, the

threat is considered to have been made in the course of committing the theft. In addition, where a defendant uses force against an individual in an effort to flee from the scene or avoid apprehension, that force is considered to have been carried out in the course of committing the theft, regardless of whether the force is used against the theft victim or someone else. See State v. Mirault, 92 N.J. 492, 498-99 (1983).

In this case, there was no evidence that the perpetrator threatened Joseph or put her in fear of immediate bodily injury in an attempt to cause her to relinquish money. Joseph testified that she immediately put money on the counter in response to hearing the man say, "[g]ive me all your money." (3T 95-8 to 11) Shah, on the other hand, did not put any money on the counter at that time, prompting the man to say, "[g]ive me all your money or I'll shoot." (3T-14 to 16) When asked to whom the latter statement was directed, Joseph responded, "it was obviously directed either to me or [Shah]. I'm going to say it was directed to [Shah] because I had already given him money." (3T 96-17 to 24) Considering Joseph's testimony in its entirety, it is evident that the only statement made by the perpetrator with the goal of causing Joseph to relinquish money was, "[g]ive me all your money." This statement is not a threat, nor was it made with the purpose of putting Joseph in fear of immediate bodily injury.

As this Court has recognized, "[a] mere request for money, without more, is not criminal." State ex rel. L.W., 333 N.J. Super. 492, 497 (App. Div. 2000). The

totality of the circumstances must be considered in determining the purpose of a statement, ibid., and the focus is on the conduct of the perpetrator, rather than the characteristics of the victim. State v. Zembreski, 445 N.J. Super. 412, 433 (App. Div. 2016) (quotations omitted). Thus, whether the victim is, in fact, scared that bodily injury will result is not dispositive.

Here, the State presented no evidence that the perpetrator made the statement, "[g]ive me all your money" with the purpose of putting Joseph in fear of immediate bodily injury. The fact that the perpetrator threatened to shoot only after Shah did not hand over money in response to his first statement reinforces this conclusion; it shows that the perpetrator resorted to threats of violence once his non-threatening tactic failed with respect to Shah. With respect to Joseph, however, no verbal threat or threatening conduct was carried out in an effort to cause her to relinquish money.

Moreover, the statement, "[g]ive me all your money or I'll shoot" was directed at Shah and was made after the theft from Joseph had been completed. Although an act may be considered to be "in the course of committing a theft" it if occurs in the immediate flight from the theft or in an effort to avoid apprehension, that is not what occurred here. In State v. Mirault, for instance, a returning homeowner called police from outside her home after noticing that her front door was ajar and the molding was torn off. 92 N.J. at 456. The responding officer entered the home to investigate and engaged in a violent struggle with the defendant, who was committing a theft

inside. Ibid. The Supreme Court held that the defendant used force against the officer "in the course of committing a theft" because the theft and assault "were clearly part of a continuous transaction." Id. at 501. Indeed, it was evident that force was used in an attempt to resist apprehension after the officer ordered the defendant to "freeze." Id. at 500. See also State v. McClary, 252 N.J. Super. 222, 224-25 (App. Div. 1991) (defendant fought with victim's employees who continuously pursued him after he fled victim's workplace with her purse). Here, by contrast, the perpetrator did not threaten to shoot with the goal of avoiding getting caught. Rather, the threat was made in an attempt to carry out a second, separate theft of Shah.

In sum, the statement, "[g]ive me all your money or I'll shoot" was not made "in the course of committing a theft" against Joseph, and the statement, "[g]ive me all your money" was not, by itself, threatening. Accordingly, the State failed to prove the required second element of robbery as it pertains to Joseph.

Even if the State had presented evidence from which a jury could find that the second element of robbery was met with respect to Joseph, the State failed to present evidence that any robbery committed against Joseph involved a threat of the immediate use of a deadly weapon, elevating that robbery from a second- to first-degree crime. The critical question is whether, "in the course of committing the theft the actor . . . uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1b. As discussed, the statement, "[g]ive me all your money or I'll shoot" was

made after the theft of Joseph was completed—she had already handed over money and stepped back from her station. (3T 95-8 to 16) Furthermore, there is no evidence that the statement was made with the intent to aid the commission of the theft against Joseph after-the-fact, for example by furthering the perpetrator's efforts to flee or avoid apprehension. To the contrary, the evidence indicates that the threatening statement was made not in the course of the commission of a theft against Joseph, but in the course of the commission of a separate theft against Shah. Accordingly, even if the State had proved that Mr. Bell committed robbery against Joseph, it did not prove that that robbery was a crime of the first-degree.

B. The State Failed To Present Any Evidence From Which A Jury Could Find That Mr. Bell Committed First-Degree Robbery Against Shah.

The State also failed to show that any robbery committed against Shah was a first-degree crime. In a case like this, where the perpetrator of the theft did not actually possess a deadly weapon, the State may satisfy the element that elevates second-degree robbery to first-degree robbery by presenting evidence that the victim actually and reasonably believed that the defendant was armed. Dekowski, 218 N.J. at 599, 608. Here, the State failed to satisfy this element, as no evidence was presented that Shah actually believed that the perpetrator was armed.

Joseph testified that when the man said, "[g]ive me all your money or I'll shoot," he had one hand in his sweatshirt pocket, and an object was protruding from the pocket that looked like it could be the tip of a gun. (3T 95-14 to 19, 97-11 to 14)

From this testimony, a jury could conclude that if Shah did in fact believe that the perpetrator had a gun, that belief was a reasonable one based on the perpetrator's statement and accompanying gesture.

However, Shah did not testify at trial. Without Shah's testimony, the jury had no evidence from which it could find that Shah herself thought that the perpetrator could be hiding a gun in his sweatshirt. Nor was any evidence presented that would indicate that Shah even saw the perpetrator's gesture. If anything, the evidence suggests that Shah may have missed it, as Joseph's testimony established that Shah was with a customer when the perpetrator entered the bank and was not paying attention to the perpetrator's words or actions. (3T 95-8 to 11)

The Supreme Court has made clear that there is both a subjective-belief requirement and a reasonable-belief requirement in a simulated deadly weapon case. See State v. Williams, 218 N.J. 576, 593 (2014) ("That the victim believes that the robber may be armed with a deadly weapon is sufficient to satisfy the actual-belief requirement. That subjective belief, however, must also be reasonable under the circumstances.") (emphasis omitted). In this case, while the State presented evidence to satisfy the reasonable-belief requirement, it presented no evidence to satisfy the subjective-belief requirement. The State therefore failed to prove that Mr. Bell committed first-degree robbery against Shah.

In view of these critical holes in the evidence, the trial court should have granted in part the motion for a judgment of acquittal. The court should have concluded that the State failed to present sufficient evidence to sustain a conviction for either first- or second- degree robbery with respect to Joseph or for first-degree robbery with respect to Shah. Mr. Bell's conviction must be vacated as a result, and double jeopardy considerations prevent retrial of Mr. Bell for first-degree robbery altogether.[8] See State v. Krieger, 285 N.J. Super. 146, 154 (App. Div. 1995) (holding that since the State presented no evidence of a required element of an offense, defendant could not be retried for that offense).

POINT IV

DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE THE COURT FAILED TO INSTRUCT THE JURY ON MULTIPLE ESSENTIAL ELEMENTS OF ROBBERY AND FAILED TO GIVE A SPECIFIC UNANIMITY INSTRUCTION. (Not Raised Below)

The trial judge has a mandatory duty to "instruct the jury as to the fundamental principles of law which control the case." State v. Butler, 27 N.J. 560, 594 (1958). Given the importance of jury instructions in safeguarding a defendant's right to due process, "erroneous instructions are almost invariably regarded as prejudicial." Vick, 117 N.J. at 289. Even if there was no objection below, errors in instructions that are

[8] Mr. Bell may be reindicted and retried on a charge of second-degree robbery of Shah.

crucial to the jury's deliberations require reversal of a defendant's conviction. State v. Jordan, 147 N.J. 409, 422-23 (1997).

The jury instructions in this case contained several fatal errors. First, the instructions omitted an explanation of the second element of robbery and an explanation of the distinction between first- and second-degree robbery, thereby making it nearly impossible for the jury to return a valid verdict on either degree of robbery. Second, the instructions incorrectly failed to specify that the jury had to unanimously agree on the essential elements of (1) the identity of the victim of the theft, (2) the identity of the person whom the defendant threatened or purposely put in fear of immediate bodily injury, and (3) the identity of the person who reasonably believed that the defendant was armed. The instructions also improperly failed to explain that it is the victim of the robbery, as opposed to a bystander, who must reasonably believe that the defendant is armed in a simulated deadly weapon case. These errors, separately or together, require reversal of Mr. Bell's conviction.

A. The Court Failed To Instruct On The Second Element Of Robbery And Failed To Explain The Distinction Between First- And Second-Degree Robbery.

In instructing the jury on the elements of robbery, the court made two fatal errors. First, the instructions entirely failed to explain the second element of robbery: that the defendant "threaten[ed] another or purposely put[] him in fear of immediate bodily injury." N.J.S.A. 2C:15-1a(2). Second, the instructions failed to identify the

element that distinguishes first- and second-degree robbery, which in this case was whether the defendant "threaten[ed] the immediate use of a deadly weapon." N.J.S.A. 2C:15-1b. Without an instruction on an essential element of the offense, the jury's verdict cannot stand. Vick, 117 N.J. at 292-93. In light of these omissions in the final jury instructions, a new trial is required.

A critical component of the trial judge's mandatory duty to instruct the jury as to the law of the case is the duty to define the offense charged. Butler, 27 N.J. at 594-95. "To fail to define the offense attributed to the accused and the essential elements which constitute it, is to assume that jurors are educated in the law—an assumption which no one would undertake to justify." Id. at 595. Without a definition of the offense and its elements, the jury has no basis for determining if the law has been violated. See Butler, 27 N.J. at 594-95.

"[A] jury charge is presumed to be proper when it tracks the model jury charge because the process to adopt model jury charges is 'comprehensive and thorough.'" Cotto, 471 N.J. Super. at 583 (quoting State v. R.B., 183 N.J. 308, 325 (2005)). Indeed, the Supreme Court has advised trial courts that "model jury charges should be followed and read in their entirety to the jury," insofar as they are "consistent with and modified to meet the facts adduced at trial." R.B., 183 N.J. at 325.

In this case, the court skipped over two significant parts of the Model Jury Charge for robbery: the explanation of the second element and the identification of

the element that elevates a robbery to a crime of the first-degree. The court began by properly instructing the jury that in order to find the defendant guilty of robbery, it must be satisfied that the State has proven "each of the following elements beyond a reasonable doubt: That the defendant was in the course of committing a theft and that while in the course of committing a theft the defendant threatened another with or purposely put him or her in fear of immediate bodily injury." (4T 123-18 to 24) The court proceeded to define the first element, that "the defendant was in the course of committing a theft." (4T 123-25 to 125-8) At this point, however, the court strayed from the model charge.

After defining the first element, the model charge reminds the jury of the second element of robbery and defines it. The model charge reads: "In addition to proving beyond a reasonable that the defendant was in the course of committing a theft, the State must also prove, beyond a reasonable doubt, that in the course of committing that theft the defendant threatened another with or purposely put him/her in fear of immediate bodily injury." Model Jury Charges (Criminal), "Robbery in the First-Degree (N.J.S.A. 2C:15-1)" (rev. Sep. 10, 2012). The model charge then explains the meaning of the phrase "bodily injury" and advises the jury that no bodily injury need have resulted. Ibid.

Here, the court entirely omitted the definition of the second element of robbery and instead incorrectly went straight to defining the element that elevates

robbery to a first-degree crime. The court told the jury that "[i]n addition to proving beyond a reasonable doubt that defendant was in the course of committing a theft, the State must also prove beyond a reasonable doubt that while in the course of committing that theft the defendant did not actually possess a deadly weapon, but, instead, purposely threatened the immediate use of such a weapon and purposely engaged in conduct or gestures which simulated possession of a deadly weapon and which would lead a reasonable person to believe defendant possessed such a weapon." (4T 125-9 to 18) By failing to define the essential second element of robbery—that in the course of committing a theft, the defendant threatened another with or put another in fear of immediate bodily injury—the court made it nearly impossible for the jury to return a valid verdict on either degree of robbery. See Vick, 117 N.J. at 293 (holding that the requirement that the jury be instructed on each and every element of an offense "is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances").

To make matters worse, the court also omitted the portion of the model charge that explains the grading of robbery to the jury, thereby making it functionally impossible for the jury to have returned a verdict for second-degree robbery. The model charge advises the jury that "robbery is a crime of the second degree, except that it is a crime of the first degree if the actor: Is armed with, or uses or threatens the immediate use of a deadly weapon." Model Jury Charges (Criminal), "Robbery

in the First-Degree (N.J.S.A. 2C:15-1)" (rev. Sep. 10, 2012). Not only did the court skip this part of the model charge, but at no point did the court use different words to explain this critical concept of grading. In conjunction with the court's omission of the definition of the second element of robbery, this failure to advise the jury on the grading of robbery meant that the jury did not understand which three elements the State needed to prove to support a first-degree robbery conviction, nor how they could return a verdict for second-degree robbery.[9]

It is essential that the jury be advised of the factor or factors that distinguish one degree of a crime from another. See State v. Federico, 103 N.J. 169, 172, 176-77 (1986) (reversing defendant's kidnapping conviction where the jury was not instructed on the factor that distinguishes first- and second-degree kidnapping). In State v. Roberson, this Court reversed the defendant's conviction for second-degree possession of more than one-half ounce but less than five ounces of cocaine with intent to distribute because of a failure to properly instruct the jury on grading. 246 N.J. Super. 597, 607 (App. Div. 1991). The statute at issue raised the crime to the second-degree only if the State could prove beyond a reasonable doubt that the amount of cocaine defendant possessed included at least 3.5 grams of pure cocaine.

