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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0527-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JERMAINE EASON, a/k/a JULITO
EASON and JERMAINE JULITO,

Defendant-Appellant.

Submitted April 24, 2017 – Decided May 4, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
11-08-0754.

Joseph E. Krakora, Public Defender, attorney
for appellant (Michele A. Adubato, Designated
Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Tom Dominic Osadnik,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Jermaine Eason appeals from an August 31, 2015
judgment of conviction for third-degree unlawful possession of a

handgun and from his custodial sentence. He raises the following arguments:

POINT I

CERTAIN CONDUCT BY THE PROSECUTOR WAS GROSSLY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT II

IT WAS ERROR FOR THE COURT TO FAIL TO SANITIZE THE DEFENDANT'S PRIOR CONVICTION.

POINT III

THE SENTENCE OF FIVE (5) YEARS WITH TWO AND ONE HALF (2 1/2) YEARS OF PAROLE INELIGIBILITY WAS EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED. (Not raised below).

For the reasons that follow, we affirm.

In August 2011, a Passaic County grand jury charged defendant with one count of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count one), and one count of third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count two). At trial, a jury acquitted defendant of the first count and convicted him of the second. On August 31, 2015, a judge sentenced defendant to a five-year prison term and imposed a two and one-half year period of parole ineligibility in accordance with N.J.S.A. 2C:43-6(b). The judge also ordered defendant to pay appropriate fines and assessments. Defendant appealed.

The State developed the following proofs at trial. At approximately 2:30 p.m. on March 30, 2011, Officer Frank Narvaez was off-duty and getting a haircut at a barber shop on Market Street in Paterson. As he looked out the window, he "observed a male wearing a red hooded sweatshirt" walking down Market Street towards Summer Street. The man, later identified as defendant, reached into his waistband, pulled out a large black handgun, and pointed it at a man working on his car. Officer Narvaez exited the barber shop and defendant began walking quickly towards Summer Street.

Once outside, Officer Narvaez approached the man working on his car. The man said, a "black man pointed a handgun at [me]." After speaking with the man, Officer Narvaez entered his personal vehicle, put on his police badge, and followed defendant. As he approached the Summer Street intersection, the officer observed defendant cross the street in his direction towards Park Avenue. Officer Narvaez exited his vehicle, took out his service weapon, and approached defendant. Defendant turned to face the officer when the two were approximately ten feet from each other.

Officer Narvaez announced, with his weapon drawn, "police, police, show me your hands." In response, defendant pulled out his handgun and pointed it directly at the officer as he continued to walk across the street. Fearing for his life, Officer Narvaez

discharged his firearm, but did not know whether the rounds hit defendant. Defendant began to run but continued to point his weapon at the officer. As defendant ran, he tossed his gun to the ground and then dropped to the ground himself. Defendant spread his arms and legs on the ground as Officer Narvaez placed his foot on defendant's back to hold him down until backup arrived.

The Passaic County Sheriff's Department and other law enforcement officers responded. Sheriff's Detective Jason Barbier testified he took Officer Narvaez's firearm from Paterson Police Officer Cruz. A few feet away from Officer Cruz, Detective Barbier recovered a black air gun. Detective Barbier removed the cartridge from the air gun and placed both weapons in separate boxes.

Defendant elected to testify. The court held a Sands/Brunson¹ hearing to determine the scope of the admissibility of defendant's 2010 third-degree theft conviction, for which defendant received a 737-day county jail sentence. At the hearing, defense counsel argued the conviction should have been "sanitized" because the theft charge allowed the jury to draw inferences about defendant's current weapons charges. Specifically, defense counsel believed the jury could infer defendant pointed the gun at the man working on his car in an attempt to rob him.

¹ State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993).

The judge admitted defendant's prior conviction for purposes of impeachment, and found that the theft was distinct from the weapons offenses. Accordingly, the judge declined to sanitize the conviction, but limited the description of the prior offense to "theft" rather than "theft from a person."

Defendant's testimony contradicted the State's proofs. Defendant testified he was walking to a grocery store on Market Street with his friend, Qua. During their walk, defendant encountered Luis Bonilla, someone with whom he had "problems" in the past. According to defendant, Bonilla "hopped" out of his truck and grabbed defendant by the arm. Defendant "snatched" his arm away. He feared Bonilla had a knife in his pocket because he knew him to carry knives. Although Bonilla never brandished a knife, defendant flashed the handle of a BB gun. Bonilla "stopped" and defendant put the BB gun "back in" before continuing towards Summer Street.

When defendant and Qua reached the intersection of Summer Street and Park Avenue, a white Acura drove across the sidewalk and cut them off. An unknown Spanish man, who defendant later learned was Officer Narvaez, got out of the car with a gun in hand. Defendant did not hear Officer Narvaez say anything, and did not observe a badge around the officer's neck. Defendant thought the officer was one of Bonilla's "boys." Believing he was

going to be shot, defendant ran up Park Avenue and was shot in the back of his arm. While he ran, his BB gun fell out of his pocket.² After he fell to the ground, Officer Narvaez placed his foot on defendant's back. Additional officers arrived, and defendant was transported to a local hospital for medical treatment where he remained for six days.

