SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1478-13T2
A-3626-13T2
A-5242-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RENANDO SHEFFIELD, a/k/a
RENANDO SHEFIELD, a/k/a
RENALDO SCHEFFIELD,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JARRELL BORDEAUX, a/k/a
JERRELL BORDEAUX,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARC RAINEY, a/k/a
MARC MCCULLUM,

Defendant-Appellant.

Submitted December 22, 2016 – Decided March 28, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 12-12-1879.

Joseph E. Krakora, Public Defender, attorney for appellant Renando Sheffield (William Welaj, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Jarrell Bordeaux (Richard Sparaco, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Marc Rainey (Michael Confusione, Designated Counsel, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Elizabeth R. Rebein, Assistant Prosecutor, of counsel and on the brief).

Appellant Renando Sheffield filed a pro se supplemental brief.

PER CURIAM

Defendants Renando Sheffield, Jarrell Bordeaux, and Marc Rainey were tried jointly and convicted of third-degree receiving stolen property and disorderly person's possession of burglary tools. Bordeaux and Rainey appeal from the judgments of conviction entered by the trial court on October 18, 2013, and Sheffield appeals from the judgment of conviction entered October 24, 2013. We address all three appeals in this opinion. For the reasons that follow, we affirm the convictions of all three defendants.

We discern the following facts from the record. In September 2012, Detective Joseph Costello from the Morris County Prosecutor's Office was investigating Bordeaux as a possible suspect in a burglary. Based on information he received during the investigation, Costello expected Bordeaux to return to New Jersey from North Carolina in a rented, white Dodge Caravan. On or about October 23, 2012, Costello surveilled Bordeaux who was staying at a hotel in Elizabeth and driving a white Dodge Caravan with North Carolina plates. Costello obtained controlled data warrants (CDWs) to install a global positioning system (GPS) device on the van and to monitor Bordeaux's cell phone. On October 25, 2012, Detectives Costello and Jan-Michael Monrad followed Bordeaux, Akeem Boone, and an unidentified third man as they drove the van to a restaurant and eventually, to a private residence in Greenwich, Connecticut, where it stopped around 8:00 p.m.

Costello and Monrad believed Bordeaux and Boone were burglarizing the Greenwich residence and notified their superior officer, Sergeant Brian Keane, who contacted the Greenwich police department. Costello and Monrad followed the van to Englewood, New Jersey, after it left Greenwich at 8:27 p.m. While in route to Englewood, the Greenwich police department notified Costello a burglary occurred at the Greenwich residence, and a large safe had been stolen.

Robert Hastu testified he was sleeping in a detached two-story garage in Englewood when Sheffield arrived. Sheffield was wearing a red hooded sweatshirt, and he gave Hastu twenty dollars to leave for twenty minutes. After a brief stop, around 9:24 p.m., the van and its occupants arrived at the garage. When Hastu came back, he heard banging coming from the garage and saw a white van parked in front. Hastu attempted to enter the garage but was told to return later.

Costello and Monrad arrived at 9:41 p.m. and notified local police. The detectives were surveilling the van and garage when they heard the ringing of metal on metal. Costello believed the noise was due to individuals attempting to force the safe open. Monrad and Costello did not know how many people were in the garage. While the contents of the safe were also unknown, the detectives feared it might contain firearms. The detectives were aware an active arrest warrant existed for Boone based on narcotics and weapons-related charges. The detectives and Englewood police decided to surround the garage.

At 10:35 p.m., the detectives and several officers assembled on the property. The white van was parked in front of the garage with the motor running. Officer Timothy Barrett of the Englewood Police Department observed Jamelle Singletary sitting in the driver's seat of the van. Singletary ran when he saw the police.

Barrett chased him on foot before apprehending him and returning to the garage. Hastu was standing near the front of the van, and he attempted to flee on foot before he was apprehended. Both men were arrested.

Barrett and Costello entered the garage and saw Boone lying on the floor behind the safe, Rainey sitting on a couch with his hood pulled over his head, and Bordeaux hiding behind a mattress. The safe was in the middle of the garage, partially covered by a blanket. Screwdrivers, knifes, gloves, a cell phone, and a pair of scissors were in plain sight. Rainey, Bordeaux, and Boone were arrested.

