SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1014-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LASHAWN FITCH, a/k/a
LASHAWN D. FITCH,

Defendant-Appellant.

Submitted January 11, 2017 – Decided September 22, 2017

Before Judges Simonelli and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 09-07-1467.

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

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Following a jury trial, defendant Lashawn Fitch was convicted of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1 (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); first-degree robbery, N.J.S.A. 2C:15-1 (count three); and first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count four). At sentencing, the trial judge merged counts one and two into count three and count three into count four, and sentenced defendant on count four to a forty-year term of imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On appeal, defendant raises the following contentions:

POINT I

> ADMISSION OF THE TWO TEXT MESSAGES THAT REFERENCED [DEFENDANT] PURSUANT TO THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE WAS ERRONEOUS.

POINT II

> THE ADMISSION OF OTHER CRIME EVIDENCE WAS GROSSLY PREJUDICIAL AND DENIED DEFENDANT A FAIR TRIAL.

POINT III

> THE REPEATED PLAYING OF THE 2009 VIDEOTAPED STATEMENT OF IAN EVERETT CONTAINING INADMISSIBLE HEARSAY WAS

UNDULY PREJUDICIAL AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT IV

THE TESTIMONY OF DETECTIVE BALDWIN OPINING ON THE CREDIBILITY OF A WITNESS AND GUILT OF DEFENDANT WAS IMPROPER AND DEPRIVED DEFENDANT OF A FAIR TRIAL. (Not raised below).

POINT V

THE FAILURE OF THE COURT TO GIVE THE APPROPRIATE CHARGE TO THE JURY ON ACCOMPLICE LIABILITY WAS ERROR MANDATING REVERSAL.

POINT VI

DENIAL OF THE DEFENDANT'S MOTION FOR [A] NEW TRIAL WAS ERROR.

POINT VII

THE SENTENCE IMPOSED UPON THE DEFENDANT OF FORTY (40) YEARS WITH [EIGHTY-FIVE PERCENT] PAROLE INELIGIBILITY WAS EXCESSIVE AND SHOULD BE MODIFIED AND REDUCED.

POINT VIII

THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

Defendant raises the following contentions in a pro se supplemental brief:

POINT I

PROSECUTOR'S REMARKS DURING OPENING STATEMENTS DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

POINT II

TRIAL ERRORS
(Partially raised)

I. IT WAS PREJUDICIAL FOR THE COURT TO PERMIT VIDEO EXCERPTS OF IAN [EVERETT'S] MARCH 26, 2009 STATEMENT WITHOUT HOLDING A [N.J.R.E.] 104(a) HEARING AND FOR NOT INSTRUCTING THE JURY.

II. IT WAS PREJUDICIAL FOR THE TRIAL COURT IN PERMITTING VIDEO PLAY-BACK OF IAN [EVERETT'S] MARCH 26, 2009 OUT-OF-COURT STATEMENTS WITHOUT PUTTING THE REPLAY IN PROPER CONTEXT FOR THE JURY.

POINT III

JUROR TAINT (not raised below).

I. THE COURT ERRED IN NOT EXCLUDING JUROR #6 . . . AFTER SHE RECEIVED A PHONE CALL FROM A CORRECTIONAL FACILITY.

II. BECAUSE JUROR #5 . . . WITHHELD PREJUDICIAL INFORMATION ON VOIR DIRE[,] DEFENDANT WAS DENIED PEREMPTORY CHALLENGE WHICH DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT IV

JURY CHARGE ERRORS DEPRIVED [DEFENDANT OF] A FAIR TRIAL. (Not raised below).

POINT V

THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

We have considered the contentions in Points IV and VIII of defendant's initial brief and Points I, II, III, and V of his pro se supplemental brief in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Accordingly, we focus on the remaining contentions.

I.

The charges against defendant stemmed from the shooting death of Nathaniel Wiggins, a marijuana dealer. Ian Everett was the State's main witness. According to Everett, on the afternoon of March 11, 2008, he, defendant, Kenny Michael Bacon-Vaughters (Kenny-Mike), and Aron Pines (Aron) were outside Everett's home on 9th Avenue in Neptune "chillin' before [Kenny-Mike] went to work." Everett saw a car pass by with a blue pit bull inside. The occupant waved at Aron, and Aron waved back. Aron said to Everett, "that's the weed man."

At approximately 4:15 p.m., Everett and Aron were outside Everett's home when a fight erupted in a park across from the corner of 9th and Ridge Avenue. Everyone fled after the Neptune Township police arrived. Someone ran into the backyard of Everett's home. Everett went to the backyard, but saw no one there. He looked around and saw "a big" gun on the ground, which he described as a revolver or "shell catcher" or "probably like a

.45 or something crazy like that." Defendant was also in the backyard at the time. Everett told him to remove the gun from the backyard, and defendant complied.

At approximately 8:30 p.m., defendant, Everett, and Aron returned to Everett's home and were playing video games and "smoking weed." Defendant had the gun with him and shot it once while on the back roof of Everett's home. Everett told defendant and Aron to get the gun out of his home. Everett heard Aron say that he wanted to take the gun to the weed man's home to rob him. Everett also heard defendant and Aron talk "about going over there to rob, to go through [with] it." As defendant and Aron left, they asked Everett if he was coming, but he declined.

Everett testified that Aron left his home to go pick up Kenny-Mike and defendant left approximately twenty to thirty minutes later after defendant's mother told him to babysit his younger siblings. He also testified that the next morning, defendant came to his home and told him that "he heard something about what [Kenny-Mike] and them did" the night before, but did not say he was involved.

Because this testimony contradicted Everett's March 29, 2009 videotaped statement to Detective Daniel Baldwin of the Monmouth

County Prosecutor's Office, the State requested a Gross[1] hearing to determine the admissibility of the videotaped statement. In the videotaped statement, Everett said defendant and Aron left his home together, and that defendant told him the next day that Kenny-Mike knocked on the weed man's door, the weed man wrestled with Kenny-Mike, "something had happened[,]" and they got rid of the gun afterwards. On cross- and re-direct examination during the Gross hearing, Everett recanted nearly his entire videotaped statement. The judge permitted the State to play the videotaped statement to the jury during Baldwin's testimony, with inadmissible statements redacted. Defendant agreed to the redactions.