At trial, the prosecutor made several remarks which defendant contends deprived him of a fair trial. In her opening statement, the prosecutor said, "[w]hat is uncontested in this case [is] that defendant does not have a permit to carry this handgun and that defendant was in possession of this handgun." Defense counsel did not object. Next, the prosecutor asserted Officer Narvaez and two other law enforcement officers were "very and extremely credible witnesses." Defense counsel objected to this statement, alleging it was improper for the prosecutor to comment on the credibility of her witnesses. Defense counsel did not believe a curative instruction was an appropriate remedy and instead moved for a mistrial. In response, the prosecutor explained she intended her comment to explain the concept of credibility to the jury. She suggested the judge provide a curative instruction in lieu of declaring a mistrial.

² Defendant testified he did not have a permit to carry the BB gun.

The judge denied defendant's application for a mistrial and gave the following curative instruction:

All right. Ladies and gentlemen . . . toward the end of [the prosecutor's] opening statement, there was a comment in terms of the State calling . . . three credible witnesses. You're to disregard that comment. It is for the jury to determine. As I've already instructed you a few moments ago, you're the judges of the facts and it's you, the jury, that is to determine the credibility of witnesses That's a function of the jury. It's not a function of the [p]rosecutor in this case, so you are to disregard that comment. What the [p]rosecutor has said in opening statements, as I've already told you, is not evidence. The evidence will come from the witnesses that testify as well as other tangible evidence and written evidence that may come in through the course of the trial. And, again, with regard to . . . credibility determinations, that's your role, entirely your role, and so you're to disregard that comment.

In the prosecutor's closing statement, she argued, "Officer Narvaez, he had no interest. His actions were reviewed by another proceeding. He doesn't have an interest in the outcome of this case." Defense counsel did not object to this comment.

On appeal, defendant first contends the prosecutor's comments during her opening and closing deprived him of a fair trial. We disagree.

It is well settled that "prosecutors, as lawyers, are engaged in an oratorical profession" and given "latitude for forceful and

graphic advocacy." State v. Reddish, 181 N.J. 553, 640 (2004) (citations omitted). As such, courts afford prosecutors "considerable leeway" in opening and closing statements. State v. Timmendequas, 161 N.J. 515, 577, 587 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). Nonetheless, "prosecutors should not make inaccurate legal or factual assertions during a trial and . . . must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." Reddish, supra, 181 N.J. at 641 (quoting State v. Smith, 167 N.J. 158, 178 (2001)).

A prosecutor's comments justify reversal only when they are "clearly and unmistakably improper" and "substantially prejudice[] defendant's fundamental right to have a jury fairly evaluate the merits of his defense." Timmendequas, supra, 161 N.J. at 575 (citations omitted). In assessing whether a prosecutor's remarks deprived defendant of a fair trial, courts "consider the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they occurred." Ibid. (citing State v. Scherzer, 301 N.J. Super. 363, 433 (App. Div.), certif. denied, 151 N.J. 466 (1997)). Thus, "an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the

record and instructed the jury to disregard them." State v. Frost 158 N.J. 76, 83 (1999) (citations omitted).

We turn first to the prosecutor's characterization of her law enforcement witnesses as "very and extremely credible." This statement was improper and the prosecutor's explanation for making the improper remark is hardly credible. Nonetheless, we are unable to conclude the remark deprived defendant of a fair trial.

"A prosecutor may argue that a witness is credible but may not personally vouch for the credibility of a State witness or suggest that the witness's testimony has been 'checked out,' thereby referring to matters outside the record." Scherzer, supra, 301 N.J. Super. at 445 (quoting State v. Marshall, 123 N.J. 1, 156 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993)). See also State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993) (stating prosecutors cannot express their own beliefs regarding the truthfulness of their witness's testimony). When proper curative instructions are given, however, we "act on the belief and expectation that jurors will follow the instructions given them by the court." State v. T.J.M., 220 N.J. 220, 237 (2015) (citations omitted). Here, the trial court gave a prompt curative instruction.

In addition, defendant admitted to possessing the BB gun without a permit to carry, and the jury acquitted him of possessing

a weapon for an unlawful purpose. Defendant does not discuss how, in view of his admission and the jury's verdict, he was deprived of a fair trial.

We reach the same conclusion concerning the prosecutor's opening remark that defendant's possession of a gun was uncontested, and the prosecutor's remarks during summation that Officer Narvaez had no interest in the case or its outcome, and his actions were reviewed in another proceeding.

The prosecutor's comments concerning the officer's interest were made in response to defendant's argument "that Narvaez also has an interest and he has a bias and he testified before you and we're going to look at his testimony and we're going to carefully examine it." Defendant could not reasonably expect that the prosecutor would not respond to the attack on the officer's credibility.

The prosecutor should not have stated in her opening, before any evidence was presented, that the possessory offense was uncontested. Her comment in summation about another proceeding was equally improper. Nonetheless, defendant did not object to these comments. "Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial." Timmendequas, supra, 161 N.J. at 576 (citation omitted).