After securing the scene, the officers exited the building and applied for a search warrant for the garage. Around the same time the officers were securing the garage, but still waiting for the search warrant, Englewood Officer Byron Aguayo spotted Sheffield walking nearby wearing a red hooded sweatshirt. Upon seeing the police, Sheffield quickly changed direction. Aguayo ordered Sheffield to stop, but Sheffield ignored him and ran into the adjacent apartment building.

Another police officer followed Sheffield into the building and rang doorbells to the apartments. The officers were

voluntarily let into an apartment occupied by resident J.G.[1] The officers told J.G. they were looking for an individual in a red hooded sweatshirt. One officer saw a red hooded sweatshirt on the couch near the bedroom. Sheffield emerged from the bedroom and told officers he had been in the apartment for "a while," and he had no plans to leave. The officers returned later to question Sheffield about the safe, but Sheffield had left the apartment.

On December 20, 2012, Sheffield, Rainey, Bordeaux, Boone, Singletary, and Hastu were charged with third-degree receiving stolen property in violation of N.J.S.A. 2C:20-7. Boone, Singletary, and Hastu entered into plea agreements.

Prior to trial, the court denied several motions filed by Sheffield, Rainey, and Bordeaux. Specifically, the court denied defendants' requests for a Frye[2] hearing or an order requiring expert testimony for the admission of GPS evidence, the suppression of evidence seized from the garage, and the suppression of evidence related to CDWs. The court further rejected defendants' claims they were prejudiced due to the late production of discovery and denied Sheffield's motion to suppress evidence obtained from a

[1] We use initials to protect the identity of witnesses.

[2] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

warrantless entry into J.G.'s apartment.

Sheffield, Rainey, and Bordeaux were tried before a jury which found all three defendants guilty of third-degree receiving stolen property on July 24, 2013.[3] On October 11, 2013, the court granted the State's motion for an extended term sentence for Rainey, denied his motion for a new trial, sentenced him to a ten-year prison term with a four-year period of parole ineligibility, and imposed a six-month concurrent sentence for possession of burglary tools.

The judge granted the State's extended term motion for Bordeaux, denied his motion for a new trial, and sentenced him to an eight-year prison term with a four-year period of parole ineligibility and a six-month concurrent term for possession of burglary tools.

On October 18, 2013, the court granted the State's motion for an extended term for Sheffield, denied his motion for a new trial, and sentenced him to an eight-year prison term with a four-year period of parole ineligibility, and a six-month concurrent term for possession of burglary tools.

These appeals followed. We address each defendant in turn.

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[3] Afterward, the court observed each defendant had pending municipal complaints for possession of burglary tools and requested briefs from each attorney regarding the charges. The court subsequently found all three guilty.

I.

We direct our attention first to the appeal of defendant Sheffield. He raises the following arguments:

> POINT I.
> THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION TO SUPPRESS THE WARRANTLESS SEARCH OF THE GARAGE INHABITED BY ONE OF THE CO-DEFENDANTS LOCATED AT [] IN ENGLEWOOD IN WHICH A 600 POUND SAFE AND RELATED ITEMS WERE OBSERVED AND EVENTUALLY SEIZED PURSUANT TO A SEARCH WARRANT WHICH WAS SUBSEQUENTLY ISSUED.
>
> A. FACTUAL BACKGROUND.
>
> B. THE RELEVANT CIRCUMSTANCE OF THE PRESENT CASE DID NOT JUSTIFY THE WARRANTLESS SEARCH AND SEIZURE CONDUCTED BY LAW ENFORCEMENT.
>
> POINT II.
> THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS A RESULT OF THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT THE GUILTY PLEAS ENTERED INTO BY TWO CO-DEFENDANTS COULD NOT BE USED IN DETERMINING THE DEFENDANT'S CRIMINAL CULPABILITY TO THE SAME CHARGE (NOT RAISED BELOW).
>
> POINT III.
> THE TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S MOTION TO SUPPRESS RELATING TO THE WARRANTLESS ENTRY BY POLICE INTO THE APARTMENT AT [].
>
> POINT IV.
> THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A NEW TRIAL ON THE BASIS THAT THE PROSECUTOR'S SUMMATION EXCEEDED THE BOUNDS OF PROPRIETY (PARTIALLY RAISED BELOW).

POINT V.
THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE; WHILE THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A DISCRETIONARY EXTENDED TERM.

Defendant raised the following issues in a pro se supplemental brief:

POINT VI.
THE FORGED SIGNATURES DID NOT CONSTITUTE A TRUE BILL WITHIN THE INDICTMENT.

POINT VII.
THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION AND PERMITTING THE STATE TO ELICIT EXPERT TESTIMONY WITHOUT THE UTILIZATION OF EXPERTS IN THEIR RESPECTIVE FIELDS.

POINT VIII.
THE CUMULATIVE EFFECT OF THE ERRORS IN THIS MATTER WARRANTS A NEW TRIAL WHERE THEY WERE NOT HARMLESS AND WAS PREJUDICIAL TO DEFENDANT IN RECEIVING A FAIR TRIAL.

Sheffield argues the court erred by denying his motion to suppress the safe and burglary tools observed during the warrantless entry of the garage and seized after the issuance of a warrant. The court found exigent circumstances existed to justify the warrantless entry into the garage to apprehend the suspects, and the police waited to obtain a search warrant before searching the garage.

When we review a motion to suppress evidence from a warrantless search, we determine if the trial court's findings were supported by evidence in the record and defer to the trial

court's ability to observe witnesses and its feel of the case. State v. Alvarez, 238 N.J. Super. 560, 564 (App. Div. 1990).

A search conducted without a warrant can be valid if it is an exception to the general rule prohibiting warrantless searches. State v. Johnson, 193 N.J. 528, 552 (2008). The existence of exigent circumstances is one such exception. See ibid. To find exigent circumstances, the court should consider

> the degree of urgency and the amount of time needed to obtain the warrant; the reasonable belief that the evidence was about to be lost, destroyed, or removed from the scene; the severity or seriousness of the offense involved; the possibility that a suspect was armed or dangerous; and the strength or weakness of the underlying probable cause determination.
>
> [State v. Laboo, 396 N.J. Super. 97, 104 (App. Div. 2007) (citation omitted).]

Sheffield contends no exigent circumstances existed to justify entry into the garage and argues the police should have waited and obtained a telephonic warrant before entering. We disagree.

Exigent circumstances necessitate immediate police action. State v. De La Paz, 337 N.J. Super. 181, 195-97 (App. Div. 2001). Here, the officers did not know how many people were in the garage; however, they knew Bordeaux and Boone were in the garage, and they were aware of their past criminal histories. The officers heard the sounds of metal hitting metal, indicating the suspects were

attempting to open the stolen safe, and the detectives suspected the safe contained weapons. Moreover, the van was still running, and people were coming and going from the property, creating an opportunity for the suspects to flee the scene with possible evidence.

We agree the officers had sufficient exigent circumstances to enter the garage and arrest Sheffield, and they did not need to wait for a telephonic warrant before entering.[4] After apprehending the suspects, the officers exited the garage, secured the area, and secured a warrant before re-entering to search the garage.

Sheffield argues for the first time the court erred allowing guilty pleas entered by Singletary and Boone to be read to the jury. During the trial, Bordeaux sought to have the stipulations of Singletary and Boone read to the jury. Sheffield did not request a specific instruction regarding the pleas and did not object to Bordeaux's requests. The court read the following stipulations to the jury:

> The State and Defendants Bordeaux, Rainey and Sheffield agree to stipulate to the

[4] The trial judge explained to the jury in general terms the process of securing a telephonic warrant usually involves more than a simple phone call. We note there was little specific discussion of the officer's actual ability to secure a warrant in this case. The complexity of securing a warrant was not the sole basis for the judge's decision exigent circumstances existed.

following facts. The jury should treat these facts as undisputed. For example, the State and Defendants Bordeaux, Rainey, and Sheffield agree that these facts are true.

The stipulation indicates that on June 19th, 2013[,] in this courtroom and under oath [sic] entered into a signed guilty plea stipulation, referring -- stipulating to certain facts.

Defendant Singletary's stipulation read as follows:

On October 25, 2012[,] I was in Englewood, New Jersey. I was arrested by police. I ran from the garage. In the garage was a safe which I had possession of. I knew stolen property and cash were in the safe, and I was going to take the money. I did not have permission to possess the stolen [sic] in the safe.

Defendant Boone's stipulation reads as follows:

On October 25th, 2012[,] I was in Englewood, New Jersey in possession for [sic] a safe I believe [sic] to be stolen.

As with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict.

During the jury charge, the court repeated the stipulations without objection. In addition, the court instructed the jury to consider each defendant separately stating:

I've explained to you previously there are three defendants in this case, and they're entitled to have their case heard on the evidence that is applicable to them, and what in fact would be fair to them under all of the

> circumstances. So I've told you that there are three separate cases in one case that is being heard by you all at the same time. Each defendant is entitled to have his or her case decided upon the merits and individually.

Because this issue was not raised below, we consider it unchallenged and reverse only if we find plain error clearly capable of producing an unjust result. R. 2:10-2. An unjust result 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. Macon, 57 N.J. 325, 336 (1971). We review the charge as a whole to determine its overall effect. State v. Wilbely, 63 N.J. 420, 422 (1973).

Sheffield does not contend the charge was an incorrect statement of the law or the stipulations should not have been read. He asserts the court should have issued sua sponte a limiting instruction, so the stipulations of his co-defendants could not be used in determining his criminal culpability. See Agha v. Feiner, 198 N.J. 50, 63 n.7 (2009) (finding judges can provide limiting instructions sua sponte to avoid unjust results). We disagree.

The court's omission of a sua sponte instruction was not clearly capable of producing an unjust result. The court provided clear instructions to consider Sheffield's, Rainey's, and Bordeaux's cases separately and instructed the conduct of each

defendant had to be analyzed individually, removing the need for the court to provide an additional instruction sua sponte. Further, a court presumes a jury will follow instructions, State v. Feaster, 156 N.J. 1, 65 (1998), cert. denied sub nom., Kenney v. New Jersey, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001), and understand instructions, State v. Loftin, 146 N.J. 295, 390 (1996).[5]

We reject Sheffield's argument the court erred by allowing evidence from the warrantless entry of J.G.'s apartment, as J.G. did not freely and voluntarily consent because the officers did not inform her of her right to refuse. The officers did not conduct a search of the girlfriend's apartment. The officers merely requested entry while they went door-to-door canvassing the area, which J.G. consented to. Once inside J.G.'s apartment, they did not examine the contents of her residence, enter her bedroom, or remove any items. While they observed a red hooded sweatshirt on the couch, they did not seize it. Moreover, they did not arrest, detain, or search Sheffield. The officers left the apartment shortly after Sheffield informed them he had been in the

[5] Moreover, Sheffield invited any error by agreeing to Bordeaux's request the stipulations of co-defendants be read to the jury. See State v. Simon, 79 N.J. 191, 205 (1979) (stating that errors originating with a defendant generally cannot serve as a basis for reversal on appeal).

apartment for a significant length of time. Thus, no search occurred.

Additionally, even if a search had occurred, Sheffield had no reasonable expectation of privacy in J.G.'s apartment, once she consented to allow the police to enter. He offered no evidence he owned or rented the apartment, and thus, he had no proprietary or possessory interest to override J.G.'s decision to consent. See State v. Alston, 88 N.J. 211, 228-29 (1981). Sheffield had no expectation of privacy regarding his red hooded sweatshirt that he left on the couch in the main living area. J.G. consented voluntarily; the officers did not need to let her know she had a right to refuse entry as long as she was aware she had a choice in the matter. See State v. Koedatich, 112 N.J. 225, 262-64 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 813 (1989), 102 L. Ed. 2d 803 (1989).

We also reject Sheffield's argument the court erred when it denied his motion for a new trial because of the prosecutor's improper comments in summation. At the conclusion of summations, Sheffield objected to the prosecutor's remarks, which suggested all of the defendants knew each other. The court overruled Sheffield's objection, stating "at the same time [they] were known to each other."