Michael Smith testified that he was a passenger in Wiggins' car when they drove by a "group of [high school] kids" on 9th Avenue and Wiggins waved to one of them. At approximately 9:00 p.m., he and Wiggins were shopping at the Walmart in Neptune when Wiggins received a phone call. As Wiggins drove Smith home, he told Smith the call was from "the kid" he had waved earlier to on 9th Avenue. Wiggins was skeptical and seemed worried because "the kid" wanted to purchase a different amount of marijuana than usual and said he had no car, when Wiggins knew he had a Honda Civic.

[1] State v. Gross, 121 N.J. 1 (1990).

Smith said to Wiggins, "if you feel something's wrong, then . . . don't go through with it."

Wiggins' girlfriend, Faith Montanino, testified that she was in the couple's apartment the evening of March 11, 2008, and saw Wiggins weighing marijuana in the bedroom. She heard a knock on the kitchen door and saw Wiggins peer out the bedroom window. Wiggins said "Oh, shit" and quickly walked to the kitchen door. She then heard "a loud noise, like a commotion almost" and heard Wiggins call her name. She walked quickly to the kitchen and saw the kitchen door ajar and Wiggins on the floor. Wiggins said, "Faith, I've been shot. Hide the weed. Call the cops." She ran around the apartment and placed all of the drug paraphernalia in a bag. She hid the bag in the trunk of her car and went back to the apartment and called 9-1-1. As she was speaking to the 9-1-1 operator, Wiggins said that Kenny-Mike shot him.

Police Officers Brett Paulus and Matthew Bailey from the Eatontown Police Department (EPD) arrived on scene less than one minute after dispatch. Paulus testified that as he approached the apartment building, Montanino rushed out crying and yelling that her boyfriend had been shot. Paulus directed Montanino towards Bailey and proceeded to the rear of the building where a stairway led to the couple's second floor apartment. As Paulus scanned the dark, wooded area behind the building for potential suspects, he

heard someone yelling for help and saw a person lying with his head outside the doorway of a second floor apartment.

Paulus proceeded up the stairway and stood next to Wiggins. Wiggins grabbed Paulus' pant leg and started to pull on it. When Paulus knelt down beside him, Wiggins said, "I'm dying, oh God, I'm dying. Kenny-Mike shot me." Paulus asked where Kenny-Mike lived, and Wiggins replied, "Neptune." Paulus questioned Wiggins about Kenny-Mike's appearance and whether he had seen a gun, but Wiggins simply repeated that Kenny-Mike shot him. Wiggins was transported to the hospital where he later died of his gunshot wounds.

The police secured the scene and began searching the exterior of the building for evidence. In the parking lot of a neighboring business, the police found a black knit glove, black knit face mask, and saliva on the ground.

Montanino eventually went to the EPD, where the police showed her a photo of Kenny-Mike. She immediately recognized him as one of Wiggins' frequent marijuana customers and told the police where he lived in Neptune.

At approximately 9:30 the next morning, Lieutenant John Cleary of the EPD drove through the housing development adjacent to Wiggins' apartment building. On Grant Avenue, which was approximately one-half mile from the crime scene, Cleary found a

black knit hat with two holes cut out for eyes and purple gloves. As Cleary was collecting the items, Susan Schmardel, who lived nearby, exited her home to walk her dog. Cleary asked Schmardel whether she had noticed the hat and gloves during any of her previous walks, and she said she had not. Schmardel said she had walked her dog along the same route at approximately 9:00 the night before, and was positive the items were not there at that time.

The evidence collected from both the parking lot adjacent to Wiggins' apartment complex and Grant Avenue, along with DNA samples from defendant, Aron, Kenny-Mike, and Aron's brother, Tahj Pines, who later became a suspect, were submitted for DNA analysis and comparison. Tahj's DNA was found on the saliva and black mask collected from the parking lot, but all four suspects were excluded as contributors of the DNA on the black glove found in the parking lot. Defendant could not be excluded as a contributor of the DNA on the purple gloves found on Grant Avenue, but his DNA was found on the black cloth hat discovered there.

The police obtained Wiggins', Aron's, and Kenny-Mike's cellphone records. Aron's cellphone records revealed he communicated with Tahj on the night of the murder. The cellphone records also revealed that in the hours preceding the murder, Aron called Wiggins at 9:09 p.m. via a cell tower in Neptune. There

were also five calls between Aron and Tahj, and two calls between Aron and Kenny-Mike, all via cell towers in Neptune or Asbury Park. Aron called Wiggins at 10:03 p.m., and Wiggins returned the call one minute later; both calls were via an Eatontown cell tower less than one mile from Wiggins' apartment. Kenny-Mike received a call at 10:04 p.m. via the same Eatontown cell tower. There was no activity on any of the cellphones between 10:07 p.m. and 10:20 p.m.

Six minutes after Montanino called 9-1-1, Kenny-Mike received a call and made two calls, all via a cell tower on Route 35 in Ocean Township between Wiggins' apartment and the suspects' homes. Between 10:32 p.m. and 10:46 p.m., there were two calls between Aron and Kenny-Mike, and three calls between Aron and Tahj; all via cell towers in Neptune or Asbury Park.

The morning after the murder, Aron called Kenny-Mike at 6:49 and 6:58. At 9:46 a.m., Kenny-Mike sent Aron the first of numerous text messages relaying updates on the homicide investigation. Two text messages referenced defendant. One stated "Ayo wats good wit fitch like he said he told delete this ryt away." The other text message stated "Fitch said they mite b cumin 4 u . . . they took him in."

II.

The State charged defendant as a co-conspirator and proffered the two text messages as statements in furtherance of the conspiracy pursuant to N.J.R.E. 803(b)(5). Defendant filed a motion to suppress, arguing there was insufficient evidence of a conspiracy. The judge denied the motion, finding Everett's statements about defendant's involvement and the black cloth hat containing defendant's DNA found on Grant Avenue were independent proof establishing a conspiracy and defendant's participation in it.

On appeal, defendant contends in Point I of his initial brief that admission of the text messages violated the hearsay rule and his right of confrontation because the conspiracy was over; the text messages were not made in furtherance of or during the course of the conspiracy; and there was no evidence of a cover-up or that he was involved in the robbery. We disagree.

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

> Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential. We are obliged to uphold the motion judge's factual findings so long as sufficient credible evidence in the record supports those findings. Those factual findings are entitled to deference because the motion judge, unlike an appellate court, has the opportunity to hear and see the witnesses

> and to have the feel of the case, which a reviewing court cannot enjoy.
>
> [State v. Gonzalez, 227 N.J. 77, 101 (2016) (citations omitted).]