Therefore, "defendant must demonstrate plain error to prevail."
Ibid. (citation omitted).

As we previously noted, defendant admitted to the possessory offense and the jury acquitted him of possessing a weapon for an unlawful purpose. Considering defendant's admission, his failure to make timely objections, and the outcome of the trial, we conclude the prosecutor's remarks, though improper, were not clearly capable of producing an unjust result. R. 2:10-2.

We next turn to defendant's contention the trial court improperly failed to sanitize his prior third-degree theft conviction. Defendant contends the jury might infer from the circumstances surrounding his weapons charges that he was attempting to commit a theft and his weapons charges were thus similar to his prior theft conviction. Based on that reasoning, defendant argues the judge should have eliminated the substantive word "theft" when referencing his prior conviction. In raising this argument, defendant alleges the trial court failed to recognize its authority to fully sanitize his conviction. We disagree.

"Our rules of evidence allow a witness's prior convictions to be admitted for impeachment purposes despite the obvious prejudice that flows from such evidence, particularly for a criminal defendant." State v. Hamilton, 193 N.J. 255, 256 (2008);

see also N.J.R.E. 609. However, in cases where "a testifying defendant previously has been convicted of a crime that is the same or similar to the offense charged, the State may introduce evidence of the defendant's prior conviction limited to the degree of the crime and the date of the offense but excluding any evidence of the specific crime of which [the] defendant was convicted." State v. Brunson, 132 N.J. 377, 391 (1993). In other words, similar prior convictions must be "sanitized," "allowing the jury to learn only limited information about the conviction." Hamilton, supra, 193 N.J. at 257 (citation omitted). "Sanitization protects a defendant from the risk that a jury will be influenced by knowledge of the prior conviction for the same or a similar offense when determining whether to convict the defendant on the new charge." Ibid. (citation omitted).

Expanding upon the Brunson rule for prior similar convictions, the Court in Hamilton held trial courts have "discretion to consider sanitization of prior conviction evidence in any other circumstances that posed a risk of undue prejudice to a defendant." Id. at 269.

Here, the trial court acknowledged it was "within the realm of possibility" that defendant's present offense could create an inference of theft. The judge explained that he "listened to the [trial] testimony [and] didn't hear anything about a potential

robbery or theft." As a precaution, the judge nevertheless sanitized defendant's prior theft conviction to the extent it referred to a person. Thus, on direct examination, the following colloquy occurred between defendant and his attorney:

[Defense Counsel:] Now, [defendant], you were convicted of the crime of theft on July [29], 2011 and you received time served, 737 days in the Passaic County Jail, is that correct?

[Defendant:] Yes.

Because no witness suggested defendant attempted to rob Bonilla, it is difficult to conceive how jurors would have drawn an inference that defendant's weapons offenses were similar to a theft. For that reason, and for those previously explained concerning the jury's verdict, the judge's error, if any, was harmless. R. 2:10-2.

Lastly, defendant challenges his sentence as excessive and contends the trial judge abused his discretion by imposing a period of parole ineligibility under N.J.S.A. 2C:43-6(b). Defendant argues the judge unjustifiably relied upon aggravating factors three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(3); and six, the extent of defendant's prior criminal record and the seriousness of his present convictions, N.J.S.A. 2C:44-1(6).

An appellate court reviews a sentence under a deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014). Under that standard, "[a]n appellate court is bound to affirm a sentence, even if it would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. O'Donnell, 117 N.J. 210, 215 (1989) (citing State v. Jarbath, 114 N.J. 394, 400-01 (1989)).

Here, the trial judge found aggravating factor three based on defendant's prior juvenile and municipal CDS offenses, his prior indictable theft conviction, his drug use and marijuana abuse, and his failure to complete school or maintain employment. The judge found aggravating factor six because he believed defendant's present conviction was serious, "notwithstanding that it[] [involved] a BB gun." The judge also based aggravating factor six on defendant's criminal record. From the judge's thorough review of defendant's circumstances at sentencing, we find no abuse of discretion in the decision to consider aggravating factors three and six. The judge's findings are amply supported by the record.

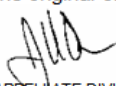
Regarding defendant's period of parole ineligibility, "[t]he sentencing court, when 'clearly convinced that the aggravating factors substantially outweigh the mitigating factors,' may

sentence a defendant to 'a minimum term not to exceed one-half of the term' allowed by the statute." State v. Case, 220 N.J. 49, 65-66 (2014) (quoting N.J.S.A. 2C:43-6(b)). In imposing such a sentence, "the court must 'specifically place on the record the aggravating factors . . . which justify the imposition of a minimum term.'" Id. at 66 (quoting N.J.S.A. 2C:44-1(f)(1)).

Here, the trial judge thoroughly explained his reasons for finding the aggravating factors, and was "clearly convinced that the aggravating factors substantially outweigh[ed] any non-existent mitigating factors." He properly exercised his discretion by imposing a minimum term that did not exceed one-half of defendant's overall custodial sentence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION