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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0135-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRANCE J. PATTERSON,

Defendant-Appellant.

Submitted September 26, 2017 – Decided October 10, 2017

Before Judges Carroll, Leone and Mawla.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 14-08-0830.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Arielle E. Katz, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Terrance J. Patterson was charged in Burlington County Indictment No. 14-08-0830 with first-degree murder,

N.J.S.A. 2C:11-3a(1) and (2) (Count One); first-degree felony murder while engaging in robbery, N.J.S.A. 2C:11-3a(3) (Count Two) and kidnapping, N.J.S.A. 2C:11-3a(3) (Count Three); first-degree kidnapping, N.J.S.A. 2C:13-1b(1) and (2) (Count Four); and first-degree robbery, N.J.S.A. 2C:15-1a(1) and (2) (Count Five). Prior to trial, defendant moved unsuccessfully to suppress evidence obtained pursuant to three communications data warrants (CDWs), to exclude the statement he gave to police, and to bar the admission of telephone conversations recorded while he was an inmate at the Burlington County Jail.

Defendant was tried before a jury on various dates between May 17, 2016 and June 1, 2016. The jury convicted defendant on Counts One, Two, Three, and Four, and found him guilty of second-degree robbery as a lesser-included offense of first-degree robbery on Count Five upon determining that the State did not prove he committed the robbery while armed with a deadly weapon.

On July 12, 2016, the court granted the State's request to sentence defendant on Count One to life imprisonment without the possibility of parole pursuant to the "Three Strikes Law," N.J.S.A. 2C:43-7.1a. Counts Two and Three merged with Count One. The court imposed a thirty-year prison term on Count Four, and a twenty-year term on Count Five, each subject to an eighty-five percent parole ineligibility period pursuant to the No Early

Release Act, N.J.S.A. 2C:43-7.2, and concurrent to the sentence imposed on Count One. The present appeal followed.

In his counseled brief, defendant raises the following issues for our consideration:

POINT I

IT WAS REVERSIBLE ERROR FOR THE JUDGE TO FAIL TO INSTRUCT THE JURY ON ACCOMPLICE LIABILITY, ESPECIALLY IN LIGHT OF THE JURY'S QUESTION SIGNALING ITS CONFUSION. (Not Raised Below).

POINT II

THE CONVICTIONS FOR ROBBERY AND FELONY MURDER PREDICATED UPON ROBBERY MUST BE REVERSED BECAUSE THE JUDGE NEGLECTED TO CHARGE THE JURY ON AN ESSENTIAL ELEMENT OF THOSE OFFENSES, NAMELY, THEFT. (Not Raised Below).

POINT III

THE IMPOSITION OF LIFE WITHOUT PAROLE PURSUANT TO THE "THREE STRIKES LAW," N.J.S.A. 2C:43-7.1, WAS UNLAWFUL BECAUSE IT WAS BASED ON THE JUDGE'S FALSE BELIEF THAT DEFENDANT HAD COMMITTED TWO PRIOR FIRST-DEGREE ROBBERIES. (Not Raised Below).

The following additional points are raised in defendant's pro se supplemental brief:

POINT I

THE AFFIDAVITS [ON] WHICH THE COMMUNICATIONS DATA WARRANTS WERE BASED [] FAILED TO ESTABLISH[] PROBABLE CAUSE THAT EVIDENCE OF A CRIME WOULD BE FOUND THEREIN.

POINT II

THE COMMUNICATIONS DATA WARRANT AUTHORIZING THE SEIZURE OF DEFENDANT'S CELL PHONE RECORDS WAS PROCURED BY WAY OF WILLFULLY FALSE STATEMENTS IN [DETECTIVE] FENKEL'S SEARCH WARRANT APPLICATION.

POINT III

THE JUDGE BASED HIS DECISION ON A MISINTERPRETATION OF THE FACTS AND ERRONEOUSLY ALLOWED THE [CDWs] INTO EVIDENCE AND NOT ALLOWING [] DEFENDANT A FAIR TRIAL.