In addition, we review a trial court's evidential ruling for abuse of discretion. State v. Kuropchak, 221 N.J. 368, 385-86 (2015). An abuse of discretion only arises on demonstration of "manifest error and injustice[,]" State v. Torres, 183 N.J. 554, 572 (citation omitted), and occurs when the evidence diverts jurors "from a reasonable and fair evaluation of the basic issue of guilt or innocence." State v. Moore, 122 N.J. 420, 467 (1991) (citation omitted). Applying the above standards, we discern no reason to reverse the admission of the text messages.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). Hearsay is inadmissible unless it falls within one or more of the exceptions enumerated in the evidence rules. State v. Branch, 182 N.J. 338, 348 (2005). Hearsay "admitted contrary to this State's evidentiary rules and decisional laws . . . violate[s] the Federal and State Confrontation Clauses." Id. at 353. "Both the hearsay rule and the right of confrontation protect a defendant from the incriminating statements of a faceless accuser who remains in the shadows and avoids the light of court." Id.

at 348. The exceptions to the hearsay rule "are justified primarily because the circumstances under which the statements are made provide strong indicia of reliability." State v. Savage, 172 N.J. 374, 402 (2002) (quoting State v. Phelps, 96 N.J. 500, 508 (1984)).

The co-conspirator exception to the hearsay rule, embodied in N.J.R.E. 803(b)(5), permits a statement to be admitted against a party if the statement was made while the party and declarant were allegedly participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan, even if the plan was frustrated. See Savage, 172 N.J. at 404. The rationale for the co-conspirator exception is the concept that "[p]articipation in a conspiracy confers upon co-conspirators the authority to act in one another's behalf to achieve the goals of the unlawful scheme." State v. Harris, 298 N.J. Super. 478, 487 (App. Div.), certif. denied, 151 N.J. 74 (1997). "Since conspirators are substantively liable for the acts of their co-conspirators," it follows that "they are equally responsible for statements by their confederates to further the unlawful plan." Ibid. It is well-established that the co-conspirator exception does not offend the Sixth Amendment's guarantee of a defendant's right to confront the witnesses against him. State v. Boiardo, 111 N.J. Super. 219, 229 (App. Div.), certif. denied, 57 N.J. 130

(1970), cert. denied, 401 U.S. 948, 91 S. Ct. 931, 28 L. Ed. 2d 231 (1971).

To qualify for admissibility under N.J.R.E. 803 (b)(5), the State must show that: (1) the statement was made in furtherance of the conspiracy; (2) the statement was made during the course of the conspiracy; and (3) there is "evidence, independent of the hearsay, of the existence of the conspiracy and defendant's relationship to it." Savage, supra, 172 N.J. at 402 (quoting State v. Phelps, 96 N.J. 500, 509-10 (1984)). The "nature of the hearsay should engender a strong sense of inherent trustworthiness." Phelps, supra, 96 N.J. at 511. The first two factors "reflect notions that an agent's statements are vicariously attributable to a principal." Id. at 510. The third factor "reduces the fear that a defendant might be convicted or held liable in damages solely on the basis of evidence that he has had no opportunity to impeach or refute." Id. at 510-11.

A conspiracy continues until its objective is fulfilled. State v. Cherry, 289 N.J. Super. 503, 523 (1995). If a statement is made after the conspiratorial objective is completed, it is generally not admissible under the co-conspirator exception. State v. Sparano, 249 N.J. Super. 411, 420-21 (App. Div. 1991). However, a conspiracy may continue beyond the actual commission of the object of the conspiracy if it is shown that a conspirator

enlisted false alibi witnesses, concealed weapons, or fled in order to avoid apprehension. Cherry, supra, 289 N.J. Super. at 523-24. Moreover, statements relating to past events may be admissible if they are "in furtherance" of the conspiracy and "serve some current purpose, such as to . . . provide reassurances to a co-conspirator or prompt one not a member of the conspiracy to respond in a way that furthers the goals of the conspiracy." State v. Taccetta, 301 N.J. Super. 227, 253 (App. Div. 1997).

The trial court must make a preliminary determination of whether there is independent proof of the conspiracy. N.J.R.E. 104(b). Specifically, the court must determine whether there is independent evidence "substantial enough to engender a strong belief in the existence of the conspiracy and of [the] defendant's participation." Phelps, supra, 96 N.J. at 511. The requisite independent evidence may take many different forms, "such as books and records, testimony of witnesses, or other relevant evidence. There may be a combination of different types of proof." Id. at 511. "Thus, if the hearsay evidence is corroborated with sufficient independent evidence that engenders a strong sense of its inherent trustworthiness, it is admissible under the co-conspirator exception." Savage, supra, 172 N.J. at 403.

Here, the two post-homicide text messages mentioning defendant satisfied all three factors for admissibility and did

not violate defendant's confrontation rights. Although defendant asserts the conspiracy had ended when the robbery was completed, a conspiracy may continue beyond the commission of the object of conspiracy. Cherry, supra, 289 N.J. Super. at 523-24. In Cherry, we held that statements made after a murder by a co-conspirator to his wife, explaining her alibi role, were made in the course of the conspiracy because the husband was still planning to conceal himself from detection and dispose of evidence. 289 N.J. Super. at 523-24. The conspiracy in this case continued after the initial conspiratorial object of robbing Wiggins was satisfied because the text messages show that defendant and his co-conspirators continued to collaborate about the homicide.

Moreover, the text messages satiate the remaining two prongs to qualify for admissibility pursuant to the co-conspirator hearsay exception. The text messages between Aron and Kenny-Mike were exchanged in furtherance of the conspiracy, and the exchange of messages "promoted, or [were] intended to promote, the goals of the conspiracy" by evading apprehension. State v. Farthing, 331 N.J. Super. 58, 84 (App. Div. 2000) (quoting United States v. Beech-Nut Nutrition Corp., 871 F. 2d. 1181, 1199 (2d. Cir.), cert. denied sub nom., Lavery v. United States, 493 U.S. 933, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989)). The text messages reassured Aron that defendant was abiding by their plan, and encouraged him to

destroy evidence and evade apprehension by directing him to delete the message. The text message stating "Fitch said they mite b cumin 4 u . . . they took him in" apprised Kenny-Mike that detectives had interviewed defendant and warned Kenny-Mike that investigators might be coming for him, hindering Kenny-Mike's apprehension and prosecution.

Finally, there was ample evidence independent of the text messages supporting the judge's determination that a conspiracy existed and defendant participated in it. Everett's videotaped statement described the formation of the conspiracy to commit the robbery, recounting both Aron and defendant speaking about robbing Wiggins. In addition, defendant's DNA was found on the black cloth hat recovered less than a mile from Wiggins' apartment. Defendant was similarly involved in the post-homicide conspiracy to avoid apprehension, discarding his mask during flight after the homicide, and admitting to Everett that "they got rid of the gun." Accordingly, admission of the text messages was proper.