[9] The verdict sheet compounded this error by failing to make clear that the jury should first decide if a robbery occurred and then decide if that robbery was a first-degree, armed robbery. Instead, the verdict sheet first asked if the defendant was guilty of first-degree robbery and if not, whether the defendant was guilty of second-degree robbery. (Da 4)

Ibid. While the judge properly instructed the jury that possessing less than 3.5 grams of pure cocaine constituted a third-degree crime, the judge failed to instruct the jury that, for the purposes of the second-degree crime, the jury had to determine whether the amount of cocaine the defendant possessed included at least 3.5 grams of pure cocaine. Ibid. This Court held that "[t]he error requires reversal of the conviction even though the State's evidence is uncontradicted." Ibid.

In this case, the jury was similarly not told that that the element that elevates robbery from a second-degree crime to a first-degree crime is whether the defendant used or threatened to use a deadly weapon. While the judge did define that element for the jury, the instructions misleadingly suggested that it was the second element of robbery rather than the element that distinguishes a first-degree robbery from a second-degree robbery. The misleading nature of this omission was exacerbated by the failure of the judge to define the actual second element of robbery.

Errors in a jury instruction "on matters or issues that are material to the jury's deliberation are presumed to be reversible." Jordan, 147 N.J. at 422 (citing State v. Warren, 104 N.J. 571, 579 (1986)). As the Supreme Court has observed, "it is speculative to forecast what verdict a jury would have returned if properly instructed on the basis of the verdict that a jury returned after an incomplete instruction." Vick, 117 N.J. at 292. Thus, erroneous instructions on material issues, such as the elements of a crime, are "poor candidates for rehabilitation under the plain error theory."

Jordan, 147 N.J. at 422-23 (quotation omitted). Here, the omissions in the jury instructions were crucial to the deliberations because they related to the elements of robbery. The court failed to instruct on the use-of-force element of robbery and further failed to explain how a second-degree robbery could be elevated to a first-degree robbery. These omissions constituted plain error, and Mr. Bell's conviction must be reversed.

B. The Court Failed To Specify That The Jury Had To Unanimously Agree On The Identity Of The Persons Against Whom The Defendant Committed Various Acts.

In this case, there was one count of robbery but two potential victims—Joseph and Shah. It was therefore essential that the court instruct the jury that it had to unanimously agree on (1) the identity of the person from whom money was stolen, (2) the identity of the person who was threatened in the course of that theft, and (3) the identity of the person who was purposely led to believe that the perpetrator was armed in the course of that theft. The failure to provide a specific unanimity instruction created the risk of a non-unanimous verdict and requires reversal of Mr. Bell's conviction. See State v. Gentry, 183 N.J. 30, 33 (2005).

The unanimous jury requirement is "an indispensable element at all criminal trials." State v. Parker, 124 N.J. 628, 633 (1991). Our Constitution "requires jurors to be in substantial agreement as to just what a defendant did before determining his guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002) (quotation omitted);

N.J. Const. art. I, ¶ 9. Although the unanimity rule does not require jurors to agree on every detail, the jury must "reach[] a subjective state of certitude on the facts in issue." Frisby, 147 N.J. at 596 (quotation omitted). The failure to properly instruct jurors as to unanimity leaves the door open for an unacceptable "patchwork verdict" and mandates reversal of a defendant's convictions. State v. Tindell, 417 N.J. Super. 530, 551, 558 (App. Div. 2011).

Although a general instruction on the requirement of a unanimous verdict ordinarily suffices, our Supreme Court has held that a specific unanimity instruction may be necessary where there is a "danger of a fragmented verdict." Parker, 124 N.J. at 641-42. Such circumstances may arise where "it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts." Ibid.

In State v. Gentry, our Supreme Court held that in deliberating on an essential element of robbery, use of force upon another, the jury must be unanimous that the defendant used force upon an identifiable victim during the course of a theft. 183 N.J. at 31-33. The trial testimony in Gentry established that while attempting to steal items from a drug store, the defendant first knocked over a store employee and then kicked and punched the store manager who had grabbed his pants to stop him from fleeing. Id. at 31. During deliberations, the jury sent a note to the judge indicating that all jurors agreed that the defendant had knowingly "use[d] force upon another"

within the meaning of the robbery statute, but one group of jurors believed that the defendant knowingly used force against the employee but not the manager, and the other group believed that the defendant knowingly used force against the manager but not the employee. Id. at 31-32. Notwithstanding this split on the identity of the person against whom force was used, the trial court concluded that the jurors were unanimous on the force element and accepted a guilty verdict. Ibid. The Supreme Court disagreed and reversed, concluding that the identity of the person against whom defendant used force was a critical element of the offense, and the jury had to agree on whom that person was. Id. 33.

Gentry stands for the proposition that where the State introduces evidence that the defendant committed different acts against different victims, the jury must unanimously agree on which specific acts satisfy the elements of a conviction. See State v. Macchia, 253 N.J. 232, 260 (2023) (distinguishing Gentry on the basis that the State "did not introduce evidence that defendant committed different acts against different victims"). Applying Gentry to this case, the jury had to unanimously agree on (1) the identity of the person from whom money was stolen, (2) the identity of the person who was threatened in the course of that theft, and (3) the identity of the person who was purposely led to believe that the perpetrator was armed in the course of that theft. See Mirault, 92 N.J. at 496 n.4 (robbery statute does not require that the victim of the theft is also the person who is threatened in the course of the theft).

Given that there were two potential robbery victims, the jury needed to be told that they had to unanimously agree on the identities of the persons involved.

The jury instructions did not communicate this unanimity requirement. The judge instructed: "In order for you to find the defendant guilty of robbery the State is required to prove each of the following elements beyond a reasonable doubt: That the defendant was in the course of committing a theft and that while in the course of committing a theft the defendant threatened another with or purposely put him or her in fear of immediate bodily injury." (4T 123-18 to 24 (emphasis added)) Later, the judge explained that the State "alleges that the defendant threatened to kill bank employees and patrons if he was not provided with cash." (4T 127-18 to 20 (emphasis added)) The verdict sheet also did not require the jury to identify a robbery victim. (Da 4) Thus, in violation of Gentry, the judge never told the jurors that they had to unanimously agree on the identities of the person against whom the theft was committed and the person against whom force was threatened.

In addition, the jury instructions failed to specify that the jury had to unanimously agree on the identity of the person whom the defendant purposely led to believe that the defendant was armed. Where the State's theory in a first-degree robbery case is that the defendant only simulated possession of a deadly weapon, the State must prove that the perpetrator engaged in conduct or gestures that led the victim to actually and reasonably believe that the defendant was armed. Williams,

218 N.J. at 593; Dekowski, 218 N.J. at 599, 608. The jury instructions in this case did not make clear that the jury had to agree on the identity of that person. Instead, the court told the jury that "[t]he State must prove beyond a reasonable doubt the defendant purposely led employees and patrons of the TD Bank to reasonably believe by words and conduct or gestures that the defendant possessed such a deadly weapon." (4T 126-15 to 19) Not only did this phrasing not communicate the unanimity requirement, but it also misleadingly suggested that it did not matter whose subjective belief the jury evaluated, so long as that person or those persons were "employees and patrons of the TD Bank." Given that the only two potential robbery victims were Joseph and Shah, it is only the subjective beliefs of those two individuals that the jury should have been evaluating. The court erred by failing to explain that it is a robbery victim, as opposed to a bystander, who must be led to believe that the defendant is armed in a simulated deadly weapons case and by failing to inform the jury that it had to unanimously agree on the identity of that person. [10]

Without a specific unanimity instruction, there is a real risk that the jury did not unanimously agree as to the identities of the persons involved. Some jurors may

[10] Later, the court correctly instructed the jury that it must determine whether "the combination of words and conduct or words and gestures created a reasonable belief in the victim that the defendant possessed a deadly weapon." (4T 127-20 to 25) This subsequent explanation of the law was insufficient to correct the prior, inaccurate instruction, as it did not make clear that "the victim" of the robbery must either be Shah or Joseph, not any employee or patron inside the bank at the time of the incident. This later instruction also did not cure the unanimity problem.

have believed that in the course of committing a theft against Joseph, Mr. Bell threatened Joseph, but not Shah, leading Joseph to reasonably believe that he was armed. Another set of jurors could have believed that in the course of committing a theft against Shah, Mr. Bell threatened Shah, but not Joseph, leading Shah to reasonably believe that he was armed. On the other hand, it is possible that some jurors believed that in the course of committing a theft against Joseph, Mr. Bell threatened and purposely led Shah, but not Joseph, to believe that he was armed, while others believed that in the course of committing a theft against Shah, Mr. Bell threatened and purposely led Joseph, but not Shah, to believe that he was armed.[11]

The circumstances are analogous to those in State v. Tindell, where the defendant, charged with terroristic threats, was alleged to have made multiple distinct threats against a number of different individuals. 417 N.J. Super. at 553-54.

[11] The fact that, unlike the jury in Gentry, this jury did not ask the judge whether it had to unanimously agree on these underlying facts is of no matter. In Gentry, the judge instructed the jury as to the use of force element that it had to find that the defendant "did inflict bodily injury or use force upon David Lowe and/or Tiffany Davis." 183 N.J. at 31. The jury was thus apprised that it had to decide which of these individuals force was used against, and its question to the judge indicated its uncertainty as to whether it needed to be unanimous in this decision. By contrast, the jury instructions here did not make plain that the jury had to decide that Mr. Bell committed robbery against a single victim, as opposed to the "employees and patrons of the TD Bank" as a whole. In fact, the instructions on the robbery charge did not mention Joseph or Shah individually at all. Thus, the jury may not have even decided on a single victim of the robbery, and it is therefore unsurprising that they had no questions for the judge about the unanimity requirement as it applied to the facts of this case.

Rather than separately identifying the possible victims of the terroristic threats charge, the jury instructions provided that the "the State alleges that defendant intended to terrorize . . . persons at or near . . . [the] High School." Id. at 552. The court also failed to give a specific unanimity instruction. Ibid. This Court reversed the conviction because "neither the jury charge nor the verdict sheet required the jurors to reach unanimity on which threat warranted a conviction." Tindell, 417 N.J. Super. at 557-58. The Court explained that "[t]he nature of the alleged threats and the circumstances surrounding them required that the victims be identified with particularity. Without such specificity, there is a distinct and legally unacceptable risk that a jury may return a verdict that was not based on the unanimous judgment of the deliberating jurors." Id. at 555. Similarly, here, the circumstances of the alleged crime created a distinct risk that the jury did not unanimously agree on the identities of the persons against whom Mr. Bell committed various acts.

Because Mr. Bell did not object to the jury instructions, this Court reviews the instructions under the plain-error standard. State v. Cotto, 471 N.J. Super. 489, 544 (App. Div. 2022), cert. denied, 252 N.J. 166 (2022). This standard "requires reversal only for errors 'of such a nature as to have been clearly capable of producing an unjust result.'" Ibid. (quoting State v. Trinidad, 241 N.J. 425, 451 (2020)). An alleged error is viewed in the context of the entire charge, not in isolation, and it is

dependent on an evaluation of the overall strength of the State's case. Cotto, 471 N.J. at 545 (citing State v. Nero, 195 N.J. 397, 407 (2008)).

The failure to give a specific unanimity charge in this case amounted to plain error. As discussed in detail in Point III.A, the State presented insufficient evidence that a robbery was committed against Joseph. Moreover, as discussed in Point IV.A, the instructions were deficient in several other respects. Considering the State's case and the jury instructions as a whole, the failure to give a specific unanimity charge was clearly capable of producing an unjust result. Mr. Bell's conviction must be reversed. Gentry, 183 N.J. at 32-33.

POINT V

THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCING PROCEEDING WAS REPLETE WITH ERRORS. (6T 10-24 to 14-19)

The court sentenced Mr. Bell to a seventeen-year prison term subject to NERA. (6T 14-10 to 14; Da 5) In reaching this sentence, the sentencing court committed numerous errors. First, the court found that aggravating factors three, six, and nine were applicable, but it did not provide any factual basis for applying aggravating factors three and nine. N.J.S.A. 2C:44-1a(3), (6), (9). (6T 10-24 to 11-14) Second, the court failed to assign a particular weight to any of the aggravating factors it found. Third, while the court found that mitigating factor four was applicable, it improperly did not weigh that factor "particularly heavily," despite the

credible evidence that Mr. Bell's conduct was motivated by a severe substance abuse disorder. (6T 12-4 to 16) Fourth, the court imposed a sentence at the higher end of the sentencing range without any explicit balancing of the aggravating and mitigating factors. Finally, the court imposed this seventeen-year sentence consecutively to a ten-year prison term Mr. Bell is currently serving without conducting a fairness analysis pursuant to State v. Torres, 246 N.J. 246, 268 (2021). Accordingly, if this Court does not agree that Mr. Bell's conviction should be reversed, his sentence should be vacated and the matter remanded for resentencing.

A. The Sentencing Court Failed To Provide A Factual Basis For Aggravating Factors Three And Nine, Assign Any Particular Weight To The Aggravating Factors, And Engage In A Proper Balancing Process.

"[O]ur case law and the court rules prescribe a careful and deliberate analysis before a sentence is imposed." State v. Fuentes, 217 N.J. 57, 71 (2014). First, the sentencing court must identify whether any of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1a-b apply. Id. at 72. Rather than merely enumerate the applicable factors, however, the court must "state on the record . . . the factual basis supporting its finding of particular aggravating or mitigating factors." N.J.S.A. 2C:43–2(e). See R. 3:21-4(g). "The finding of any factor must be supported by competent, credible evidence in the record." State v. Case, 220 N.J. 49, 64 (2014) (citing State v. Roth, 95 N.J. 334, 363 (1984)).

Next, the court must balance the relevant aggravating and mitigating factors. Fuentes, 217 N.J. at 72-73. In so doing, the court should not simply count "whether one set of factors outnumbers the other." Case, 220 N.J. at 65. Instead, "[t]he court must qualitatively assess the relevant aggravating and mitigating factors, assigning each factor its appropriate weight." Ibid. "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." State v. Natale, 184 N.J. 458, 488 (2005).

To facilitate meaningful appellate review, the court must provide a detailed explanation of the balancing process and the reasons for the sentence imposed. Case, 220 N.J. at 65. "Inadequate explanation of the sentencing judge's reasons . . . generally requires a remand for resentencing." State v. Pennington, 301 N.J. Super. 213, 220 (App. Div. 1997), rev'd in part on other grounds, 154 N.J. 344 (1998).

Here, the court erred by failing to provide a factual basis for its application of aggravating factors three and nine. With respect to aggravating factor three, the court stated, "I do find that there is a risk that the defendant will commit another offense." (6T 11-3 to 4) Similarly, the court stated, "[a]nd Aggravating Factor 9, present in most cases, the need to deter the defendant and others from violating, the law, I do find that that is applicable here." (6T 11-11 to 14) The court did not point to any facts in the record about the offense or about Mr. Bell as an individual to support the

conclusion that Mr. Bell is likely to recidivate and needs deterrence. See State v. Randolph, 210 N.J. 330, 349 (2012) (aggravating factors three and nine "invite consideration by the sentencing court of the individual defendant's unique character and qualities"); State v. Thomas, 188 N.J. 137, 153 (2006) (aggravating factors three and nine require the sentencing court to make a "qualitative assessment" that "go[es] beyond the simple finding of a criminal history").

In addition, the court erred by failing to assign a particular weight to any of the aggravating factors it found applicable and by failing to explicitly balance the aggravating and mitigating factors. The only factor that the court assigned weight to was mitigating factor four; with respect to aggravating factors three, six, and nine, the court stated that they were applicable but did not state whether it weighed them heavily or not. (6T 11-1 to 14, 12-13 to 19) See Case, 220 N.J. at 69 ("[T]he court [is] required to explain the weight it assigned to the factors it found.") As for balancing the applicable factors, the court stated: "And so the Court in weighing the aggravating and mitigating factors and applying the considerations outlined in the relevant case law . . . . The Court, uh, is going to sentence, uh, Mr. Bell on Count – at Count 1, robbery in the first degree, to a term of imprisonment to the custody of the Commission of the Department of Corrections for a term of 17 years." (6T 14-3 to 14) There is no indication that the court engaged in any qualitative assessment of the relevant factors or that the court thoughtfully considered how to balance them.

See Case, 220 N.J. at 64-65. The fact that the court imposed a sentence at the higher end of the range suggests that it found the aggravating factors to predominate, but it offered zero insight as to how this conclusion was reached.

The "desired goal" of our sentencing scheme – "uniformity in sentencing – is achieved through the careful application of statutory aggravating and mitigating factors." State v. Cassady, 198 N.J. 165, 179-80 (2009). Because the court merely enumerated aggravating factors three and nine and provided no explanation to support their application, and because the court failed to assign any particular weight to the applicable aggravating factors and failed to engage in a proper balancing process, resentencing is required. See Fuentes, 217 N.J. at 80-81 (remanding for resentencing in part based on the sentencing court's failure to sufficiently explain its reasons for applying aggravating factor nine); Case, 220 N.J. at 69-70 (remanding for resentencing in part based on the sentencing court's failure to engage in a qualitative analysis of the sentencing factors it found).

B. The Sentencing Court Did Not Give Sufficient Weight To Mitigating Factor Four, Despite The Credible Evidence That Mr. Bell's Conduct Was Motivated By A Severe Substance Abuse Disorder.

Defense counsel presented evidence that Mr. Bell's conduct, both in this case and in his prior case in which he was convicted of first-degree robbery, was highly motivated by a substance abuse disorder. (6T 6-18 to 24) Defense counsel stated that both robberies "were meant to fuel and to fund . . . a heroin habit that had altered his

decision making." (6T 7-2 to 4) Counsel noted that the facts of this case—particularly the fact that a dirty bottle was used to mimic a weapon—indicate that Mr. Bell had no intention of actually hurting anyone. (6T 7-5 to 14) Instead, the facts show that he was "so drugged out, so driven by his desire for drugs he wanted any amount of money to fuel that." (6T 7-14 to 16) What's more, counsel informed the court that Mr. Bell was awaiting a spot at Maryville Treatment Center at the time this incident occurred. (6T 6-25 to 7-2) When addressing the court directly, Mr. Bell reiterated that he was "waiting for a bed at Maryville" when this incident occurred and that he "just didn't get the bed fast enough." (6T 10-8 to 12)

Based on this evidence, which the court found to be credible, the court noted that "perhaps, one of the main motivating factors here and in the prior instance was attempting to secure funds to, uh, continue to use in the context of the, uh, substance abuse issue." (6T 12-9 to 12) The court concluded as a result that there were substantial grounds tending to excuse the defendant's conduct. (6T 12-13 to 16) However, the court stated that it would not "weigh that particularly heavily." (6T 12-17 to 18) The court's failure to give due weight to this mitigating factor renders Mr. Bell's sentence excessive.

The scientific community has long understood that addiction is a disease of the brain that affects behavior. See National Institute on Drug Abuse, Drugs, Brains, and Behavior: The Science of Addiction 5 (2007), available at

https://nida.nih.gov/sites/default/files/soa_2014.pdf ("Addiction is defined as a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences.") Drug abuse changes the structure of the brain and how it works; specifically, "[b]rain imaging studies of people with addiction show physical changes in areas of the brain that are critical to judgment, decision making . . . and behavior control." Id. at 5, 11. It is no surprise, then, that "[d]rug addiction erodes a person's self-control and ability to make sound decisions, while producing intense impulses to take drugs." Id. at 20.

Amongst the public at large, there is also a growing recognition that addiction is an illness, rather than evidence of a moral failure. See National Institute on Drug Abuse, Neurobiology of Addiction, in Pocket Guide to Addiction Assessment and Treatment 5 (2016) ("It has been a great struggle, unfolding for over several decades, to change the public's perception of addiction from one of moral failure to the disease model now accepted by physicians."). Given this improved understanding of addiction, there is an increased emphasis on rehabilitation programs rather than incarceration. The push is motivated further by the fact that incarceration can often serve to exacerbate this public health dilemma, as it "tends to worsen the preexisting condition, especially in the case of addiction," Ernest Drucker, A Plague of Prisons: The Epidemiology of Mass Incarceration in America 116 (2011). Indeed, it was this very solid foundation of scientific and statistical evidence illustrating the need for

treatment within the criminal justice system which compelled former Attorney General Gurbir Grewal to declare that successful programs must stop "treating addiction as a law enforcement issue alone, but rather treat[] it for what it is, a public health crisis." Lilo H. Stainton, N.J. Spotlight, Law Enforcement, Addiction Services Forge New Alliance to Help Drug Offenders (June 28, 2018) https://www.njspotlight.com/stories/18/06/27/law-enforcement-addiction-services-forge-new-alliance-to-help-drug-offenders/.

Our criminal sentencing law with respect to the finding of aggravating and mitigating factors is out-of-step with this new understanding of addiction as a brain disease. More than 30 years ago, our Supreme Court held that addiction was not a mitigating factor. See State v. Rivera, 124 N.J. 122, 126 (1991); State v. Ghertler, 114 N.J. 383, 390 (1989). Since then, the Court has acknowledged that addiction may be mitigating if it is causally linked to the offense. State v. Clarke, 203 N.J. 166, 182 (2010) (in an appeal of a denial of Drug Court, findings of the aggravating and mitigating factors were adversely influenced by the sentencing court's failure to appreciate the defendant's drug dependency at the time of the offense). And more recently, this Court recognized that a sentencing court should consider a defendant's substance abuse history, as "it may help to explain past criminal behavior and put past crimes in context in terms of the goal of interrupting a recurring cycle of recidivism." State v. Harris, 466 N.J. Super. 502, 545 (App. Div. 2021).

Based on the scientific evidence, however, it is clear that in most cases, "addiction mitigates a defendant's culpability." United States v. Hendrickson, 25 F. Supp. 3d 1166, 1174 (N.D. Iowa 2014). "The capacity to evaluate the consequences of one's actions is central to one's culpability," and individuals suffering from addiction have a diminished capacity to make such evaluations. Ibid. Moreover, addiction is mitigating for many of the same reasons that youth is mitigating. Ibid. "Just as there are fundamental differences between the juvenile and adult brain, so too are there fundamental differences between the addict and non-addict brain." Id. at 1175. These differences cause individuals suffering from addiction to make ill-considered decisions in the same manner that they cause juveniles to do so. Ibid. See State v. Comer, 249 N.J. 359, 397 (2022) (misconduct of juveniles "is not as morally culpable as an adult's" because juveniles "lack maturity and responsibility" which can lead to poor decision-making).

Here, the court acknowledged that Mr. Bell had a serious drug addiction which contributed to the commission of this offense and a prior offense. Yet, the court failed to give due weight to this information, which bears significantly on Mr. Bell's culpability. The court's failure to fully appreciate the mitigating nature of Mr. Bell's addiction renders his sentence excessive. Resentencing is therefore required.

C. The Sentencing Court Failed To Consider The Fairness Of Imposing This Seventeen-Year Sentence Consecutively To A Ten-Year Prison Term Mr. Bell Is Currently Serving.

While the court appropriately considered the Yarbough factors in deciding to impose a consecutive sentence, see 100 N.J. 627, 643-44 (1985), it failed to conduct a Torres fairness analysis. (6T 14-15 to 19) Under Torres, a sentencing court that imposes consecutive terms must provide "[a]n explicit statement, explaining the overall fairness of [the] sentence." 246 N.J. at 268. The fairness evaluation is "the necessary second part to a Yarbough analysis," and its omission necessitates resentencing. Id. at 268, 270. Here, the court did not consider the fairness of imposing an overall term of 27 years with a nearly 23-year parole disqualifier. This matter must be remanded for an explicit consideration of the fairness of the sentence.

CONCLUSION

For the reasons set forth in Points I-IV, Cortney Bell's conviction should be vacated and the denial of his motion for a judgment of acquittal should be reversed in part. In the alternative, for the reasons set forth in Point V, the matter should be remanded for resentencing.

Respectfully submitted,

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Attorney for the Defendant-Appellant

BY: s/Rachel Glanz
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Attorney ID: 446232023

Dated: January 10, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-3500-22

STATE OF NEW JERSEY, :

PLAINTIFF-RESPONDENT, :

V. :

CORTNEY BELL, :

DEFENDANT-APPELLANT. :

CRIMINAL ACTION

On Appeal From a Final Judgment of Conviction in the Superior Court of New Jersey, Law Division, Burlington County.

Sat Below:
Hon. Christopher J. Garrenger, J.S.C., and a Jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS CONFINED

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TABLE OF APPENDICES

TABLE OF AUTHORITIES

Judicial Authorities Cited

[1] The Cover Page and Title of Contents is attached pursuant to R. 2:6-1a(2) as the brief is germane to issues raised on appeal by defendant.

Constitutional Authorities Cited

Statutory Authorities Cited

Rules Cited

PROCEDURAL HISTORY

On July 9, 2021, the Burlington County Grand Jury returned a three-count indictment, Indictment Number 2021-07-0634-I, against defendant, Cortney Bell. Count One of the Indictment charged defendant with first-degree Robbery, in violation of N.J.S.A. 2C:15-1a(2). Counts Two and Three of the Indictment charged defendant with third-degree Terroristic Threats, in violation of N.J.S.A. 2C:12-3b. [Da1-3].

On January 19, 2023, defendant appeared before the Honorable Christopher J. Garrenger, J.S.C., and a jury for trial. [1T].[1] Prior to trial, the State moved to dismiss Count Two of the Indictment. Judge Garrenger granted the State's request and dismissed Count Two. [1T5-9 to -11].

Defendant informed the court that he wanted an expert on DNA, but the request was not authorized by the Office of the Public Defender. [1T5-17 to -24]. Defendant stated that he was being forced to proceed to trial without

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[1] 1T refers to the trial transcript dated January 19, 2023.
2T refers to the trial transcript dated January 24, 2023.
3T refers to the trial transcript dated January 25, 2023.
4T refers to the trial transcript dated January 26, 2023.
5T refers to the trial transcript dated January 31, 2023.
6T refers to the sentencing transcript dated June 9, 2023.
7T refers to a hearing transcript on Burlington County Indictment No. 20-02-0187 dated March 22, 2021.

reviewing the discovery. [1T8-6 to -11]. Defense counsel stated that he had provided defendant still photos from the video of the robbery. [1T8-12 to 9-1].