POINT IV

THE JUDGE ERRED IN NOT SUPPRESSING THE DEFENDANT'S ILLEGALLY OBTAINED JAIL HOUSE CALLS, WHICH PROVIDED INADMISSIBLE [HEARSAY] AND ALSO DID NOT DEPICT [] DEFENDANT AS THE SPEAKER.

POINT V

THE STATEMENTS OF LORAIN HAWKINS SHOULD BE EXCLUDED AS INADMISSIBLE [HEARSAY].

For the reasons that follow, we affirm defendant's convictions. However, we reverse the sentences imposed on Counts One and Five and remand for resentencing on those counts.

I.

We derive the following facts from the record developed at trial. At approximately 8:30 a.m. on October 7, 2013, a woman's lifeless body was found in a wooded area near Route 206 in Tabernacle. Police responded and discovered a casino player's card in the victim's pocket bearing the name Lisa Armstrong. The

officers subsequently confirmed the identity of the victim as Lisa T. Armstrong of Trenton.

Police obtained a CDW authorizing the production of Armstrong's cell phone records. An analysis of Armstrong's call history revealed she was in contact with a phone number belonging to Lorain Hawkins multiple times between 3:30 a.m. and 4:14 a.m. on October 7, 2013. Hawkins's phone records, obtained following issuance of a second CDW, showed Hawkins was also frequently in contact with another phone number. After a third CDW was issued, police ascertained that number belonged to defendant. Notably, the phone records revealed Hawkins sent defendant a text message at 4:17 a.m. stating, "The door is open, come in[.]"

Detective Fred Goelz of the New Jersey State Police (NJSP) testified he reviewed surveillance footage from two businesses near Armstrong's home, which defendant admitted visiting in the early morning hours of October 7, 2013. Goelz testified that on the video he observed two people walking toward Armstrong's house between 4:14 a.m. and 4:18 a.m. He further observed three people leave the area between 4:32 a.m. and 4:34 a.m. and enter a parked car. One of these individuals appeared to be hunched over with her hands bound.

Armstrong's daughter, Jahyda Bennett, viewed the video and identified her mother as the person hunched over and bound, based

on her "body mass [and] the way she walked." However, the quality of the surveillance video was poor and neither Bennett nor any other witness could identify the other persons in the video.

Bennett further testified she spoke with Armstrong at approximately 7:45 p.m. on October 6. There was nothing abnormal about the conversation, and her mother gave no indication she planned to go out that evening. Bennett also knew her mother had been at a casino with Hawkins on October 4, as Armstrong had spoken to her about it. According to Bennett, Armstrong and Hawkins had met in Narcotics Anonymous and became close friends.

Bennett attempted to reach her mother on October 7, after she bought some groceries that Armstrong requested. Bennett called her mother approximately twenty times and became worried when she did not answer because Armstrong "never has her phone off" and "always answers for [her]." Bennett then went to her mother's house, where NJSP officers were already present. Bennett noticed, among other things, that multiple items were missing including cash, an iPad, camera, and jewelry worth more than $10,000.

Hawkins passed away from natural causes before defendant's trial. Her widower, Kerry Mitchell, testified Hawkins left their home around midnight on October 6, stating she was going to the casino. Mitchell woke up around 5:30 a.m. the next day and noticed Hawkins and her car were gone. He did not see Hawkins until he

returned home from work during the afternoon of October 7, and did not learn of Armstrong's disappearance until October 8.

Mitchell testified he did not know defendant, but was "familiar" with him because he was a relative of someone that Mitchell and Hawkins previously had a sexual relationship with. Mitchell also knew defendant and Hawkins were involved in a sexual relationship.

On October 11, 2013, Hawkins and defendant arrived at Mitchell's home with a letter defendant wrote in which he confessed to Armstrong's murder and exonerated Hawkins of any responsibility. They asked Mitchell to transcribe the letter due to defendant's poor penmanship and spelling. Mitchell testified he agreed to write the letter because he was frightened. He did not insert any of his own words, but was told by defendant and Hawkins what to write. Defendant, Hawkins, and Mitchell all signed the letter and Mitchell turned it over to the NJSP that day.