III.

For the first time on appeal in Point II of his initial brief, defendant challenges evidence of alleged other crimes he committed by firing a gun not identified as the murder weapon under circumstances where he was not accused of being the shooter and smoking weed prior to the robbery. Because defendant did not

raise this argument at trial, we review it for plain error. R. 2:10-2; State v. Macon, 57 N.J. 325, 336 (1971). We will reverse on the basis of an unchallenged error only if it was "clearly capable of producing an unjust result." Macon, supra, 75 N.J. at 337. To reverse for plain error, we must determine there is a real possibility that the error led to an unjust result, that is, "one sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." Id. at 336.

"[E]vidence of other crimes, wrongs or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith." N.J.R.E. 404(b). However, "[s]uch evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute. Ibid.

"The threshold determination under Rule 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under Rule 404(b), or whether it is evidence intrinsic to the charged crime, and thus need only satisfy the evidence rules relating to relevancy, most importantly, Rule 403." State v. Rose, 206 N.J. 141, 179 (2011); see also State v. Sheppard, 437 N.J. Super. 171, 193 (App. Div. 2014) (holding that

if the evidence is intrinsic, "N.J.R.E. 404(b) does not apply because the evidence does not involve some other crime, but instead pertains to the charged crime").

As the Court acknowledged, the term "intrinsic" is not easy to define with precision. Rose, supra, 206 N.J. at 178. To address this difficulty, the Court adopted the test articulated in United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010), limiting intrinsic evidence to two narrow categories of evidence. Id. at 180. The first category applies to evidence that "directly proves" the charged offense. Ibid. The operative factor is whether the evidence has probative value as to the charged offense. The Court explained that "[t]his gives effect to Rule 404(b)'s applicability only to evidence of 'other crimes, wrongs, or acts.' If uncharged misconduct directly proves the charged offense, it is not evidence of some 'other' crime." Ibid. (quoting Green, supra, 617 F.3d at 248-49). The Court adopted Green's definition of the second category of intrinsic evidence, stating that "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime." Ibid. (quoting Green, supra, 617 F.3d at 249).

Evidence of defendant's conduct with the gun at Everett's home was intrinsic evidence because it directly proved the charged crimes. Defendant removed the gun from Everett's backyard and

later returned to Everett's home with it and discharged it on the back roof. Defendant and Aron discussed robbing the weed man using the gun, they left Everett's home with the gun, and the day after the homicide defendant told Everett "they got rid of the gun." Further, Everett described the gun as a "revolver" and "shell catcher," which was consistent with the testimony of the State's expert that the .38 caliber bullet recovered from Wiggins' body could have been fired from a revolver, and with evidence that no shell casings were found at the scene.

The evidence in this case indicates the gun defendant possessed and discharged mere hours before the robbery and homicide was the same gun used by his co-conspirators to commit those crimes and supports the inference that defendant allowed use of the gun to promote the conspiracy. Therefore, the evidence was admissible as intrinsic evidence because it directly proved defendant was part of the conspiracy.

There is no merit in defendant's claim that he was prejudiced by admission of evidence that he "smoked weed." Defendant did not object to this evidence or request a curative or limiting instruction, and he twice referred to it during summation.[2] Moreover, this evidence was material to facts at issue in

[2] Defendant appeared pro se at trial and was assisted by standby counsel.

determining defendant's guilt on the charged offenses, indicating that he knew Wiggins and supplied the catalyst for the formation of the robbery plan. We conclude that the complained-of error did not rise to the level of plain error.

IV.

Everett's redacted videotaped statement was played to the jury during Baldwin's testimony; certain portions were played during the prosecutor's summation; and the video was re-played to the jury in defendant's presence during deliberations in response to a jury question. After the jury resumed deliberations, defendant lodged a hearsay objection to the following statements:

> BALDWIN: What did he tell you? Take your time. I need you to think, man. Just be truthful with us.
>
> EVERETT: I'm being truthful with you.
>
> BALDWIN: Yeah, no, the story—the story is correct. I mean, the story adds up, corroborated with the . . . other information we've learned from other people we've talked to, so I know you're being truthful with us. Just take your time and think about exactly what he said to you.

As the interview concluded, the detectives said the following to Everett and his mother:

> BALDWIN: [Everett] witnessed things that led up to the homicide.

> DETECTIVE NELSON: And the information that he's given, we've heard it one, two, three times before, so it's like—
> BALDWIN: Just wanted him to be truthful with us and I'm glad, and I thank you for bringing him down. I'm glad you're being truthful with us. We know—we knew the story.
>
> EVERETT: I wish I told you earlier.

The judge overruled the objection and denied defendant's request for a limiting instruction.

Defendant contends in Point III of his initial brief that these portions of Everett's videotaped statement constituted inadmissible hearsay prohibited by State v. Bankston, 63 N.J. 263 (1973). Defendant also contends the judge erred in failing to issue a limiting instruction on the limited use of this evidence, and his confrontation rights were violated.

Defendant's untimely objection does not alter the standard of review from one for plain error. See R. 1:7-2 (requiring objection "at the time the ruling or order is made or sought"); State v. Weston, 222 N.J. 277, 294 n. 5 (2015); Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 1:7-2 (2017) (noting the need to provide the court with a basis of complaint to permit an opportunity to respond). The question therefore is whether the detectives' remarks prejudiced a substantial right of defendant and therefore were capable of producing an unjust result.

State v. Douglas, 204 N.J. Super. 265, 272-73 (App. Div.), certif. denied, 102 N.J. 378 (1985). We conclude they did not.

In Bankston, the Court concluded that both the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged. 63 N.J. at 268-69. To protect the defendant from the confrontation problems associated with such evidence, restrictions have been placed on Bankston-type testimony. An officer may explain the reason he approached a suspect or went to a crime scene by stating he did so "upon information received," Banskton, supra, 63 N.J. at 268, but the officer may not become more specific by repeating details of the crime, or implying he received evidence of the defendant's guilt, as related by a non-testifying witness. State v. Luna, 193 N.J. 202, 216-17 (2007).

The Court affirmed and reinforced the Bankston rule in State v. Branch, 182 N.J. 338 (2005). In Branch, an officer testified he had included the defendant's photograph in an array "because he had developed defendant as a suspect 'based on information received.'" Id. at 342. The Court determined the officer's testimony was inadmissible hearsay, engendering a jury that "was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime." Id. at

348. The Court noted "[b]ecause the [informant] . . . was not called as a witness, the jury never learned the basis of [the informant's] knowledge regarding defendant's guilt, whether he was a credible source, or whether he had a peculiar interest in the case." Ibid. The Court emphasized that the introduction of this "gratuitous hearsay testimony violated defendant's federal and state rights to confrontation as well as our rules of evidence." Ibid. The Court concluded by finding the violation sufficiently prejudicial, warranting reversal as plain error. Id. at 354.

The present case is distinguishable from Bankston. The complained-of statements came from a videotaped statement, not live testimony. Defendant had the videotaped statement in his possession well before trial, and also had the opportunity to request redactions. Before the videotape was played to the jury, defendant had the opportunity to view the proposed redactions, and he accepted them. The hearsay rule does not apply to facts agreed to by the parties. State v. Neal, 361 N.J. Super. 522, 534 (App. Div. 2003) (citing N.J.R.E. 101(a)(4)). Accordingly, the judge properly rejected defendant's untimely hearsay challenge. See State v. Lanzo, 44 N.J. 560, 566 (1965) (noting that "the defendant is in no position to urge prejudicial error" where he was afforded the opportunity and declined to propose redactions to an admissible statement).

In addition, there was no plain error as to the lack of a limiting instruction. Examining plain error in the Bankston context, hearsay testimony is prejudicial to the defendant when the State's case is tenuous. However, "when a case is fortified by substantial credible evidence—for example, direct identification of the defendant—the testimony is not likely to be prejudicial under the 'plain error' rule." State v. Irving, 114 N.J. 427, 448 (1989). While Everett's videotaped statement was undoubtedly the key to proving defendant's guilt, its reliability was established through independent evidence, nullifying any perceived Bankston prejudice.

Specifically, Smith testified that he and Wiggins drove by Everett's home in Neptune and Wiggins waved to Aron, corroborating Everett's statement that defendant's co-conspirator was at his home and saw Wiggins. Police Officer Marques Alston corroborated Everett's statement that a person fleeing the fight ran through his backyard and discarded a gun. Aron's cellphone records indicating that a call was made to Wiggins from the Neptune area immediately before the robbery corroborated Everett's statement that defendant and Aron talked about going to Wiggins' home. The ballistics report, noting both the absence of a shell casing on scene and that Wiggins was likely murdered with a revolver, was

consistent with Everett's statement that defendant had possession of and discharged a revolver.

The text message mentioning defendant and the police investigation established the co-conspirators' contact and collaboration with each other after the robbery and corroborated Everett's account of defendant's identification of the participants in the robbery. Finally, the physical evidence collected from the nearby parking lot containing Tahj's DNA and the hat and gloves discovered on Grant Avenue containing defendant's DNA supported Everett's explanation of the robbery. Accordingly, there was no plain error in the admission of the detectives' statements and the judge's failure to proffer a limiting instruction.

V.

Defendant contends for the first time on appeal in Point IV of his initial brief that Baldwin's testimony opining on Everett's credibility and defendant's guilt was improper and deprived him of a fair trial. Defendant relies on Baldwin's testimony on direct examination that he "did [not] believe Everett was involved in the death of . . . Wiggins."

Defendant also relies on Baldwin's testimony that Everett "was reluctant, it took him a year to be truthful about [defendant's] involvement in this homicide, so I didn't want any

harm to come to him." However, because this testimony occurred on cross-examination, it constituted invited error. Under the invited error doctrine, trial errors that "were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal[.]" State v. A.R., 213 N.J. 542, 561 (2013) (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)). "In other words, if a party has 'invited' the error, he is barred from raising an objection for the first time on appeal." Ibid. (citation omitted.) Thus, we focus on Baldwin's direct testimony that he did not believe Everett was involved in the homicide.

"[O]ne witness cannot vouch for the truth of another witness's testimony." See State v. Lazo, 209 N.J. 9, 24 (2012). A witness is not permitted to vouch for the testimonial account of another witness "because the ultimate determination of a witness's credibility falls within the exclusive domain of the jury." R.B., supra, 183 N.J. at 337.

Baldwin's testimony did not constitute improper vouching. There was no evidence whatsoever suggesting that Everett was involved in the crimes. Thus, Baldwin's testimony that he did not believe Everett was involved in Wiggins' death caused no error, let alone plain error. Baldwin's direct testimony did not

prejudice defendant, as Baldwin did not comment on defendant's truthfulness, guilt, or innocence, or Everett's credibility.

VI.

Defendant challenges the jury charge on accomplice liability for the first time on appeal in Point V of his initial brief. He argues that because the jury was charged on robbery as a lesser-included offense of armed robbery, the judge erred in charging Model Jury Charge (Criminal), "Liability for Another's Conduct" (N.J.S.A. 2C:2-6) (1995) Charge #1 - Where defendant is charged as accomplice and jury does not receive instruction on lesser included charges (Charge #1). Defendant argues the judge should have charged Model Jury Charge (Criminal), "Liability for Another's Conduct" (N.J.S.A. 2C:2-6) (1995) Charge #2 - "Where defendant is charged as accomplice and jury is instructed as to lesser included charges" (Charge #2).

At the charge conference, defendant requested an accomplice liability charge to address the lesser-included offense of "accessory after the fact." Defendant never requested Charge #2. In denying the request, the judge explained that complicity was a theory of liability, not a charge itself, and therefore "accessory after the fact" could not be a lesser-included offense of the accomplice liability theory. Defendant subsequently approved all the jury charges given in this case.

"Appropriate and proper jury charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). "The trial court must give '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 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "Thus, the court has an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party." Ibid. (quoting Reddish, supra, 181 N.J. 613). "Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." Ibid. (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)).

When a defendant fails to object to an error regarding jury charges, we review for plain error. State v. Funderburg, 225 N.J. 66, 79 (2016). "Under that standard, we disregard any alleged error [in the charge] 'unless it is of such a nature as to have been clearly capable of an unjust result.'" Ibid. (quoting R. 2:10-2). "The mere possibility of an unjust result is not enough. To warrant reversal . . . an error [in the charge] must be sufficient to raise 'reasonable doubt . . . as to whether the

error led the jury to a result it otherwise might not have reached.'" Ibid. (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

"When a defendant might be convicted as an accomplice, the trial court must give clear, understandable jury instructions regarding accomplice liability." State v. Walton, 368 N.J. Super. 298, 306 (App. Div. 2004). "[A] principal and accomplice, although perhaps guilty for the same guilty act, may have acted with different or lesser mental states, thus giving rise to different levels of criminal liability." State v. Latney, 415 N.J. Super. 169, 174 (App. Div. 2010) (quoting State v. Ingram, 196 N.J. 23, 41 (2008)). "[W]hen an alleged accomplice is charged with a different degree offense than the principal or lesser included offenses are submitted to the jury," the court must carefully impart to the jury the distinctions between the specific intent required for the offense. State v. Bielkiewicz, 267 N.J. Super. 520, 528 (App. Div. 1993).

We have extended Bielkiewicz to cases involving robbery. Where the jury is instructed on both accomplice liability and the lesser-included offense of robbery, the jury must be told that "an accomplice who does not have a shared purpose 'to commit a robbery with a weapon' is guilty of robbery—not armed robbery." State v. Whitaker, 200 N.J. 444, 459 (2009) (quoting State v. Weeks, 107

N.J. 396, 405 (1987)). Thus, the judge here should have "additionally charged the jury according to Bielkiewicz's mandate." Ingram, supra, 196 N.J. at 41.

However, the error was not sufficient to raise reasonable doubt as to whether it led the jury to a result it otherwise might not have reached. In Ingram, the trial court did not properly instruct the jury under Bielkiewicz that the defendants alleged to be accomplices to a robbery could be found guilty of the lesser-included offense of theft. Ingram, supra, 196 N.J. at 36-37. Nonetheless, our Supreme Court reinstated the robbery convictions, holding as follows:

> [W]here the indictment substantively charged the defendant with both the greater and lesser-included offenses, and the trial court properly instructed the jury in respect of each, the evil Bielkiewicz seeks to guard against—that is, that the jury could have found that one or more of the defendants were guilty of robbery while also finding that one or more of the defendants were guilty only of the lesser-included offense of theft—does not pose the same risk. We therefore conclude that it was not reversible error when the trial court instructed the jury on the elements of the offenses of robbery and theft, together with the elements required for accomplice liability, without also specifically charging that [o]ur law recognizes that two or more persons may participate in the commission of an offense but each may participate therein with a different state of mind" and that [t]he liability or responsibility of each participant for any ensuing offense is

> dependent on his/her own state of mind and not on anyone else's.
> [Id. at 40 (quoting Charge #2).]

Here, defendant asserts that even if he participated in the robbery, he could have been unarmed and unaware that his co-defendants were armed. He avers that the judge's accomplice liability charge failed to differentiate between second-degree robbery and first-degree robbery, where an actor "is armed with, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b). However, applying the Ingram principles, defendant has failed to show prejudice. The judge properly instructed the jury on first- and second-degree robbery. Moreover, although the indictment only charged defendant with first-degree robbery, the verdict sheet gave the jury the option of convicting him of either first- or second-degree robbery. Thus, the Bielkiewicz error here "was not reversible error." Ingram, supra, 196 N.J. at 40.

Other factors support this conclusion. Defendant was not tried with his co-defendants. While "[t]he fact defendant was tried alone is not dispositive," State v. Franklin, 377 N.J. Super. 48, 57 (App. Div. 2005), that fact makes it a more "remote possibility that [the jurors] were distracted from their task by a conclusion that the principal had possessed a more culpable intent than the accomplice." State v. Norman, 151 N.J. 5, 39

(1997). In addition, defendant maintained through this matter that he was not involved at all in the robbery. While this does not "eliminate[] the possibility that a faulty accomplice liability charge could have prejudiced him," State v. Cook, 300 N.J. Super. 476, 488 (App. Div. 1996), it does reduce the likelihood. Where "a defendant argues that he was not involved in the crime at all," that helps to show the "defendant suffered no prejudice" from a failure to instruct the jury on accomplice liability under Bielkiewicz. State v. Maloney, 216 N.J. 91, 105-06, 109-10 (2013). As we have held:

> Even if the judge should have instructed the jury that it could convict defendant of the lesser included offense of second degree robbery as [an] accomplice if it found that defendant's purpose was only to participate in the robbery, and not to commit armed robbery, the failure to give a Bielkiewicz charge is not plain error . . . [if] there was no evidence presented that the principal may have acted with a different purpose than the accomplice.
>
> [State v. Oliver, 316 N.J. Super. 592, 597 (App. Div. 1998), aff'd, 162 N.J. 580 (2000).]

Considering the totality of the circumstances, including the entirety of the jury charges, the strength of the State's case, the nature of the defense, and the verdict sheet, we conclude that defendant failed to show the omission of the Bielkiewicz language from the accomplice liability charge was not "clearly capable of

producing an unjust result." R. 2:10-2. The absence of prejudice is confirmed by defendant's failure to request a Bielkiewicz charge or object to the charge given.

VII.

Relying on State v. Gonzalez, 444 N.J. Super. 62 (App. Div.), certif. denied, 226 N.J. 209 (2016), defendant contends for the first time on appeal in Point IV of his pro se supplemental brief that the use of the phrase "and/or" in the jury charges for first- and second-degree robbery, accomplice liability, and felony murder rendered the charges impermissibly ambiguous, generating uncertainty that the jury was unanimous in finding the elements of these crimes. We disagree.

In Gonzalez, the defendant was charged as a co-conspirator and accomplice with robbery and three counts of aggravated assault. 444 N.J. Super. at 73. We found error in the jury charge on conspiracy and accomplice liability because the charge referred to "robbery and/or aggravated assault" when referring to the substantive crimes the co-defendants were alleged to have committed for which the defendant was to be considered accountable. Id. at 73-75. We explained the critical flaw in the charge as follows:

> [T]he nature of the indictment required that the jury decide whether defendant conspired in or was an accomplice in the commission of

> a robbery, or an aggravated assault, or both. By joining (or disjoining) those considerations with "and/or" the judge conveyed to the jury that it could find defendant guilty of either substantive offense — which is accurate — but left open the possibility that some jurors could have found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery. In short, these instructions did not necessarily require that the jury unanimously conclude that defendant conspired to commit or was an accomplice in the same crime. Such a verdict cannot stand.
>
> The jury was also told that "to find the defendant guilty of committing the crimes of robbery and/or aggravated assault charges, the State must prove [among other things] that the co-defendant] committed the crimes of robbery and/or aggravated assault." Assuming the "and/or" in this instruction was interpreted as being a disjunctive, it is entirely possible the jury could have convicted defendant of both robbery and aggravated assault even if it found [the co-defendant] committed only one of those offenses, i.e., the jury was authorized, if it interpreted "and/or" in this instance as "or," to find defendant guilty of robbery because it was satisfied the State proved that [the co-defendant] committed an aggravated assault.
>
> [Id. at 75-77 (citations omitted).]

The phrase "and/or" is used repeatedly in Charge #1. The judge's accomplice liability charge mirrored Charge #1 as follows, in pertinent part:

> So now I'm going to talk to you about accomplice liability. Now this is liability

for another's conduct. It's called accomplice liability.

The State alleges that the defendant . . . is legally responsible for the criminal conduct of co-defendants Kenneth Bacon-Vaughters, Aron Pines and/or Tahj Pines in violation of the law which reads in pertinent part as follows:

A person is guilty of an offense if . . . it is committed by his own conduct or the conduct of another person for which he is legally accountable, or both.

A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of an offense. A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense he, A, solicits such other persons to commit it and/or B, aids or agrees or attempts to aid such other persons in planning or committing it. This provision of the law means that not only is the person who actually commits the criminal act responsible for it, but one who is legally accountable as an accomplice is also responsible.

Now, this responsibility as an accomplice may be equal and the same as he who actually committed the crimes or there may be responsibility in a different degree, depending on the circumstances as you find them to be. I will further explain this distinction in a moment.

In this case, the State alleges that the defendant . . . is equally guilty of the crimes committed by co-defendants Kenneth Bacon-Vaughters, Aron Pines and Tahj Pines, because he acted as their accomplice with the purpose that the specific crimes charged be committed.

In order to find the defendant . . . guilty of the specific crimes charged, the State must prove beyond a reasonable doubt each of the following elements:

That co-defendants Kenneth Bacon-Vaughters, Aron Pines and/or Tahj Pines committed the crimes of armed robbery, robbery, felony murder or possession of a firearm for an unlawful purpose; that the defendant . . . solicited the co-defendants Kenneth Bacon-Vaughters, Aron Pines and/or Tahj Pines to commit and/or did aid or agree or attempt to aid them in planning or committing the crimes; three, that the defendant['s] . . . purpose was to promote or facilitate the commission of the aforesaid crimes; and four, the defendant . . . possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.

Remember that one acts purposely with respect to his conduct or a result thereof, if it is his conscious object to engage in conduct of the nature or to cause such a result.

. . . .

If you find that defendant . . . with the purpose of promoting or facilitating the commission of the crimes solicited co-defendant Kenneth Bacon-Vaughters, Aron Pines and/or Tahj Pines to commit them, or aided, or agreed or attempted to aid them in planning or committing them, then you should consider [defendant] as if he committed the crimes.

<u>In this case, accomplice liability status should be considered separately for the crimes of armed robbery, robbery, felony murder, and possession of a . . . firearm for [an] unlawful purpose</u>.

. . . .

An accomplice may be convicted of proof of the commission of a crime or of his complicity therein, even though the person who is claimed [to have] committed the crime has not been prosecuted or has been convicted of a different offense or degree of offense, or has immunity from prosecution or conviction or has been acquitted.

. . . .

In order to convict the defendant as an accomplice to the crimes charged, you must find the defendant . . . had the purpose to participate in that particular crime. He must act with the purpose of promoting or facilitating the commission of the substantive crimes with which he is charged. It is not sufficient to prove only that the defendant . . . had knowledge that other person or persons were going to commit the crimes charged. The State must prove that it was defendant['s] . . . conscious object that . . . the specific conduct charged be committed.

In sum, in order to find the defendant . . . guilty of the crime of accomplice to commit armed robbery, robbery, felony murder. possession of a . . . firearm for [an] unlawful purpose, the State must prove each of the following elements beyond a reasonable doubt:

That co-defendant Kenneth Bacon Vaughters, Aron Pines and Tahj Pines committed the crimes of armed robbery, robbery, felony murder and possession of [a] firearm for [an] unlawful purpose; that defendant solicited . . . them . . . to commit them and/or did aid or agree or attempt to aid the co-defendants Kenneth Bacon-Vaughters, Aron Pines and/or Tahj Pines in planning or committing [the] crimes; three, defendant['s] . . . purpose was

> to promote or facilitate the commission of the crimes, meaning armed robbery, robbery, felony murder or possession of [a] firearm for [an] unlawful purpose; and four, that defendant . . . possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal acts.
>
> I remind you again as to the charges of armed robbery, robbery, felony murder and possession of [a] weapon for [an] unlawful purpose to consider the accomplice charge separately.
>
> . . . .
>
> As I previously instructed, any verdict rendered must be unanimous, meaning all [twelve] jurors must agree as to the finding of guilty or not guilty.
>
> [(Emphasis added).]

Unlike Gonzalez, the charge here did not connect the substantive crimes of defendant's co-defendants with "and/or." Rather, the jury was charged that to find defendant guilty as an accomplice, the State must prove: (1) the co-defendants committed the crimes of armed robbery, robbery, felony murder or possession of a firearm for an unlawful purpose; (2) defendant's purpose was to promote or facilitate the commission of the crimes; and (3) defendant possessed the criminal state of mind required to be proved against the person who actually committed the crimes. The charge adequately instructed the jury that it should consider defendant's accomplice liability status separately for the crimes

of armed robbery, robbery, felony murder, and possession of a weapon for an unlawful purpose, and determine whether defendant had the purpose to participate in that particular crime. We discern no plain error in use of the phrase "and/or" in the accomplice liability charge.

We also discern no plain error in use of the phrase "and/or" in the first- and second-degree jury charges. The judge charged the jury on first- and second- degree robbery as follows, in pertinent part:

> A section of our statute provides that robbery is a crime of the second degree, except that armed robbery is a crime of the first degree if the actor, A, purposely attempted to kill anyone and/or B, purposely inflicted or attempted to inflict bodily injury and/or C, was armed with or threatened the immediate use of a deadly weapon.
>
> . . . .
>
> [I]f you find 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 also find the State has failed to prove beyond a reasonable doubt as to whether, A, defendant purposely attempted to kill Nathaniel Wiggins and/or B, defendant purposely inflicted or attempted to inflict serious bodily injury upon Nathaniel Wiggins
> and/or C, defendant was armed with, or used or threatened immediate use of a deadly weapon at the time of commission of the robbery, then you must find the defendant . . . guilty of robbery in the second degree.

> If you find the State has proven beyond a reasonable doubt that defendant, while in the course of committing a theft, A, purposely attempted to kill Nathaniel Wiggins and/or B, purposely inflicted or attempted to inflict serious bodily injury upon Nathaniel Wiggins and/or C, was armed with, or used or threatened the immediate use of a deadly weapon, then you must find the defendant . . . guilty of robbery in the first degree.
>
> [(Emphasis added).]

Defendant argues that the charge was impermissibly ambiguous, generating uncertainty the jury was unanimous in finding the elements of these two crimes.

A unanimity instruction requires unanimous agreement as to each element of the offense. State v. Gentry, 183 N.J. 30, 33 (2005). Ordinarily, a general jury instruction requiring unanimity suffices in directing the jury that it must unanimously agree on the specific predicate of a guilty verdict. State v. Cagno, 211 N.J. 488, 516-17 (2012). Here, the judge instructed the jury on unanimity as follows:

> The verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means all of you must agree if the defendant is guilty or not guilty on each charge.
>
> . . . .
>
> Now, I'll talk to you just again about unanimous verdict. I've mentioned that a few times. You may return on each crime charged a verdict of either not guilty or guilty. Your

> verdict, whatever it may be as to each crime charged, must be unanimous. Each of the twelve members of the deliberating jury must agree as to the verdict.

In some circumstances, a general charge of unanimity creates the possibility of jury confusion or that a conviction may occur as a result of different jurors concluding the defendant committed conceptually different acts. State v. Parker, 124 N.J. 628, 641 (1991), cert. denied, 503 U.S. 939, 112 S. Ct. 1483, 117 L. Ed. 2d 625 (1992). In those circumstances, where danger of a fragmented verdict exists, a specific unanimity instruction is required. Id. at 641-42. These circumstances include:

> where (1) a single crime could be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or marginally related to each other; (4) the indictment and proof at trial varies; or (5) there is strong evidence of jury confusion.
>
> [Cagno, supra, 211 N.J. at 517 (citation omitted).]

A specific unanimity charge was not necessary as none of these circumstances existed in this case. The State proceeded on a single factual and legal theory of defendant's guilt. The underlying facts to support either element A (defendant purposely attempted to kill Wiggins), or B (defendant purposely inflicted

or attempted to inflict serious bodily injury upon Wiggins),[3] were not very complex, and the allegations of the counts constituted parts of a single unified theory. Further, there was no evidence of jury confusion. The judge instructed the jury as to what evidence to consider when deliberating each charge, and the jury never sought clarification or expressed uncertainty regarding the execution of its fact-finding duties. See State v. Gandhi, 201 N.J. 161, 193-94 (2008).

Despite the judge's use of the phrase "and/or," the charge required the jury to unanimously determine whether defendant purposely attempted to kill Wiggins or purposely inflicted or attempted to inflict serious bodily on Wiggins. Thus, the jury could find defendant intended to inflict serious bodily injury on Wiggins, which is a component of an attempt to kill, or that defendant attempted to kill Wiggins. Both distill into a unanimous jury verdict.

Lastly, the judge instructed on felony murder in pertinent part as follows:

> Criminal homicide constitutes murder when it is committed when the actor, either acting alone or with one or more other persons, is engaged in the commission of or

[3] There was no evidence to support a finding on element C (defendant was armed with, or used or threatened the immediate use of a deadly weapon), which eliminates any possibility of a less-than-unanimous jury finding.

> attempt to commit or flight after committing or attempting to commit armed robbery and/or robbery, and in the course of such crime or the immediate flight therefrom, any person causes the death of a person other than one of the participants.
>
> [(Emphasis added).

Use of the phrase "and/or" in the charge was not plain error because unanimity was not required on the issue of whether defendant's predicate felony was robbery or armed robbery. N.J.S.A. 2C:11-3(a)(3) provides that "criminal homicide constitutes murder when . . . [i]t is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery[.]" Because robbery is a lesser-included offense of armed robbery, a jury concluding beyond a reasonable doubt that the defendant was guilty of armed robbery necessarily also found him guilty of robbery. Here, the jury unanimously found defendant guilty of armed robbery. Thus, regardless of the use of the phrase "and/or" in the charge, the jury here necessarily found defendant guilty of robbery, a qualifying predicate felony for felony murder.

VIII.

Defendant contends in Point VII of his initial brief that his forty-year sentence is excessive. He argues he had no prior

record, was seventeen years old at the time of the homicide, was not the shooter, and the shooter received a forty-year sentence. Defendant also argues that State v. Zuber, 227 N.J. 422 (2017) compels a remand for re-sentencing because he was a juvenile at the time of the murder.[4]

At sentencing, the judge found aggravating factor N.J.S.A. 2C:44-1(a)(3), "[t]he risk that the defendant will commit another offense," based on defendant's pending weapons and possession charges. The judge also found aggravating factor N.J.S.A. 2C:44-1(a)(9), "[t]he need for deterring the defendant and others from violating the law," emphasizing the national epidemic of gun violence in general, and the pervasive problem of gun violence in Asbury Park and Neptune specifically.

The judge found mitigating factor N.J.S.A. 2C:44-1(b)(11), that defendant's imprisonment would entail excessive hardship to himself and his young son. The judge also considered defendant's age at the time of the offense and mental health issues. The judge concluded the aggravating factors substantially outweigh the single mitigating factor.

Our review of a sentence is limited. State v. Miller, 205 N.J. 109, 127 (2011). Our basic responsibility is to assure that

[4] The Court decided Zuber after defendant's sentencing.

the aggravating and mitigating factors found by the sentencing judge are supported by competent, credible evidence in the record. Ibid. As directed by the Court, we must determine whether:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [State v. Fuentes, 217 N.J. 57, 70 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

We review a judge's sentencing decision under an abuse of discretion standard. Ibid.

We discern no abuse of discretion in defendant's sentence. The judge did not violate the sentencing guidelines, and the record amply supports his findings on aggravating and mitigating factors. The sentence is clearly reasonable and does not shock our judicial conscience.

Further, Zuber is inapplicable. In Zuber, the court sentenced the juvenile defendant to an aggregate 110-year sentence with fifty-five years of parole ineligibility. 227 N.J. at 428. The Court extended the United States Supreme Court's decision in Miller v. Alabama, 576 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) to juvenile offenders who were subject to life-without-parole

sentencing, sentenced to "the practical equivalent of life without parole," and subject to "multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life." Id. at 446, 448. In this case, defendant received a forty-year sentence with a thirty-four-year parole bar, and will be eligible for parole at the age of fifty-three. Unlike in Zuber, defendant's sentence is not a life sentence or its practical equivalent.

Affirmed.