Defendant then argued that he was entitled to a Wade[2] hearing. [1T15-10 to -11]. Judge Garrenger held that a Wade hearing was unnecessary because none of the State's witnesses could identify defendant. [1T15-12 to -19]. Judge Garrenger gave defendant the opportunity to view the videos on the State's laptop. [1T12-3 to 13-24; 1T17-10 to 18-8]. When the court reconvened for jury selection, defendant refused to appear. [1T18-20 to 20-4]. Defense counsel argued that the jurors should be dismissed as defendant's absence could create prejudice in the minds of the jurors. [1T24-2 to -15]. Judge Garrenger denied the motion. [1T24-16 to 25-10].

Defendant appeared before Judge Garrenger and a jury for trial on January 24, 25, 26, and 31, 2023. [2T; 3T; 4T; 5T]. On January 24, 2023, defendant was brought into court on an extraction order. [2T4-1 to -3]. Judge Garrenger informed defendant that if defendant refused to come to court, or come out of the holding area, the trial could proceed without him. [2T5-18 to 7-9]. Defendant asked to use the bathroom after receiving the warnings and then refused to go back into the courtroom. [2T5-14 to 7-15].

[2] United States v. Wade, 388 U.S. 218 (1967)

On January 25, 2023, defendant refused to appear in court. [3T4-10 to 5-9]. Judge Garrenger informed the attorneys that defendant had been remanded to the holding cell so defense counsel could confer with defendant throughout the trial process. [3T4-17 to -22].

After opening arguments, defendant elected to appear at trial. [3T28-2 to -19]. Defendant made a verbal motion to transfer the case to another venue. [3T33-3 to -21]. Defendant argued that he could not receive a fair trial because he had filed a lawsuit against one of the municipalities in Burlington County. [3T33-5 to -21]. Judge Garrenger denied his motion. [3T33-25 to 34-19]. Judge Garrenger stated there was no basis in law or facts to support defendant's argument and the court was unaware of a lawsuit involving defendant. [3T33-25 to 34-19]. He cautioned defendant against making outbursts or any further dilatory actions. [3T34-20 to 35-2].

Defendant was disruptive throughout the trial. During witness Rosemary Colon's testimony, defendant interrupted the testimony to state that the video surveillance footage from the bank did not show that a bottle was dropped. [3T71-22 to 72-5]. Out of the presence of the jury, Judge Garrenger cautioned defendant to refrain from further outbursts. [3T72-8 to 73-24]. Judge Garrenger noted that before jury selection defendant had said that he was being railroaded. [3T72-10 to 13].

Defendant argued that trial counsel was not helping defendant. [3T74-3 to -12]. Judge Garrenger held that defendant's repeated comments were "calculated to disrupt this trial." [3T73-7 to -9; 3T74-13 to 75-19]. He informed defendant that if defendant continued his pattern of behavior the court had legal means of securing defendant's compliance, but the court did not want to take such extreme measures. [3T73-12 to -13].

Defendant informed the court he wanted to fire trial counsel and represent himself. [3T75-4 to 11]. Judge Garrenger denied defendant's motion. [3T75-7 to -9]. He told defendant, "No, Mr. Bell, that's not happening. We've canvassed those issues before, too, some year-plus ago." [3T75-7 to -9].

Defendant interrupted the trial again during the testimony of Detective Ryba. [3T126-12]. He asked to be taken to the back room. [3T126-12 to -19]. The jury was excused. [3T126-20 to -21]. Defendant demanded to fire his trial attorney and wanted to hire a private attorney. [3T127-3 to -16]. Defendant stated he was being forced to proceed with the trial despite not reviewing all of the discovery. [3T127-14 to -16]. The court reviewed the record and determined that defendant had been given all of the discovery in addition to the time the court gave defendant to review the video footage in the courtroom. [3T127-17 to 128-9].

Out of the presence of the jurors, defendant again claimed that the court was biased against defendant. [3T128-19 to -21]. Pursuant to Judge Garrenger's earlier warnings, defendant was removed from the courtroom and placed in the holding area so trial counsel could consult with defendant between the direct and cross-examinations of the remaining witnesses. [3T128-10 to 129-12].

On January 26, 2023, defendant was brought back into the courtroom. [4T4-5 to -6]. He informed the judge he had been given Suboxone by the jail staff and it impacted his ability to understand the proceedings. [4T4-23 to 5-7]. Defense counsel filed a motion for a mistrial based on defendant's misconduct during the trial. [4T5-10 to -15]. Judge Garrenger denied the motion and held that a curative instruction would be sufficient to remove the prejudice. [4T5-23 to 9-6]. In denying the motion, Judge Garrenger weighed defendant's obstreperous behavior against his assertions. [4T5-23 to 9-6].

Judge Garrenger issued curative instructions. [4T11-3 to -14]. Immediately after the instructions were issued, defendant interrupted the proceedings again and claimed that his attorney had threatened him, called the trial attorney an expletive, and claimed he wanted to press charges. [4T12-17 to 14-5]. Judge Garrenger again had defendant removed from the proceeding. [4T13-21 to -24]. Judge Garrenger reissued the curative instruction and the trial proceeded. [4T15-11 to 16-8].

The State presented the testimony of Pemberton Borough Police Patrolman William Besnecker, Rosemary Colon, Lacey Joseph, Eric Segars, New Jersey State Police Detective II Przemyslaw Ryba, New Jersey State Police Detective Sergeant Fred Goelz, New Jersey State Police Detective II John Hannan, IV, New Jersey State Police Forensic Scientist II Andrea McCormack, and New Jersey State Police Forensic Scientist I Laura Cannon. [3T36; 3T52; 3T86; 3T113; 3T125; 3T143; 4T17; 4T44; 4T55; 4T72]. At the conclusion of the State's case-in-chief, defendant moved for a judgment of acquittal pursuant to State v. Reyes, 50 N.J. 454 (1967). [4T96-21 to 97-13]. Judge Garrenger denied the motion. [4T96-21 to 97-13].

Defendant did not call any witnesses and exercised his right to remain silent. [4T97-22 to 98-6]. The jury convicted defendant of first-degree Robbery but acquitted him of Terroristic Threats. [5T6-7 to -21]. The judge polled the jury and the verdict was unanimous. [5T7-6 to 8-9].

Defendant appeared for sentencing on June 9, 2023. [6T]. The State filed a motion for an extended-term sentence but withdrew it orally at sentencing and requested that defendant's sentence run consecutively to the sentence defendant was currently serving. [6T4-15 to -24].

Defendant argued that mitigating factors (1) and (4) applied. [6T6-18 to 7-20]. Defendant argued that he was addicted to drugs at the time of the robbery.

[6T6-18 to 7-20]. Defense counsel acknowledged that the factors do not amount to a defense. [6T7-17 to -20]. Defendant argued that he should receive a 15-year sentence and that the sentences should run concurrently. [6T7-21 to 8-13].

Judge Garrenger analyzed defendant's potential sentence pursuant to State v. Yarbough, 100 N.J. 627 (1985). [6T12-20 to 13-5]. He held that there were no free crimes, defendant's offenses took place in different towns with different victims and involved different businesses. [6T13-6 to 14-2]. He held that this was not a single period of aberrant behavior and the sentences should run consecutively to each other. [6T13-21 to 14-2]. Judge Garrenger found that aggravating factors (3), (6), and (9) applied based on defendant's criminal history. [6T10-24 to 11-14]. He found mitigating factor (4) applied, but gave it slight weight. [6T12-4 to -19].

He imposed the following sentence: On Count One, first-degree Robbery, he sentenced defendant to 17 years in New Jersey State Prison, subject to the No Early Release Act, to run consecutively to the sentence defendant was already serving for Robbery. [6T14-10 to -19]. Judge Garrenger imposed the following fines and monetary penalties: $100 VCCB, $75 Safe Neighborhoods, and $30 LEOTEF. [6T15-1 to -4].

This appeal follows defendant's conviction and sentencing.

STATEMENT OF FACTS

On July 23, 2019, at approximately 9:30 a.m., Pemberton Borough Police Patrolman William Besnecker responded to the TD Bank on Elizabeth Street in Pemberton Borough for a report of a robbery. [3T36-15 to -21; 3T38-2 to -20]. Equipped with a description of the suspect, Officer Besnecker drove around the bank and checked the area for the suspect but did not see anyone. [3T38-21 to 39-11]. In the bank, the officer could see U.S. currency on the floor in the vestibule. [3T39-11 to -14]. There was also a bottle of Corona beer on the floor amid the currency. [3T43-11 to -19].

Officer Besnecker spoke with the TD Bank branch manager, Rosemary Colon, and then called the New Jersey State Police because the Borough Police Department was too small to handle major crimes. [3T47-10 to 48-10]. He did not see the robbery. [3T49-17 to -19]. He did not see how the beer bottle ended up on the floor of the bank. [3T49-14 to -16].

On July 23, 2019, the bank opened at 8:20 a.m.; Rosemary Colon was working with three other people that morning, tellers Kushal Shah and Lacey Joseph, and financial advisor representative, Larry Rahn. [3T53-15 to 55-4]. At some point during the morning, the suspect, later identified as defendant, Cortney Bell, entered the bank through the doors that faced that parking lot. [3T55-22 to 56-4; 3T57-2 to -6]. There were customers in the bank at the time

of the robbery: Eric Segars was in the bank with his mother. [3T56-11 to -19; 3T114-19 to 115-4].

Defendant was dressed completely in black.[3] [3T56-23 to -24]. He was wearing a black hoody sweatshirt with hood up and tied tightly around his face. [3T56-23 to -25; 3T95-1 to -4]. He was wearing sunglasses and a scarf or some type of cloth that covered the lower half of his face. [3T56-24 to -25; 3T95-4 to -7]. Defendant was wearing dirty white socks on his hands. [3T56-25 to 57-1; 3T95-6]. Defendant was described as a Black male, in his thirties, and approximately 5'8". [3T58-24 to 59-1; 3T117-19 to -21; 4T27-18 to -25]. Because of the scarf and sunglasses, no one could identify defendant.

Defendant told the tellers to "give [him] all [their] money." [3T58-13; 3T95-6 to -7]. Lacey Joseph responded by placing a bait pack, a pre-determined set of dollar bills in different denominations, on the counter and stepping back. [3T95-12 to -14]. She heard defendant tell them that he would shoot if they did not give him money. [3T95-14 to -16]. She did not see a gun but he gestured with his hand in his pocket and there was an object in his pocket that appeared to be gun-shaped to Ms. Joseph. [3T95-16 to -19]. Ms. Colon also heard defendant say that he was armed with a gun, but she did not see one. [3T77-18 to -22]. Mr. Segars heard defendant demand money while he was in the bank.

[3] Another description stated defendant's sweatshirt was blue. [4T27-18 to -21].

[3T116-19 to -25]. Ms. Joseph was afraid that defendant could injure or kill her. [3T97-1 to -6].

After Ms. Shah placed her bait pack on the counter, defendant attempted to leave the bank by the back doors that opened to the parking lot. [3T95-19 to -21; 3T60-4 to -5]. The parking lot was bordered by a fence, but there was a gap that led to a nearby housing development at the back of the lot. [3T96-6 to -13]. Defendant could not open the back door. [3T62-17 to -20]. In the process of opening the door, he dropped several dollar bills. [3T60-17 to -23].

Because the back door was out of sight of the tellers' desk and Ms. Colon was at the desk, she believed he had left the building and began locking the front doors. [3T60-8 to -19]. Defendant came into the main area of the bank and demanded to be let out of the front door. [3T62-11 to -12; 3T76-14 to -14; 3T95-24 to 96-5]. Ms. Colon complied with his demands. Defendant dropped several more dollar bills and a dirty bottle of Corona beer. [3T61-13 to -17; 3T117-7 to 13].

When the crime scene investigators arrived on the scene, the beer bottle was dusted for fingerprints and then secured and taken to the New Jersey State Police Forensic Laboratory for DNA testing. [3T132-15-17; 3T146-17; 4T41-5 to -17; 4T71-5 to 9; 4T34-22 to 35-8]. Defendant's DNA, confirmed by a buccal

swab taken from defendant, matched the DNA on the bottle in every location. [3T132-18 to 136-1; 4T88-22 to 89-5].

POINT I

DEFENDANT WAS NOT DEPRIVED OF COUNSEL OR HIS RIGHT TO PROCEED PRO SE AS DEFENDANT'S REQUEST TO PROCEED PRO SE WAS A DELIBERATE DILATORY TACTIC MEANT TO DISRUPT THE TRIAL PROCESS.

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. U.S. CONST. amend. VI; State v. Norman, 151 N.J. 5, 23 (1997). The "benchmark" for analysis of a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984).

It is a well-settled principle of New Jersey case law that "[a]n accused is guaranteed the right to the assistance of counsel in a criminal proceeding, but not the constitutional right to counsel of his choice." State v. Jiminez, 175 N.J. 475 (2003). See also State v. McLaughlin, 310 N.J. Super. 242 (App. Div. 1998); State v. Wiggins, 291 N.J. Super. 441 (App. Div. 1996); State v. Furguson, 198 N.J. Super. 395 (App. Div. 1985). "Indigent defendants represented by court-

appointed counsel do not have a right to choose their lawyer." State v. Maisonet, 245 N.J. 552, 565 (2021).

"The right to assigned counsel is not the right to select counsel who will completely satisfy a defendant's fancy as to how he is to be represented." State v. Rinaldi, 58 N.J. Super. 209, 214 (1960). "If a defendant has good cause for substituting counsel, the trial court should entertain a request. Disagreement over defense strategy, however, does not rise to the level of good cause." State v. Crisafi, 128 N.J. 499, 518 (1992). "A defendant cannot be permitted to play a cat and mouse game, thereby placing the trial judge in a position where, in managing the business of the court, he appears to be arbitrarily depriving the accused of counsel." State v. Slattery, 239 N.J. Super. 534, 542 (App. Div. 1990).

The United States Constitution grants a criminal defendant the right to assistance of counsel when he is brought to trial. See Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527 (1975). This constitutional guarantee also provides a defendant with the right to dispense counsel and proceed pro se. State v. Crisafi, 128 N.J. 499, 509 (1992) (citing Faretta, 422 U.S. at 836). A defendant's right to self-representation can only be exercised after a knowing and intelligent waiver. Id. (citing McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S. Ct. 944, 948 (1984)).

The New Jersey Supreme Court, in Crisafi, held that a court must inquire into several factors to determine whether a defendant can proceed pro se. Id. at 510-12. To ensure that a waiver of counsel is entered knowingly and intelligently, the trial court must: (1) notify the defendant of the charges against him, the defenses available to him, and the possible punishment if convicted; (2) inform the defendant of technical difficulties and risks of proceeding pro se; (3) inform the defendant that he is bound by the rules of court and evidence and that his lack of knowledge may hinder his ability to put forth an adequate defense; and (4) inform the defendant of the difficulties of representing himself and that it is inadvisable to proceed without an attorney. Id. at 511-12. Self-representation is not a license for a defendant "not to comply with relevant rules of procedure and substantive law." Faretta, supra, 422 U.S. at 834.

This reasoning was further expanded in State v. Figueroa, 377 N.J. Super. 331, 336 (App. Div. 2005). The court explained the trial judge should engage in additional areas of inquiry of a defendant that wants to proceed pro se, such as

> whether defendant understands that he not only has the right not to testify, but also the right not to incriminate himself in any manner; whether he understands that he could make comments as counsel from which the jury might infer that he had knowledge of incriminating evidence . . .; and whether he fully understands that if he crosses the line separating counsel from witness, he may forfeit

> his right to remain silent and subject himself to cross-examination by the State.

Id. (citing State v. Reddish, 181 N.J. 553 (2004)). See also State v. Figueroa, 186 N.J. 589 (2006) (holding that the decision "to grant a defendant the opportunity to represent himself in part and be represented by counsel in part rests in the sound discretion of the trial court.")

In order to ensure that defendant's waiver is knowing, the court should make credibility determinations and ask appropriate open-ended questions. Id. "Waiver of the right to counsel 'depends in each case upon the particular facts and circumstances surrounding that case including background, experience and conduct of the accused.'" State v. Thomas, 362 N.J. Super. 229, 236 (App. Div. 2003). A court has the right to terminate the defendant's right to self-representation if it becomes apparent that the defendant is manipulating the court or engaging in misconduct. Faretta, supra, 422 U.S. at 834 n.46.

This Honorable Court revisited the issue of waiver of counsel in State v. Rose, 458 N.J. Super. 610 (2019). The Appellate Division stated that the determination of whether the right to counsel has been waived is a two-step process. First, the right must be asserted "in a timely fashion so as not to disrupt the criminal calendar or a trial in progress." Id. at 626. The request cannot be ambiguous. Second, the court must conduct a Faretta hearing to determine if the waiver was knowingly and intelligently made. Id. at 627.

"Waiver of a constitutional right, as with waiver generally, requires proof of the intentional relinquishment or abandonment of a known right or privilege. Whether a defendant has waived the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 630.

"Because "the right to self-representation is not absolute," a defendant may, at times, "be required to cede control of his defense to protect the integrity of the State's interest in fair trials and permit courts to ensure that their judgments meet the high level of reliability demanded by the Constitution." State v. McNeil, 405 N.J. Super. 39, 51 (App. Div. 2009). "[A] defendant cannot manipulate the system by wavering between assigned counsel and self-representation." State v. Buhl, 269 N.J. Super. 344, 362 (App. Div. 1994). "Moreover, **like any other request for substitution of an attorney, a defendant's decision to dismiss his lawyer and represent himself must be exercised in a timely fashion.** The right of self-representation is not a license to disrupt the criminal calendar, or a trial in progress." Ibid. (emphasis added). A request for self-representation "**must be made before meaningful trial proceedings have begun.**" Id. at 363 (emphasis added).

Following Buhl's guidelines, the Appellate Division upheld the denial of a defendant's request to proceed pro se in State v. Pessolano, 343 N.J. Super.

464, 473 (2001). In that case, the defendant made the request after the jury was impaneled but before opening statements were heard. The trial judge denied the request. The Appellate Division affirmed the denial. Ibid. Similarly, this Honorable Court affirmed the denial of a motion for self-representation in State v. Roth, 289 N.J. Super. 152 (App. Div. 1996), where the request came one day before the scheduled trial date.

Here, there can be no question that defendant's request was untimely. Defendant's request came in the middle of the testimony of the State's second witness. [3T75-4 to -11]. Defendant argues that this Honorable Court should ignore defendant's continuous pattern of obstreperous behavior to focus on the request and that it was not a delay tactic. However, examining the record as a whole, defendant was removed from the courtroom twice, defendant was cautioned to cease his obstructive behavior several times, and defendant also refused to leave the holding cell during key portions of the trial, including jury selection. Defendant made continuous outbursts. [1T18-20 to 20-4; 2T5-14 to 7-15; 3T4-17 to -22; 3T28-2 to 33-21; 3T71-22 to 72-13; 3T74-3 to 75-9; 3T126-12 to 128-21; 4T12-16 to 16-8]. He slandered his attorney and accused the court of being biased against him. [3T33-5 to -21; 3T128-19 to -20; 4T11-3 to 14-5]. He made several remarks to the jury in an attempt to subvert the trial process.

Because defendant raises the issue of his motion to proceed pro se in an earlier matter, it should be noted that Judge Garrenger cautioned defendant that any future motions for self-representation had to be made in each individual case. [7T19-24 to 20-18]. Defendant could not rely upon that waiver of counsel as a blanket waiver for all future matters. Because defendant raises that waiver from March 22, 2021, it should be noted that that indictment, Indictment 20-02-0187-I, is currently the subject of an appeal under Appellate Docket A-3978-21. In that appeal, defendant is arguing that his motion to proceed pro se was **improperly** granted, among other arguments. [Pa1-3]. Defendant argues both sides of the argument in his two separate appeals. However, it should be noted if defendant now believes withdrawing from a negotiated plea agreement was too complicated for defendant to argue effectively, it defies credulity that defendant could, as advanced in his brief, effectively represent himself at trial without causing any delays to the ongoing trial. Defendant's argument that defendant could assume his own representation without any delays when defendant had done nothing but work to delay the trial process, including voluntarily absenting himself from the courtroom and refusing to participate, is wholly belied by the record.

Defendant's argument does not require reversal because Judge Garrenger recognized defendant's request as a delay tactic and properly denied his

untimely motion. It is not tantamount to a structural error. Defendant's request to represent himself came in the middle of an outburst he made during the State's direct examination of a witness. [3T71-22 to 75-16]. When the judge admonished defendant to refrain from any further interruptions, defendant asserted that he had a conflict with his attorney. [3T73-7 to 75-16]. The judge informed defendant that his attorney would have an opportunity to cross-examine the witness and defendant stated that his attorney told him that the attorney would not ask the questions defendant wanted. [3T74-13 to 75-3]. None of these assertions is on the record. Defendant's attempt to subvert the trial process is recorded throughout the trial record. Defendant's argument must fail as defendant's demands were made in the middle of trial and in an untimely manner. They were, as is evidenced by the record, strictly a delay tactic and should not be considered now on appeal.

POINT II

JUDGE GARRENGER PROPERLY REMOVED DEFENDANT FROM THE COURTROOM AS DEFENDANT'S DISRUPTIVE BEHAVIOR WAS HINDERING THE TRIAL PROCESS.

The right for a defendant to confront the witnesses against him or her and to be present at every stage of a criminal trial is codified in the United States and New Jersey Constitutions. State v. Luna, 193 N.J. 202 (2007). The right is

further cemented in the New Jersey Court Rules, Rule 3:16, which states in subsection (b):

> The defendant shall be present at every stage of trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule. Nothing in this Rule, however, shall prevent a defendant from waiving the right to be present at trial. A waiver may be found either from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's conduct evidencing a knowing, voluntary, and unjustified absence after (1) the defendant has received actual notice in court or has a signed a written acknowledgement of the trial date, or (2) trial has commenced in defendant's presence.

"The right to be present at trial is not absolute." State v. Luna, supra, at 210. "Where there is no express waiver, the touchstone is whether defendant's conduct reveals a knowing, voluntary, and unjustified absence." Ibid. When a defendant's conduct makes it untenable for a judge to maintain courtroom decorum, the trial court judge may take various actions to ensure the proceedings can run smoothly. State v. Tedesco, 214 N.J. 177 (2013).

In the United States Supreme Court case, Illinois v. Allen, 397 U.S. 337 (1970), the Court issued guidelines for trial courts handling obstreperous or combative defendants. In Allen, the Court stated, "It is not pleasant to hold that the respondent Allen was properly banished from the court for part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity." Id. at 346.

During his trial, Allen threatened the judge, tore a trial file meant for standby counsel, repeatedly talked back to the judge, complained about standby counsel and the fairness of the trial, and subjected the jurors to an overly-long voir dire. Id. at 340-341. Allen was removed from the courtroom after repeated warnings from the trial judge. Id. at 341. The Supreme Court stated that a defendant can lose the right to be present at trial if the defendant ignores the trial court judge's warnings and continues to conduct "himself if a manner so disorderly, so disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Id. at 343. The defendant can reclaim his right by promising to alter his behavior to comport with decorum. Id. at 344.

"[T]here are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant… : (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." Id. at 343-44. Defendants cannot "be permitted to by [their] disruptive conduct indefinitely to avoid being tried on the charges brough against [them]." Id. at 346.

In New Jersey, the courts have approved the alternatives set forth in Allen as remedies for dealing with disruptive defendants. In State v. Spivey, 122 N.J. Super. 249 (App. Div. 1973), certification granted, 65 N.J. 21 (1974) (reversed on other grounds), the defendant was banned from the courtroom after he

exhibited severely disruptive behavior including singing, kicking, braying, mouthing obscenities and insults, and spitting. The judge tried binding and gagging him to avoid removing him, but ultimately removed him from the courtroom. The Spivey court reiterated the options presented to the trial courts by Allen and held that the trial court's actions were not improper when viewed in conjunction with defendant's behavior.

In State v. Reddy, 137 N.J. Super. 32 (App. Div. 1975), the Appellate Division approved the removal of a defendant who went on diatribes while in the courtroom. The defendant was given the opportunity to return if he could comport himself.

Defendant points to an unpublished case, State v. Stuart, 2010 WL 1190538 (App. Div. 2010), in support of his argument that Judge Garrenger improperly barred defendant from the trial. In Stuart, the defendant was removed from the courtroom after a prolonged exchange with the judge just as the judge began to charge the jury. [Da13]. After the exchange and repeated warnings, the judge removed the defendant from the courtroom. [Da13-14]. Although defense counsel asked to have defendant return initially, the judge did not speak to the defendant nor did he have counsel consult his client. Instead, the judge relied upon statements from the Sheriff's Officers that the defendant did not want to return and had threatened more disruption if he was forced to return. [Da14].

The Appellate Division reversed the defendant's conviction. The Appellate Division stated, "We appreciate the trusted role played by sheriff's officers in a criminal courtroom, and their familiarity to the court and the attorneys who regularly appear there. However, these sheriff's officers were not stand-ins for the judge, nor were they an appropriate substitute for defendant's attorney." [Da16-17]. The Appellate Division noted that defendant could easily have been brought before the court to determine if he was able to comport himself and reversed the defendant's conviction. [Da17].

Here, defendant's matter is easily distinguished from Stuart. In Stuart, the defendant had one, prolonged disruption. [Da13-14]. Defendant's attempts to hinder his trial process began on the first day before jury selection when defendant repeatedly interrupted the judge to argue about material he did not have. In the middle of jury selection, defendant absented himself from the courtroom and refused to return after a 10-minute recess. [1T18-20 to 21-5]. Defendant emerged briefly before the judge returned to the bench then quickly left again. [1T20-12 to -16].

Judge Garrenger suspended jury selection for the day. [1T22-10 to -13]. For the record, he stated that the court had issued two extraction orders in the past to secure defendant's presence in the courtroom. [1T22-1 to -5]. On the second day of jury selection, defendant would not appear in court until he had a

different pair of dress shoes. [2T4-21 to 5-6]. Defendant requested to use the bathroom. [2T5-14 to -16]. Judge Garrenger informed defendant that he could use the bathroom but if defendant refused to return to the courtroom, the selection process would resume without him. [2T5-17 to 7-8]. Defendant then left the courtroom and refused to come back to court. [2T7-12 to -15].

On January 25, 2023, defendant refused to appear in court for opening instructions and statements. [3T4-10 to -16]. He told his attorney he would not appear and would not leave the holding cell area. [3T4-24 to 5-9]. After opening statements and the court's initial instructions to the jury, defendant sent a note to the court stating that he wished to be present for the trial. [3T28-2 to -19].

Once in court, defendant informed the court that he believed he was being prejudiced because of defendant's lawsuit against a Burlington County township. [3T33-5 to -13]. Judge Garrenger stated he had no knowledge of the civil lawsuit and it had no bearing on the trial. [3T33-14 to 34-17]. Defendant asked for a change of venue. [3T33-19 to -21]. Judge Garrenger cautioned defendant that defendant would be removed from the courtroom if he disrupted the proceedings. [3T34-20 to 35-2].