On October 12, 2013, defendant surrendered to police and gave a video-recorded statement. During the interview, defendant read the letter, which stated in pertinent part:

> To whom it may concern. My name is TERRANCE J. PATTERSON. I am writing this statement with a sound mind. I am not under the influence of drugs, alcohol, nor am I under the influence of any prescription medications.

. . . .

[On the morning of October 7, 2013,] I asked if [Armstrong] would take me home. She said yeah because she wanted to go out and get some coffee and cigarettes. So we headed towards (INAUDIBLE). Her pocketbook was sitting by the gearshift. I reached for the volume and her pocketbook fell over. She started gathering her things and putting them back in her pocketbook and noticed her money was . . . not there. She immediately accused me of stealing her money. I asked why would I want to steal . . . her money. And she said, "[s]omebody had to steal it and you are the only one in the car." She started calling me all types of names, screaming I'm a pussy and she was going to get her sons to fuck me up. I kept trying to explain that I did not have the money. This escalated and it did not appear as if she would calm down. I said, "[b]itch, just ride around, [Hawkins] will take me home." She started (INAUDIBLE) and still cursing and yelling. I slammed the car in park and was reaching for the keys and noticed she had pulled a gun. I saw how she handled the gun and had time to snatch the gun. I got out of the car not knowing what she would do next. At this point, I was furious. I opened the trunk, not knowing what I was looking for. There was a black bag (INAUDIBLE) and there was also duct tape. I put the bag on the ground and took the duct tape out. I walked to the side of the car (INAUDIBLE) she was still running her mouth. I snatched the door open and told her, "[s]hut the fuck up and get out of the car." I yank[ed] her out of the car and told her to turn the fuck around. I started taping her hands . . . and threw her in the back seat. I got in the driver's seat and began to drive. Her money was in between the driver's seat and I threw it in the back with her and said, "[h]ere's your fucking money." I kept driving and she kept yelling and cussing. I drove

> until I couldn't drive anymore and pulled over by some woods. I got out and went to the back of it and threw her in the passenger's side and pulled her out. (INAUDIBLE) the woods and she kept calling me pussy and other names. I threw her on the ground, pointed the gun and I shot two times. It was dark and I had no idea where it hit her at. I jumped back in the car and drove back to her house. I took the money and the cell phone and left her keys and pocketbook then I left. In no[] way, shape, or form was this[] a robbery (INAUDIBLE). This was not a set-up, actually things moved so fast that I snapped. I used her phone to text [Hawkins] and other people in her phone. I made a call to the insurance company and [Hawkins] and maybe someone else. I text[ed] or called [Hawkins] and asked if she could bring my stereo and [a] bag of clothes. I put the stuff in the house. She parked on (INAUDIBLE) in case her husband drove through. I want . . . it to be known that I liked [Armstrong] a lot. I just felt as though she was trying to rob me. Many people have been accused and I want to say I am very sorry. I have wanted to turn myself in since Tuesday. I just couldn't take it anymore. There were no other people involved although it would be better for me to have co-defendants to share my stress with but there are none. I got my driver's license, I got a job (INAUDIBLE) my own apartment. I did not plan this and never wanted it to happen.

Defendant then acknowledged his signature, along with those of Hawkins and Mitchell, at the bottom of the letter.

After detectives questioned certain inconsistencies in defendant's version of events, the following colloquy ensued:

> Q: It's [Hawkins's] car man. It's not [Armstrong's] car. [Armstrong's] car doesn't move. Give me that. It's [Hawkins's] car.

A: I want to state for the record I did not kill [Armstrong].

Q: OK. So now you didn't kill her?

A: Uh huh (negative response).

Q: Then who did?

A: Not for me to tell you.

Q: Well if you didn't kill her, why would you sit here for the last few hours and tell us you did?

Q: So why'd you tell this whole story then?

A: What story?

Q: The whole thing, the letter you wrote, or you had someone write for you. Why is, why is all that?

A: Most, that letter, most of that letter all there is true except for the part of me killing her.

Q: Well you're going to have to help us out. You're going to have to fill in the blanks here for us.

Q: So, so the whole letter's true except you didn't kill her, that's how you're changing the story now?

A: Uh huh (affirmative response).

Q: Now we're going backwards, huh?

A: No you know I just want to stick to you know what I wrote.

Q: So you're sticking with what you wrote?

A: Yeah.

Q: Which is that you killed her?

A: I didn't kill her.

Q: So what you wrote is a lie?

A: Why don't y'all stick to y'all facts. Y'all facts going to outweigh mine anyway.

Q: What's that?

A: I said y'all facts going to outweigh mine anyway.

At trial, the State introduced three audio recordings of phone calls between defendant and Hawkins while defendant was lodged in the Burlington County Jail. In the calls, defendant assured Hawkins he had not implicated her to the police, and "explained to them on numerous times that you . . . had nothing to do with this nor [were] you involved in this nor did you play any part of this." For her part, Hawkins stated: "I did not witness no murder, I did not set up no murder[.]" She lamented "[t]hey just don't want to accept I had absolutely nothing to do with this."

The State also presented cell tower information designed to link defendant to the murder scene. NJSP Detective Joseph Itri testified the phone records showed that a call from Armstrong's cell phone was picked up on a tower in Mount Holly at 4:58 a.m. on October 7, 2013. Mount Holly is located about half way between

Tabernacle and Trenton, along the route defendant would have driven at that time according to his written confession. The information was also consistent with defendant's admission that he used Armstrong's phone to make multiple calls following her murder.

II.

A.

Defendant first argues the trial court erred by failing to sua sponte instruct the jury on accomplice liability. He contends the absence of the accomplice liability charge left the jury unable to consider lesser-included offenses pursuant to State v. Bielkiewicz, 267 N.J. Super. 520, 527 (App. Div. 1993). He further contends the jury thus had no guidance to understand the elements of accomplice liability when it potentially used that theory to convict him. Because defendant did not object to the charge, we consider it under the plain error standard, Rule 1:7-2, and disregard any error or omission by the trial court "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. "To warrant reversal[,] . . . an error at trial must be sufficient to raise 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

N.J.S.A. 2C:2-6 provides in pertinent part:

> c. A person is an accomplice of another person in the commission of an offense if:
>
> (1) With the purpose of promoting or facilitating the commission of the offense; he
>
> (a) Solicits such other person to commit it; [or]
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it[.]

When the State proceeds under a theory of accomplice liability, the "court is obligated to provide the jury with accurate and understandable jury instructions regarding accomplice liability even without a request by defense counsel." Bielkiewicz, supra, 267 N.J. Super. at 527. In such a case, a "jury must be instructed that defendant 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" State v. Oliver, 316 N.J. Super. 592, 596 (App. Div. 1998) (quoting Bielkiewicz, supra, 267 N.J. Super. at 528); see also State v. Whitaker, 200 N.J. 444, 458 (2009) ("An accomplice is only guilty of the same crime committed by the principal if he shares the same criminal state of mind as the principal.") (emphasis omitted).

"[J]ury instructions on accomplice liability must include an instruction that a defendant can be found guilty as an accomplice of a lesser included offense even though the principal is found

guilty of the more serious offense." State v. Norman, 151 N.J. 5, 37 (1997). Thus, "when an alleged accomplice is charged with a different degree offense than the principal or lesser included offenses are submitted to the jury, the court has an obligation to 'carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense.'" Bielkiewicz, supra, 267 N.J. Super. at 528 (alteration in original) (quoting State v. Weeks, 107 N.J. 396, 410 (1987)).

In the absence of a request, the obligation to provide an accomplice liability instruction only arises "in situations where the evidence will support a conviction based on the theory that a defendant acted as an accomplice" and not a principal in the commission of a crime. State v. Crumb, 307 N.J. Super. 204, 221 (App. Div. 1997); see also State v. Rue, 296 N.J. Super. 108, 115 (App. Div. 1996) (finding no accomplice liability charge was warranted where the prosecution was based on "defendant's culpability . . . as a principal" and defendant maintained he "was not guilty of a crime at all"), certif. denied, 148 N.J. 463 (1997). Thus, "[w]hen the State's theory of the case only accuses the defendant of being a principal, and a defendant argues that he was not involved in the crime at all, then the judge is not obligated to instruct on accomplice liability." State v. Maloney, 216 N.J. 91, 106 (2013).