In the middle of direct examination of the State's witness, defendant interrupted the proceedings to say, "You can't see where the bottle was dropped. You should be able to see where the bottle was dropped." [3T71-22 to -23].

Judge Garrenger excused the jury and addressed defendant's outbursts. [3T72-6 to -10]. He noted that the first one came when defendant told the jurors that he was being railroaded. [3T72-10 to 73-23].

Defendant expressed dissatisfaction with his attorney. [3T74-3 to 75-15]. He requested to represent himself. [3T75-4 to -6]. Judge Garrenger warned defendant that there would be no more outbursts. [3T75-12 to -15]. Trial resumed. After the testimony of the State's fourth witness for the day, out of the presence of the jury, defendant demanded to see more surveillance footage from the bank's security cameras. [3T123-23 to 124-9]. Judge Garrenger informed defendant that he had received all of his discovery. [3T124-5 to -25].

After the State called its fifth witness to the stand, defendant demanded to be taken into the back room and removed from the court. [3T126-12]. Judge Garrenger excused the jury. [3T126-20 to -21]. Defendant continued to argue with the court about whether he had seen or received all of his discovery. [3T127-3 to 128-21]. Defendant was removed from the courtroom when he would not cease arguing. [3T128-12 to -22].

Defendant was brought back into the courtroom on January 26, 2023, and was present for the start of the trial. [4T4-5 to -6]. After Judge Garrenger issued a cautionary instruction about defendant's behavior, he polled the jury to see if the jurors could follow his instructions. [4T11-3 to 12-14]. As the State was

about to call its next witness, defendant interrupted to say that his attorney had threatened him with a long period of incarceration. [4T12-15 to -25]. The jury was excused again. [4T12-21 to 13-5]. Defendant continued his tirade against defense counsel using expletives to describe his attorney. [4T12-22 to 14-5].

Judge Garrenger removed defendant from the courtroom for the remainder of the proceedings. [4T13-21 to -24]. Defendant was taken to the holding area so trial counsel could consult with defendant between witnesses and between direct and cross-examinations of the witnesses. Defendant refused to speak to his attorney. [4T37-20 to 39-25; 4T69-5 to 70-3; 4T93-15 to 95-11].

After the State presented its last witness, Judge Garrenger asked his trial attorney to ask defendant if defendant would participate in the remainder of the proceedings.

> THE COURT: Mr. Piper, if you could please go see if you can confer with your with your client just with regard to this witness's testimony, and, to save us a multitude of additional trips, you could inquire about whether he wants to participate at all in any other events moving forward. I think the plan was, having conferred with counsel off the record, that -- and in preparation of the jury charge we had a charge conference, which we'll then place some other things on the record later -- but there was the charge with regard to the defendant's election not to testify, which I would plan on giving. I think, Counsel, that was your request, as well as the charge regarding the defendant's absence at trial for portions of it, which I will include. So if you want to canvas any and all of those issues so that we don't have to have you continue to go back.
>
> …

> THE COURT: Back on the record, State of New Jersey versus Cortney Bell, Indictment 21-07-634. Assistant Prosecutor Rachel Conte appears on behalf of the State; Stephen Piper, Esquire, on behalf of Mr. Bell. Counsel is present in court. The Court, in between direct and cross-examination, afforded Mr. Piper an opportunity to go confer with his client. Was that fruitful or not, Mr. Piper?
>
> MR. PIPER: It was not, Your Honor.
>
> THE COURT: Did Mr. Bell refuse to speak to you?
>
> MR. PIPER: He did not want to speak to me and did not wish to speak about any other event.
>
> [4T93-15 to 95-4].

Defendant refused to appear in court for the jury charge and the verdict. Given defendant's long history of intentionally disruptive behavior, Judge Garrenger properly removed defendant from the courtroom. Contrary to defendant's assertions on appeal, defendant was given opportunities to return. He was removed from the court on January 24, 2023, only to be brought back on the January 25, 2023. On January 25, 2023, defendant informed his attorney he would not participate in any of the remaining proceedings. Defendant was provided multiple opportunities to participate in his trial and declined. Judge Garrenger did not err in removing defendant from the courtroom and defendant cannot succeed on this argument.

POINT III

JUDGE GARRENGER PROPERLY DENIED DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL.

R. 3:18-1, Motion Before Submission to Jury, provides:

> At the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction. A defendant may offer evidence after denial of a motion for judgment of acquittal made at the close of the State's case without having reserved the right.

In State v. Reyes, 50 N.J. 454 (1967), the New Jersey Supreme Court set forth the test for determining such a motion. "[T]he broad test for determination of such an application is whether the evidence at that point is sufficient to warrant a conviction of the charge involved. Reyes, supra, 50 N.J. at 458.

> More specifically, the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

Id. at 458-459.

In deciding whether a judgment of acquittal is warranted, the court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State," State v. Zembreski, 445 N.J. Super. 412, 431 (App. Div. 2016), citing State v. Kluber,

130 N.J. Super. 336, 342 (App.Div.1974), certif. denied, 67 N.J. 72 (1975), and "no consideration may be given to any evidence or inferences from the defendant's case." State v. Reyes, 50 N.J. 454, 459 (1967).

An appellate court reviews the denial of a motion for acquittal de novo, applying the same standard used by the trial judge. State v. Williams, 218 N.J. 576, 593-94 (2014). An appellate court must "determine whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, a reasonable jury could find guilt beyond a reasonable doubt." Ibid. (citing State v. Reyes, 50 N.J. 454, 558-59 (1967)). The reviewing court "must consider only the existence of such evidence, not its 'worth, nature, or extent.'" State v. Brooks, 366 N.J. Super. 447, 453 (App. Div. 2004) (quoting State v. Kluber, 130 N.J. Super. 336, 342 (App. Div. 1974)).

Under N.J.S.A. 2C:15-1, a person is guilty of Robbery:

> a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, he:
>
> (1) Inflicts bodily injury or uses force upon another; or
>
> (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
>
> …
>
> An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

> b. Grading. Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

In order to prove a Robbery charge, the State must prove that defendant intended to threaten the victim. State v. Planes, 274 N.J. Super. 190 (Law Div. 1994). "To judge a threat to another, in the robbery context, in technical terms of tense, syntax or grammar would allow too much leeway to an artful and articulate robber. The threat, in the totality of the circumstances presented, should be judged by a trier of fact." Id. at 196. "Robbery is elevated to a crime of the first degree when the defendant is armed with, or uses or threatens the immediate use of a deadly weapon." State v. Chapland, 187 N.J. 275, 283 (2006).

New Jersey case law does not require that "defendant actually show a victim some object that the victim reasonably perceives to be a weapon." Id. at 289. In Chapland, the New Jersey Supreme Court upheld the first-degree conviction of the defendant when the defendant made a motion that implied he was armed with a weapon.

In State v. Cassady, 198 N.J. 165 (2009), the New Jersey Supreme Court reversed an Appellate Division decision that vacated a bank robbery conviction after the defendant demanded money from the bank teller. Id. at 179. The defendant told the teller, "Hurry up. I know how to get it." Id. at 170. He then

proceeded to jump over the glass partition separating the teller and the defendant. He did not issue a direct threat of violence or brandish a weapon, but the teller nonetheless felt threatened by the exchange. Ibid.

In reviewing the Appellate Division's opinion, which reversed defendant's conviction and remanded the matter to the trial court to include jury instructions for the lesser-included offense of theft from the person, the Supreme Court stated, echoing the dissent, "This was a bank robbery: plain and simple. In my view, no rational jury could come to any other conclusion." Id. at 179, quoting State v. Cassady, 396 N.J. Super. 392 (App. Div. 2007) (Fuentes, J.A.D., dissenting).

Here, there was ample evidence to support the Robbery charge going forward to the jury. Several witnesses heard defendant tell Ms. Joseph and Ms. Shah to give him all of the money. [3T58-13; 3T95-6 to -7]. Ms. Joseph testified that she saw defendant motion with his pocket as if he had a firearm. [3T95-14 to -19]. Ms. Joseph testified that she was afraid defendant would injure or kill her. [3T97-1 to -6]. Ms. Colon also testified that defendant announced that he had a gun. [3T77-18 to -22]. Ms. Colon did not state that the statement was directed specifically at Ms. Joseph or at Ms. Shah.

Defendant's argument that, because Ms. Joseph placed the money on the counter before defendant gestured with his pocket, she was not the victim of a

robbery must fail. Ms. Joseph testified that she was afraid of defendant's actions. [3T97-1 to -6]. Ms. Joseph placed the money on the counter because she recognized the scenario as a robbery in progress. [3T95-1 to -11]. Similarly, defendant's argument that because Ms. Shah did not testify she could not have felt threatened must also fail. Moreover, Ms. Shah and Ms. Joseph were not named victims in the first-degree Robbery count. The indictment named employees of the TD Bank and patrons. Defendant entered a bank, demanded money, gestured with his hand and announced that he had a firearm. [3T58-13; 3T77-18 to -22; 3T95-16 to -19]. In response to defendant's demands and gestures, the two tellers gave defendant "bait packs" of money. [3T95-11 to -14]. The elements of the charge of Robbery were met as defendant, in the course of committing a theft, threatened immediate bodily injury by simulating a weapon and demanding the money from the bank.

Mr. Segars testified that the events unfolded rapidly. [3T116-16 to -23]. He saw defendant drop a beer bottle as defendant attempted to exit the bank. [3T117-7 to -13]. The beer bottle was recovered by the police and submitted to the New Jersey State Police Forensics Laboratory for testing. DNA testing on the bottle yielded a positive match for defendant when compared against his control sample. [4T34-22 to 35-4; 4T88-22 to 89-5].

Clearly, given all rational inferences to the State, there was more than sufficient evidence to survive defendant's motion for a judgment of acquittal. Judge Garrenger properly denied defendant's motion.

POINT IV

JUDGE GARRENGER'S JURY INSTRUCTIONS WERE PROPER AND DID NOT CONFUSE OR MISLEAD THE JURY. (NOT RAISED BELOW).

Defendant argues, for the first time on appeal, that the jury instructions failed to adequately convey the law to the jury. This argument should be barred, as defendant did not raise it at the trial court level. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229 (1973). New Jersey Court Rule 2:10-2 states:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

At the end of a case, it is important that "[a]ppropriate and proper charges to a jury" are given by the trial judge. State v. Green, 86 N.J. 281, 287 (1981). At this time, the trial judge should explain to the jury its function by detailing "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 287-88. The instructions should be given in non-legal language that those

uneducated in the law can understand. Id. at 288. The charge should explain all of the essential elements with a "plain and clear exposition of the issues." Id.

The standard of review for a jury charge is whether the charge adequately conveys the law and does not confuse the jury. State v. Brown, 80 N.J. 587, 600 (1979), (quoting Latta v. Caulfield, 79 N.J. 128, 135 (1979)). To determine whether a charge was correct, the court must examine the charge as a whole. State v. Jordan, 147 N.J. 409, 422 (1997), (citing State v. Wilbely, 63 N.J. 420, 422 (1973)). "No party is entitled to have the jury charged in his or her own words; all that is necessary is that the charge as a whole be accurate." Jordan, 147 N.J. at 422, (citing Large v. Rothman, 110 N.J. 201 (1988); State v. Thompson, 59 N.J. 396 (1971)).

"Our courts have consistently placed an extraordinarily high value on the importance of appropriate and proper jury charges to the right to trial by jury." State v. Allen, 308 N.J. Super. 421, 431 (App. Div. 1998). "Erroneous instructions on matters material to the juror's deliberations are presumed to be reversible error." Id.; citing State v. Grunow, 102 N.J. 133, 148 (1986). See also State v. Brown, 138 N.J. 481, 522 (1984), overruled on other grounds by State v. Cooper, 151 N.J. 326 (1996)(clear and correct jury instructions are essential for a fair trial.)

A trial court has an "absolute duty" to properly instruct the jury regarding its fact-finding responsibilities, State v. Concepcion, 111 N.J. 373, 379 (1988), which may include special cautionary instructions relating to the jury's consideration of particular kinds of evidence. State v. Baldwin, 296 N.J. Super. 391, 396 (App. Div. 1997).

When no objection to a jury charge is made, the charge must be reviewed for plain error. State v. Koskovich, 168 N.J. 449 (2001). "Plain error in the context of a jury charge must be sufficiently grievous to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hyman, 451 N.J. Super. 429 (App. Div. 2017)(internal citations and quotations omitted).

A trial court judge has "an independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." State v. Thomas, 187 N.J. 119, 132 (2006). N.J.S.A. 2C:1-8(d) dictates:

> A defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense. An offense is so included when:
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt to or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or

> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

N.J.S.A. 2C:1-8e states, "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense."

Because defendant did not object to the jury charge as a whole, defendant's argument that the trial court failed to include the lesser-included offense of second-degree robbery in the jury instructions must be reviewed for plain error. There is no error in the jury instructions.

A. Judge Garrenger's Instructions As To Robbery And Its Lesser-Included Offenses Was Proper.

Judge Garrenger gave the jury the correct instruction on the lesser-included offense of theft from the person. Defendant's argument that the trial court failed to adequately instruct the jury on second degree robbery is incorrect. First, the model jury charges for first-degree robbery encompass the jury instructions for second-degree robbery. Second, Judge Garrenger very clearly instructed the jury on the elements of the offense and informed the jury that they had to find defendant guilty of second-degree robbery if they did not find that defendant threatened the victims with a weapon. [4T123-12 to 128-25].

Defendant argues that because Judge Garrenger omitted the phrase that states that "robbery is a crime of the second degree, except it is a crime of the first degree" if the defendant is armed, or threatens the use of, a deadly weapon, the jury instructions are wholly insufficient to have conveyed the law to the jurors. However, read as a whole, the instructions are clear and do not prejudice defendant. Judge Garrenger informed the jurors that if they found that defendant committed the robbery, but did not threaten the use of a deadly weapon, the jurors should find defendant guilty of a second-degree robbery:

> If you find that the State has proven beyond a reasonable doubt that the defendant committed the crime of robbery as I have defined that crime to you but if you find that the State has not proven beyond a reasonable doubt that the defendant was armed with, or used or purposely threatened the immediate use of a deadly weapon, or purposely engaged in conduct or gestures which would lead a reasonable person to believe that the defendant possessed a deadly weapon at the time of the commission of the robbery, then you must find the defendant guilty of robbery in the second degree.
>
> [4T128-17 to -25].

Here, the jurors were not left in a situation where the only options for the jury were convict or acquit defendant of first-degree robbery. Along with the instruction that the jurors could find defendant guilty of second-degree robbery, the jurors were given an instruction on the lesser-included offense of third-degree theft from the person. [4T129-1 to 133-13]. As to each charge for the jury's consideration, Judge Garrenger's charge properly explained the elements

of the offenses. He did not, contrary to defendant's argument, omit language but defined bodily injury in the course of defining a deadly weapon. [4T126-1 to -8]. The instructions for second-degree robbery require that the trial court judge inform the jury that the State must prove defendant "threatened another with or purposely put another in fear of immediate bodily injury…" and requires the judge to define bodily injury or that the defendant "committed or threatened immediately to commit [a crime of the first or second-degree] while in the course of committing the theft." It does not require any more definition.

Judge Garrenger stated:

> A person is guilty of robbery if in the course of committing a theft he threatens another with or purposely puts him or her in fear of immediate bodily injury.
>
> In order for you to find the defendant guilty of robbery, the State is required to prove each of the following elements beyond a reasonable doubt: That the defendant was in the course of committing a theft and that while in the course of committing a theft the defendant threatened another with or purposely put him or her in fear of immediate bodily injury.

[4T123-12 to -24].

As the elements of theft and bodily injury were outlined for the jurors and the jury was not left to question or come to their own conclusions as to the laws governing the case, defendant's arguments must fail. As noted above, defendant was not entitled to have the instructions in his own words. Jordan, supra, 147 N.J. 409, 422 (1997). Neither the model instruction for first- nor second-degree

robbery requires the trial court judge to define threats or fear, only bodily injury. That element was clearly defined in Judge Garrenger's instructions when he defined the use of a deadly weapon. As noted above, he

When reviewed for harmless error, there is none. The jurors were very clearly instructed to move on to the lesser-included offense if they found that defendant did not possess a weapon. Judge Garrenger's instructions were proper and clearly conveyed the law of the case to the jurors. There is no error in the instructions, let alone plain error.

B. The Facts Of Defendant's Case Did Not Require The Trial Court Judge To Give An Instruction On Unanimity As To The Victims.

"[T]he United States and New Jersey Constitutions require jurors to reach a unanimous verdict in a criminal case." State v. Fair, 256 N.J. 213, 232 (2024). "Unanimity generally requires that jurors be in substantial agreement as to just what a defendant did before determining his or her guilt or innocence." Ibid. (internal citations and quotations omitted). "[T]hey need not unanimously agree as to "which of several possible sets of underlying brute facts make up a particular element, or which of several possible means the defendant used to commit an element of the crime." Ibid.

Defendant relies on State v. Gentry, 183 N.J. 30 (2005), to support his argument that the judge's failure to instruct on unanimity of which victim was

robbed was a fatal defect to the proceedings. This reliance is misplaced. In Gentry, the defendant charged at one victim and stomped another victim in an attempt to leave the store. Gentry testified at trial and disclaimed any intention to inflict injuries upon either victim. Id. at 31. The indictment charged the defendant with crimes against "Rite Aid and/or Tiffany Davis and/or David Lowe." Id. at 31.

During deliberations, the jurors indicated that they agreed that Gentry used force during the course of the events but could not come to a conclusion as to who was the victim of the use of force. Id. at 31-32. The jurors asked what was considered a unanimous vote. Id. at 32. The trial court informed the jurors that as long as they agreed that the defendant had used force against another, then the jury was unanimous and the State had proved the use of force beyond a reasonable doubt. Ibid.

The New Jersey Supreme Court reversed Gentry's conviction. Citing the dissent in the Appellate Division's opinion, the Court held that under the jury's understanding of the case, a robbery would not have been committed if one of the two victims had not been present at the scene; the jurors could not agree which person was the victim and which person was the bystander and therefore had created a pathway to an acquittal if the jurors had been instructed that they must return a unanimous verdict. Id. at 32-33.

Unlike the jury in Gentry, the jurors in defendant's matter did not exhibit any confusion or give any indication that they could not agree on who was the victim of the robbery. The indictment did not indicate that Ms. Shah or Ms. Josephs was a victim; it named the employees and patrons of the bank. Indeed, in the sole count of the indictment that indicated a specific victim was named, the jurors acquitted defendant of the charge.

Defendant points to State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011), in further support of his arguments. In that case, the defendant issued a threat to a group of people. The Appellate Division reversed because the facts of the case led to a risk of a non-unanimous verdict as the defendant made multiple distinct threats against multiple distinct individuals. Id. at 557. In Tindell, the indictment only named one victim in the defendant; however, the jury heard evidence of multiple threats to multiple people that could have led the jurors to come to differing conclusions as to who was threatened. Id. at 553.

As in State v. Macchia, 253 N.J. 232 (2023), the State did not introduce evidence that "defendant committed different acts against different victims." Like Macchia, the State presented one theory of the case: defendant entered the bank with a simulated weapon and demanded money from the tellers who were working in the bank at the time. He did not commit separate acts of violence like the defendant in Gentry. Had Shah or Joseph not been present at the bank, the

elements of the offense would still have been met. Defendant entered the bank, gestured as if he possessed a weapon and stated that he had a gun, and demanded the money from the tellers.

There was no confusion from the jurors as to the elements of the crime or as to how the law should be applied to defendant's matter. The only questions for the judge were playback requests and a question about the photographs submitted as evidence. [4T147-17 to 15-11]. There was no confusion as to the victims. Nothing on the record indicates that the jurors were unable to reach a verdict or questioned the elements of the offense including the victims of the offense. Defendant's argument fails. Defendant's argument falls well short of the threshold necessary to find plain error in this matter. Judge Garrenger's instructions were proper and did not prevent defendant from receiving a fair trial.

POINT V

DEFENDANT'S SENTENCE IS PROPER AND DOES NOT SHOCK THE JUDICIAL CONSCIENCE. (THIS REFERS TO SUBPOINTS A, B, AND C OF DEFENDANT'S POINT V.)

Defendant's sentence is appropriate. In State v. Roth, 95 N.J. 334 (1984), the New Jersey Supreme Court established a three-part analysis for appellate review of a sentencing decision. The court must determine: 1) whether the correct statutory sentencing guidelines and presumptions have been followed;

2) whether there is substantial evidence in the record to support the court's application of those guidelines; and 3) whether in applying those guidelines to the relevant facts, "the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors." Id. at 365-66.

On review, an appellate court should not substitute its judgment for that of the trial court. State v. Burton, 309 N.J. Super. 280, 290 (App. Div. 1998), certif. denied, 156 N.J. 407 (1998) (citing Roth, 95 N.J. at 365). The test is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review. Id. The appellate court shall review the aggravating and mitigating factors and "modify defendant's sentence upon his application where such findings are not fairly supported on the record, see N.J.S.A. 2C:44-7, but only where the sentencing court has made a clear error in judgment that would shock the judicial conscience of the reviewing court." Roth, 95 N.J. at 364.

The trial court must examine the aggravating factors, but the consideration of the mitigating factors remains discretionary. State v. Setzer, 268 N.J. Super. 553, 567-68 (App. Div. 1993); certif. denied 135 N.J. 468 (1993). If there is a preponderance of aggravating factors, the court may impose sentence up to the

maximum degree of the offense. If there is a preponderance of the mitigating factors, the court may sentence down to the statutory minimum. Roth, 95 N.J. at 359. The balancing, however, is not simply a quantitative analysis of the number of factors, but, rather, the "proper weight to be given each is a function of its gravity in relation to the severity of the offense." Id. at 368.

To provide for adequate review, "the trial court should identify the aggravating and mitigating factors, describe the balance of those factors, and explain how it determined defendant's sentence." State v. Kruse, 105 N.J. 354, 360 (1987). N.J.S.A. 2C:44-1 provides an enumerated list of thirteen criteria for withholding or imposing a sentence of imprisonment.

In the New Jersey Supreme Court case of State v. Natale, 184 N.J. 458 (2005), the Court excised presumptive sentences from the criminal code. The Court determined that the proper way to conform New Jersey's sentencing scheme to the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), was to excise the presumptive terms from the sentencing statutes. Id. The Court held that even though the presumptive terms were no longer a mandatory starting point, it suspected many judges would still use the mid-points in the sentencing ranges to being their analyses of the defendant's sentences. Natale, 184 N.J. at 488.

Contrary to defendant's argument on appeal, Judge Garrenger properly weighed and explained his reasons for finding aggravating and mitigating factors. Judge Garrenger found the presence of the recidivist factors applied to defendant's sentence. Judge Garrenger held that defendant's pre-sentence report indicated a lengthy criminal history and was awaiting trial for more offenses. He noted defendant was currently serving a sentence for another conviction for first-degree robbery. [6T10-24 to 12-19].

Defendant had four indictable convictions prior to this conviction. His record spanned several states. He had experienced fines, prison and probation. [PSR].

Defendant's argument that Judge Garrenger did not place enough weight on mitigating factor (4) is without merit. Judge Garrenger acknowledged that defendant had a history of substance abuse but defendant was before the court on his second conviction for a first-degree robbery. [6T12-4 to -19]. In support of this factor, defendant cites State v. Harris, 466 N.J. Super. 502, 545 (App. Div. 2021). In Harris, this Honorable Court held that a defendant's substance abuse history can explain a defendant's criminal history or likelihood of recidivism.

However, Judge Garrenger did consider defendant's criminal history and his substance abuse history. Judge Garrenger did not place great weight on

mitigating factor (4), but just because defendant is unhappy with the weight given to it by the court does not mean that the court erred in its application. Defendant was found guilty of first-degree robbery after a trial. Defendant cannot minimize his actions by arguing that his substance abuse issues merited a lower sentence. As Judge Garrenger noted, defendant's actions cannot be justified by citing to his addiction.

Defendant's sentence is within the statutory guidelines and supported by defendant's criminal history, the nature and circumstances of the offense, and Judge Garrenger's careful weighing of aggravating and mitigating factors. It represents defendant's second conviction for first-degree robbery within a short period of time. Defendant's sentence is proper and does not shock the judicial conscience.

Pursuant to N.J.S.A. 2C:44-5, "[w]hen multiple sentences of imprisonment are imposed on a defendant for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence . . . ." N.J.S.A. 2C:44-5a. "[T]here is no presumption in favor of concurrent sentences . . . . In other words, the sentencing range is the maximum sentence for each offense added to every other offense." State v. Abdullah, 184 N.J. 497, 513-14 (2005). The sentencing judge is vested with the discretion to impose consecutive or concurrent terms. See State v.

Yarbough, 100 N.J. 627, 630 (1985). Although the statute does not provide guidance for making such determinations, the New Jersey Supreme Court, in Yarbough, stated:

> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous.
>
> * * *
>
> (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of longest terms . . . that could be imposed for the two most serious offenses.

Yarbough, supra, 100 N.J. at 643-44. In 1993, the Legislature eliminated the cap on the number of consecutive sentences that could be imposed pursuant to

the sixth factor. Abdullah, 184 N.J. at 513.[4] The standard for review of the sentencing decisions as stated in Roth is also applicable to the determination of whether consecutive sentences were proper.

In the recently decided case of State v. Torres, 246 N.J. 246 (2021), the New Jersey Supreme Court held that consecutive sentences must not carry a "scent of unfairness" when the courts impose them. The Court noted that there is no presumption for imposing a consecutive sentence over a concurrent sentence, but the trial courts must engage in an analysis in determining consecutive or concurrent sentences. Id. at 266. The Torres Court noted, "An explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding or in multiple sentencing proceedings, is essential to a proper Yarbough sentencing assessment." Id. at 269. However, the Court also noted that Yarbough was a guide, not a control. Id. The sentence must overall be fair. Id. at 272.

Defendant received a 10-year sentence for first-degree robbery in 2022. Judge Garrenger held that defendant's crimes were predominantly independent of each other and were committed in separate places against separate victims. He held that the crimes each involved separate acts of violence. Defendant's

[4] The Legislature added N.J.S.A. 2C:44-5a, which states "[t]here shall be no overall limitation on the cumulation of consecutive sentences for multiple offenses." Abdullah, 184 N.J. at 513.

crimes were not committed closely in time or in a single period of aberrant behavior. [6T12-20 to 14-19].

There is nothing in the record that would justify concurrent sentences. Defendant, as mentioned earlier, had a lengthy criminal history that went back to 2004 for his adult history only. He had juvenile adjudications as well. Defendant committed two first-degree robberies and was convicted of both offenses. Defendant's consecutive sentences are amply supported by the record and by Judge Garrenger's reasoning. Defendant's sentence is well within the statutory guidelines and does not shock the judicial conscience. Defendant's sentences must stand.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Honorable Court to affirm defendant's conviction and sentence.

Respectfully submitted,

LACHIA L. BRADSHAW
BURLINGTON COUNTY PROSECUTOR

/S/ Alexis R. Agre_____
By: Alexis R. Agre (Id No. 026692002)
Assistant Prosecutor

Dated: May 31, 2024

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3500-22
INDICTMENT NO. 21-07-634-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order of the Superior Court of New Jersey,
v.	:	Law Division, Burlington County.
CORTNEY BELL,	:	Sat Below:
Defendant-Appellant.	:	Hon. Christopher J. Garrenger, 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

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Cortney Bell relies on the procedural history and statement of facts from his initial brief. (Db 2-6)[1]

LEGAL ARGUMENT

Mr. Bell relies on the legal arguments from his initial brief and adds the following:

POINT I

REVERSAL IS REQUIRED BECAUSE THE COURT REFUSED TO CONSIDER DEFENDANT'S REQUEST TO REPRESENT HIMSELF. (Db 6-13)

The trial court committed structural error by dismissing outright, without any substantive consideration, Mr. Bell's request to fire his attorney and exercise his Sixth Amendment right to represent himself. (Db 6-13) The State's arguments to the contrary are meritless.

First, the State asserts in its responsive brief that because Mr. Bell's request was made after trial had commenced, the trial court had no obligation to even consider it. (Sb 15-16) In so doing, the State ignores federal precedent indicating that a judge considering a mid-trial request to proceed pro se must engage in a specified analysis; it must "weigh the prejudice to the legitimate

[1] This brief uses the same abbreviations as Mr. Bell's initial brief. In addition, Db refers to Mr. Bell's initial brief, and Sb refers to the State's brief.

interests of the defendant against the potential disruption of proceedings already in progress." Buhl v. Cooksey, 233 F.3d 783, 797 n.16 (3d Cir. 2000) (quoting United States v. Stevens, 83 F.3d 60, 66-67 (2d Cir. 1996)). The court cannot just dismiss the request outright because it is "too late."

On issues of federal constitutional law, this Court is required to "give respectful consideration to the decisions" of lower federal courts. State v. Coleman, 46 N.J. 16, 37 (1965). "Due respect" should be given "particularly where [those decisions] are in agreement." Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 80 (1990). Here, decisions from multiple federal courts of appeal counsel that a mid-trial request to proceed pro se warrants substantive consideration. See, e.g., United States v. Noah, 130 F.3d 490, 498 (1st Cir. 1997); United States v. Hage, 74 F.4th 90, 94 (2d Cir. 2023); United States v. Bankoff, 613 F.3d 358, 373 (3d Cir. 2010); United States v. Kosmel, 272 F.3d 501, 506 (7th Cir. 2001); United States v. Wesley, 798 F.2d 1155, 1155–56 (8th Cir. 1986). Those decisions explain that a district court has the discretion to deny such a request after engaging in the required analysis. See Bankoff, 613 F.3d at 373; Wesley, 798 F.2d at 1155 (the trial court's discretion "requires a balancing" of the competing factors). In line with those decisions, this Court should not condone the trial court's failure to take seriously Mr. Bell's request to exercise a constitutional right.

The State further contends that, because Mr. Bell argued in a separate appeal that the trial court improperly granted his request to proceed pro se by failing to engage in the required colloquy, "it defies credulity that" Mr. Bell could have "effectively represent[ed] himself" in this case. (Sb 17) This results-oriented argument misses the point.

In both cases, Mr. Bell is arguing that the trial court failed to carry out its duty to safeguard his Sixth Amendment rights. In his other appeal, the court granted his request to proceed pro se without ensuring that he understood what he was giving up by waiving his right to counsel. In this appeal, the court rejected his request to exercise his corresponding right to represent himself without affording it any real consideration. Both times, the court violated Mr. Bell's constitutional rights by failing to engage in the process that is required. It is beside the point what the results of that process might have been.

In sum, the State's arguments completely disregard the safeguards established by law to protect a defendant's right to a fair trial under the Sixth Amendment. This Court must reverse Mr. Bell's conviction due to the trial court's violation of his right to represent himself. See Faretta v. California, 422 U.S. 806, 819-20 (1975); U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10.

POINT II

THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE THAT DEFENDANT COMMITTED A FIRST-DEGREE ROBBERY. A JUDGMENT OF ACQUITTAL MUST BE ENTERED AS TO THAT CHARGE. (Db 19-27)

Legally insufficient evidence at trial must result in a judgment of acquittal. See Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."). In this case, a judgment of acquittal should have been entered on the first-degree robbery charge because the State failed to show that while committing a theft, Mr. Bell -- who did not possess a deadly weapon -- led the victim to actually and reasonably believe that he possessed such a weapon. See State v. Dekowski, 218 N.J. 596, 599 (2014) (citing State v. Williams, 218 N.J. 576, 579-580 (2014)). The State utterly ignores this absence of evidence in its responsive brief, misconstruing its burden in a simulated-deadly-weapons case and ludicrously suggesting that a defendant may be convicted of first-degree robbery without proof that the essential elements of the crime are satisfied with reference to an identifiable victim. These arguments must be rejected.

First, the State asserts that Mr. Bell's acquittal argument "must fail" with respect to one of the bank tellers, Kushal Shah, because it was not necessary that

Shah testify in order for the jury to determine that she felt threatened. (Sb 31) But Mr. Bell does not dispute that the State presented sufficient evidence to convict him of second-degree robbery of Shah; he agrees that Shah did not need to testify for the jury to make the factual determination that he threatened her with immediate bodily injury. N.J.S.A. 2C:15-1. (Db 27, n.8) For the jury to convict Mr. Bell of first-degree robbery of Shah, however, the State had to prove that Shah actually believed that Mr. Bell possessed a deadly weapon even though he did not. Dekowski, 218 N.J. at 599; Williams, 218 N.J. at 587-88. The State presented no evidence from which the jury could draw a conclusion regarding Shah's subjective belief because Shah did not testify at trial.

On multiple occasions, our Supreme Court has examined the State's burden in a first-degree robbery case involving a simulated deadly weapon. The Court has reiterated that "a first-degree robbery conviction will not be sustained unless the victim possessed a subjective belief that the [weapon] was capable of producing death or serious bodily injury, and that that subjective belief was a reasonable one under the circumstances." Dekowski, 218 N.J. at 606 (cleaned up) (emphasis added). In each of these cases, the subjective-belief requirement was satisfied because the victim testified at trial that he or she thought the defendant could be armed. Id. at 601, 609-610; Williams, 218 N.J. at 580-81, 595; State v. Chapland, 187 N.J. 275, 278 (2006); State v. Hutson, 107 N.J. 222,

224, 228 (1987). Here, the State failed to call Shah as a witness, so the jury was not presented with evidence regarding her subjective belief at the time of the incident.

The heightened burden of the State in a simulated-deadly-weapons case exists for a reason: it is only justified to punish an unarmed defendant for armed robbery if he "reasonably persuade[s] the victim" that he is armed. See Williams, 218 N.J. at 591. See also ibid. ("The objective is to persuade the victim that the simulated weapon is real."). Because the State failed to satisfy its heightened burden with respect to Shah, and because the State also failed to prove that Mr. Bell committed first-degree robbery of the other teller, Lacey Joseph (Db 24-25), a judgment of acquittal should have been entered on the first-degree robbery charge.

The State tries to circumvent its failure to prove that Mr. Bell committed first-degree robbery of either Shah or Joseph by arguing that "Ms. Shah and Ms. Joseph were not named victims in the first-degree robbery count. The indictment named employees of the TD Bank and patrons." (Sb 31) The State seems to be suggesting that a defendant may be convicted of robbery without proof that the essential elements of the crime are satisfied with reference to an identifiable victim. This simply is not true.

As relevant here, the robbery statute provides that "[a] person is guilty of robbery if, in the course of committing a theft, he . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury." N.J.S.A. 2C:15-1a(2). This Court has interpreted similar language in the terroristic threats statute to "implicitly require the identification of the intended victim." See State v. Tindell, 417 N.J. Super. 530, 553 (App. Div. 2011). In Tindell, the Court reasoned that "[w]ithout knowing the identity of the victim, the statutory phrase 'with the purpose to terrorize another' is rendered devoid of substance." Ibid. (emphasis in original). The same can be said of the phrase "[t]hreatens another with or purposely puts him in fear of immediate bodily injury." N.J.S.A. 2C:15-1a(2). Thus, the State was required to identify the person that Mr. Bell threatened, and as discussed above, the State had to prove that that person actually and reasonably believed that Mr. Bell was armed. The State's suggestion that Mr. Bell could be convicted of robbing employees and patrons of the TD Bank in general, and not any person specifically, is contrary to law. See Gentry, 183 N.J. at 31-33 (holding that the identity of a robbery victim is an essential element of the offense). This Court should reject the State's arguments and reverse the trial court's denial of Mr. Bell's motion for a judgment acquittal as to first-degree robbery.

POINT III

DEFENDANT'S CONVICTION MUST BE REVERSED DUE TO THE COURT'S FAILURE TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE ON THE IDENTITY OF THE FIRST-DEGREE ROBBERY VICTIM. (Db 34-41)

The State insists that "the facts of the case did not require the trial court to give an instruction on unanimity as to the victims." (Sb 38-41) The State is wrong, and its reasoning is flawed in several respects.

First, the State contends that no specific unanimity instruction was necessary because, unlike in State v. Gentry, 183 N.J. 30 (2005), the evidence did not show that Mr. Bell committed different acts against different victims. (Sb 40) That is exactly what the evidence showed, however. According to the testimony, Mr. Bell committed two separate thefts -- he obtained money unlawfully from both Joseph and Shah. Moreover, he utilized different means to obtain that money; he first said, "give me all your money," which prompted Joseph to hand over her bait money, and then he said, "give me all your money or I'll shoot." (3T 95-8 to 16, 96-14 to 19) Joseph testified that this second statement was "directed to Shah because I had already given him money." (3T 96-20 to 24) Shah handed over her bait money after this second statement was made. (3T 95-14 to 20)

The State's argument that Mr. Bell did not commit different acts against different victims is undermined by its own indictment, which charged Mr. Bell with terroristic threats for threatening to kill Shah. (Da 3) The State did not charge Mr. Bell with a second count of terroristic threats for threatening to kill Joseph. Accordingly, the State itself apparently recognized that there was evidence that Mr. Bell made different statements to each of the victims.

The State attempts to analogize this case to State v. Macchia, where the Supreme Court held that a specific unanimity instruction was not required, but that fact pattern is completely different. 253 N.J. 232 (2023). (Sb 40) In Macchia, the defendant fatally shot a single victim, and his argument at trial was that he acted in self-defense. Id. at 239. The jury rejected his self-defense theory, implicitly concluding that the State met its burden to prove that his use of lethal force was unjustified for one of three reasons outlined by statute. Ibid. See N.J.S.A. 2C:3-4b(2). On appeal, the defendant argued that the trial court should have instructed the jury that "it needed to agree unanimously on which one or more of the three reasons led it to reject his claim of self-defense." Macchia, 253 N.J. at 239. The Supreme Court disagreed and affirmed, distinguishing Gentry on the ground that the State "did not introduce evidence that defendant committed different acts against different victims." Id. at 260.

As in Gentry, and unlike in Macchia, this case did involve multiple victims and different acts committed against them. Consequently, the jury needed to be told that it had to agree on the identity of the first-degree robbery victim.

The State also absurdly suggests that "[h]ad Shah or Joseph not been present at the bank, the elements of the offense would still have been met" because Mr. Bell entered the bank, simulated possession of a weapon, and demanded money. (Sb 40-41) Once again, the State appears to completely ignore its burden to prove that the essential elements of first-degree robbery were satisfied as to an identifiable victim. If Mr. Bell walked into an empty bank demanding money and simulating possession of a weapon, no robbery would have occurred. See 2C Chapter Headings (categorizing robbery as an offense "involving danger to the person"). Someone had to be the robbery victim, and the State had to prove that Mr. Bell, while committing a theft, threatened that victim with the immediate use of a deadly weapon by leading that victim to actually and reasonably believe that he was armed. Thus, the jury had to unanimously agree as to who that victim was.

Finally, the State asserts that "[t]here was no confusion from the jurors" as to the victims (Sb 41), but as discussed in Mr. Bell's initial brief, this is entirely unsurprising considering the jury instructions as a whole and the indictment. (Db 39, n.11) Both the instructions and the indictment referred to

the victim of the first-degree robbery as "[e]mployees and patrons of the TD Bank." (Da 1; 4T 114-4 to 12, 126-13 to 19, 127-15 to 20) Problematically, the jury was never told that it had to consider whether the elements of first-degree robbery were satisfied with reference to an identifiable victim. The jury was instead left with the false impression that it could consider a disperse group of individuals as "the victim" for purposes of first-degree robbery. In other words, the jury didn't know what it didn't know.

In short, this Court must reject the State's arguments that no specific unanimity instruction was required on these facts. Because the failure to give a specific unanimity instruction was plain error, and because the court further erred by failing to instruct on the second element of robbery and the grading of the offense (Db 28-34), Mr. Bell's conviction must be reversed.

CONCLUSION

For the reasons set forth here and in Mr. Bell's initial brief, this Court should reverse his conviction and direct the trial court to enter a judgment of acquittal as to the first-degree robbery charge. In the alternative, the matter should be remanded for resentencing.

Respectfully submitted,

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