In the present case, the judge did not commit plain error by failing to sua sponte instruct the jury on accomplice liability. "Further, even if defendant had requested such a charge, the accomplice liability instruction would not have been warranted because it was not grounded in a rational basis in the trial evidence." Maloney, supra, 216 N.J. at 108. The State contended that, while Hawkins may have had some complicity in the matter, it was defendant alone who shot Armstrong. Defendant was charged in the indictment as a principal in the murder, kidnapping, and robbery, and the State presented proofs consistent with that theory. Defendant confessed in his letter, witnessed by Mitchell, that he alone was the one who shot and killed Armstrong. In defendant's jailhouse calls with Hawkins, defendant reiterated that Hawkins had no involvement with the murder, and no evidence was introduced to the contrary. As the Court concluded in Maloney, "none of the evidence presented by the State could support a jury finding that defendant was liable as an accomplice rather than as a principal." Id. at 109. See also Norman, supra, 151 N.J. at 38 (stating that an accomplice liability charge was not warranted because the evidence did not permit the jury "to conclude that defendants fired the shots or aided in the firing of the shots with anything less than homicide in mind").

Moreover, at trial, the defense was that defendant was not involved at all in the murder. Further, there is no evidence that defendant was any less complicit in the robbery and kidnapping than Hawkins, or that any lesser included offense would have been justified even if an accomplice liability charge had been given. Defendant's remaining arguments on this issue lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

B.

Defendant next argues that his convictions for robbery and felony murder predicated on robbery must be reversed because the court failed to instruct the jury on the essential element of theft. Because defendant did not object to this omission at trial, we again review for plain error. Funderburg, supra, 225 N.J. at 79.

A person is guilty of robbery if, in the course of committing a theft, attempted theft, or in the immediate flight thereafter, he or she: (1) inflicts bodily injury or uses force upon another; (2) threatens another with bodily injury or purposefully places that person in fear of immediate bodily injury; or (3) commits or threatens to immediately commit any crime of the first or second degree. N.J.S.A. 2C:15-11(a); State v. Carlos, 187 N.J. Super. 406, 412 (App. Div. 1982), certif. denied, 93 N.J. 297 (1983). Accordingly, commission of theft or attempted theft is an element

of the crime of robbery. Whitaker, supra, 200 N.J. at 459. Under our Criminal Code, "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." N.J.S.A. 2C:20-3a.

Defendant correctly points out that the model jury charge for robbery[1] includes the statutory definition of theft. He contends the court's failure to incorporate the definition of theft into the robbery charge was not harmless because "the jury was presented with evidence from which it could have found that [defendant] did not participate in the theft." We are not persuaded.

The court gave a detailed instruction to the jury on robbery, stating:

> [Defendant] is charged in the fifth count of the indictment with robbery, it being alleged that on October 7, 2013 he did, in the course of committing a theft, inflict bodily injury or use force upon Lisa Armstrong, or did threaten her with or put her in immediate fear of bodily injury while armed with a deadly weapon.
>
> The governing statute provides: A person is guilty of robbery if, in the course of committing a theft, he knowingly inflicts bodily injury, or uses force upon another or does knowingly threaten another with or purposely put another in fear of immediate bodily injury.

[1] See Model Jury Charge (Criminal), Robbery in the First Degree (2012).

The [c]ourt has previously defined the terms purposely and knowingly and deadly weapon, and they have the same meaning here.

An act is considered to be in the course of the commission of a theft if it occurs in an attempt to commit the theft, during the commission of the theft itself, or in the immediate flight after the attempt or commission of theft.

Bodily injury means any physical pain, illness or impairment of physical condition.

The word force means any amount of physical power or strength used against the victim. The force need not entail pain or bodily harm and need not leave any mark.

In order to find [defendant] guilty of robbery, the State must prove beyond a reasonable doubt the following:

One, that [defendant] was in the course of committing a theft.

Two, that while in the course of committing the theft, [defendant]: A, knowingly inflicted bodily injury upon Lisa Armstrong or B, knowingly used force upon Lisa Armstrong or C, knowingly threatened Lisa Armstrong with or purposely put her in fear of immediate bodily injury.

If the State has proved beyond a reasonable doubt all of the elements of the crime of robbery, then the verdict must be guilty.

If the State has [f]ailed to prove any element of that crime beyond a reasonable doubt, you must find [defendant] not guilty.

. . . .

> [Defendant's] conviction on the robbery charge is a predicate to any consideration of the felony murder charge. Therefore, again, if the State has failed to prove beyond a reasonable doubt the charge of robbery, then you should not consider the felony murder charge upon which it is predicated.

It is not necessary to provide a jury with a specific definition of a term the jury can plainly understand due to its own knowledge or experience. See State v. Brannon, 178 N.J. 500, 510-11 (2004) (finding the terms "force" and "violence" do not require any specialized definitions); see also State v. Belliard, 415 N.J. Super. 51, 71-74 (App. Div. 2010), certif. denied, 205 N.J. 81 (2011) (holding the trial court's failure to define "attempt" in its jury charge was not reversible error).

It is certainly the better practice to include the definition of theft in the robbery instruction, consistent with the model jury charge. However, the court's failure to do so here was not fatal. We do not view the term theft as so vague or esoteric as to lie beyond the ken of the average juror. Moreover, the jury was presented with evidence that cash, jewelry, and other personal items were taken from Armstrong's home. Given those facts, the meaning of theft was self-evident, and all the other elements of robbery were enumerated in the jury charge. On these facts, while the judge's failure to define theft for the jury was error, this

error was not sufficient to lead the jury to a result it would not have otherwise reached. R. 2:10-2.

C.

We next address the points raised in defendant's pro se supplemental brief. Having reviewed the record, we conclude these arguments warrant little discussion.

In a pretrial motion, defendant asserted various challenges to the issuance of three separate CDWs and sought to suppress the evidence derived from them. The trial judge denied the motion, reasoning:

> Hawkins and defendant [] exchanged communications at 2:15 a.m. and 4:17 a.m. on October 7, 2013. Those communications served as a catalyst for [] defendant's statement to police, and a probable aid to their identification of him as the male escorting Armstrong with her hands behind her back and placing her into Hawkins'[s] car as recorded by a video surveillance camera.
>
> Although defendant in his brief sought a Franks[2] hearing, contending that Fenkel's characterization of defendant's communications with Hawkins as "frequent" was a material misrepresentation, he eschewed a formal Franks hearing, arguing only that use of the word "frequent," as used by Fenkel in his October 9th affidavit, was a material misrepresentation which misled the court. In any event, the court finds no breach of the

[2] Franks v. Delaware, 438 U.S. 154, 170, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667, 681 (1978).

rules which govern a challenge to the issuance of a search warrant as expressed in Franks and Howery.[3] An examination of Fenkel's affidavit and his use of the word "frequent" to describe twenty-one communications or attempted communications . . . between Hawkins and defendant does not constitute a knowing misrepresentation that would mislead a court.

Defendant further asserts that Fenkel's affidavits fail to establish probable cause for the issuance of a search warrant, and even assuming probable cause existed, the State was not authorized to seize constitutionally protected cell phone information.

Probable cause has been defined as more than a naked suspicion but less than legal evidence necessary to convict. Here, the court is satisfied that probable cause abounded for issuance of all three of the CDWs. When the court issued the initial search warrant – the one for Armstrong's phone – it was aware of her identity, the approximate time and location of her death, and that her family members had provided her cell phone number to police. Unable to locate Armstrong's phone, the police sought her cell phone records for one month preceding the date of her death – an obvious beginning point in any effective investigation that might uncover evidence leading to her killer.

Examination of Armstrong's phone records revealed numerous contacts with Hawkins surrounding the [ap]proximate time of death and warranted an examination of Hawkins'[s] cell phone records that might reveal her complicity or that of others. In turn, Hawkins'[s] records revealed frequent contact with [defendant] before and after Armstrong's death. The court is satisfied that probable

[3] State v. Howery, 80 N.J. 563, 566-68, cert. denied, 444 U.S. 994, 100 S. Ct. 527, 62 L. Ed. 2d 424 (1979).

> cause for issuance of [] Hawkins'[s] and [defendant's] cell phone records existed and that the CDWs were properly issued.

Our Supreme Court has established the standard of review applicable to a trial judge's ruling on a motion to suppress:

> We are bound to uphold a trial court's factual findings in a motion to suppress provided those findings are supported by sufficient credible evidence in the record. Deference to those findings is particularly appropriate when the trial court has the opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy. Nevertheless, we are not required to accept findings that are clearly mistaken based on our independent review of the record. Moreover, we need not defer to a trial . . . court's interpretation of the law because legal issues are reviewed de novo.
>
> [State v. Watts, 223 N.J. 503, 516 (2015) (alteration omitted) (citations omitted).]

In appealing the denial of the suppression motion, defendant renews the arguments he presented to the trial court. Guided by the above standard, we discern no reason to disturb the judge's ruling, which we affirm substantially for the reasons expressed in the judge's thoughtful written opinion.

Defendant also sought to exclude admission of his conversations with Hawkins, which were recorded by prison officials while defendant was an inmate at the Burlington County Jail. Relying on State v. Fornino, 223 N.J. Super. 531, 542-48 (App. Div. 1988), the trial judge found these conversations were

lawfully recorded. Defendant's arguments to the contrary lack sufficient merit to warrant further discussion. R. 2:11-3(e)(2).

D.

Lastly, we address sentencing issues. As noted, the trial court applied the "Three Strikes Law," N.J.S.A. 2C:43-7.1a, in sentencing defendant to life imprisonment without parole on Count One for knowing or purposeful murder. The statute requires a court to impose a term of life imprisonment, with no eligibility for parole, for a third conviction of certain enumerated offenses, including N.J.S.A. 2C:15-1 (robbery). However, N.J.S.A. 2C:43-7.1a has been construed to apply only to predicate crimes of first-degree robbery. See State v. Jordan, 378 N.J. Super. 254, 258-61 (App. Div. 2005) (rejecting sentencing under N.J.S.A. 2C:43-7.1a where one of the predicate crimes was second-degree robbery).

In the present case, prior to imposing a sentence of life without parole pursuant to N.J.S.A. 2C:43-7.1a, the trial court indicated defendant had prior convictions for first-degree robbery in 1993 and 1999. However, as defendant points out, defendant's 1993 conviction was for second-degree robbery. Defendant thus argues, and the State concurs, that N.J.S.A. 2C:43-7.1a does not apply because defendant only has one prior first-degree robbery conviction. Accordingly, we vacate the sentence imposed on Count

One and remand for resentencing absent application of that statutory provision.

Additionally, although not specifically argued by defendant, our independent review of the record indicates he was convicted on Count Five of second-degree, rather than first-degree, robbery. Generally, robbery is a second-degree crime, except it is elevated to 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." N.J.S.A. 2C:15-1b.

Here, the indictment specifically alleged defendant was armed with a deadly weapon in the course of committing a theft. The jury was asked to consider only the additional element of being armed, and none of the alternative elements that would raise the crime from second-degree to first-degree robbery. The jury found the State failed to prove beyond a reasonable doubt that defendant committed the robbery while armed with a deadly weapon. Nonetheless, the court sentenced defendant to a twenty-year prison term, exceeding the ten-year maximum for second-degree offenses. We are therefore constrained to remand the matter to the trial court to correct the judgment of conviction to reflect defendant's

conviction for second-degree robbery on Count Five, and to resentence defendant accordingly.

Affirmed in part; reversed and remanded in part. Jurisdiction is not retained.

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

CLERK OF THE APPELLATE DIVISION