In a motion for a new trial, Sheffield renewed the objection,

which the court denied because Sheffield did not meet the high burden associated with the relief requested under Rule 3:20-1 for a new trial.

Reversible error occurs when a prosecutor makes a comment so prejudicial that it deprives a defendant of his or her right to a fair trial. State v. Mahoney, 188 N.J. 359, 376 (2006). Moreover, the prosecutor can make fair comments about the evidence presented. State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008).

After reviewing the record, we agree the trial judge's conclusion finds support in the record. Barrett testified Boone, Singletary, and Rainey all lived in Englewood and were close in age. Bordeaux stated Rainey was from Englewood, and he knew both Rainey and Boone. Hastu testified he knew Sheffield. Accordingly, we do not consider the prosecutor's remark outside the bounds of fair commentary and supported by evidence in the record.

Sheffield complains of other comments by the prosecutor:

> We got Singletary. We gone [sic] Boone. We got Rainey. And we got Bordeaux. We got Hastu. Who did we not get in that backyard? Mr. Sheffield. Who knows the landscape of that backyard? Mr. Sheffield. Who knows how to get out from that area quickly, because it's his own yard? Mr. Sheffield. It's possible . . . .
>
> Also there are loud noises being heard in the area of the rear of the yard. When the cops arrive, Sheffield is now gone. You'll recall that Hastu never testified that he took the

> money and Sheffield went to bed. You never heard that testimony. As far as you could tell from Hastu's testimony, Sheffield was on seen [sic] the whole time. Remember, the [sic] was lending his garage to Sheffield and the others. There was nothing to suggest that Sheffield just paid and went to bed . . . .
>
> After the arrest of Singletary, you heard about the long jumps and runs over fences, approximately 20 minutes in total to chase him, nab him, bring him back, approximately 20 minutes according to Barrett. And that's before they go into the garage. They go into the garage and apprehend individuals, and low and behold around that time, just shortly after entering that garage, Mr. Sheffield comes on [sic] scene. Coincidence? I submit not.

We reject Sheffield's assertion these remarks constituted impermissible comment on his failure to testify and right to remain silent. At no point did the assistant prosecutor discuss Sheffield's right not to testify or suggest his decision to remain silent implied he committed a crime.

Sheffield also argues the court erred when it denied his motion to require expert testimony prior to the admission of GPS testimony at trial. He contends Monrad's and Costello's testimony about using a GPS tracker to follow the van was "incomprehensible without expert testimony to explain its foundation and meaning."

We apply an abuse of discretion standard when reviewing a trial court's evidentiary rulings. State v. Brown, 170 N.J. 138, 147 (2001). Generally, a trial court is given great latitude

regarding the admissibility of evidence. State v. Nelson, 173 N.J. 417, 470 (2001).

Here, no expert testimony was necessary. The detectives personally observed the van leave the hotel in Elizabeth, travel to Connecticut, and arrive in Englewood. The GPS data only served to confirm the location of the van. In general, expert testimony is required in cases where the accuracy or trustworthiness of the evidence can be called into question, see State v. Martini, 160 N.J. 248, 263 (1999); however, Sheffield did not contest the reliability of the GPS device itself.

Sheffield argues his sentence was manifestly excessive, and the trial court abused its discretion when it imposed a discretionary extended term. We disagree.

The court imposed an extended eight-year term with a four-year parole disqualifier for the charge of receiving stolen property and a concurrent six-month sentence for the possession of burglary tools offense, finding Sheffield was a persistent offender, and a discretionary extended term was warranted. The judge found three aggravating factors and one mitigating factor.

We apply an abuse of discretion standard to sentencing challenges. State v. Roth, 95 N.J. 334, 363-64 (1984). In order for the trial court to sentence a defendant to an extended term as a persistent offender, the defendant must be at least twenty-

one years old, have been convicted of a first-, second-, or third-degree crime, and have two prior convictions with the most recent occurring within ten years of the current crime. N.J.S.A. 2C:44-3(a). For third-degree crimes, N.J.S.A. 2C:43-7(a)(4) mandates the court impose a sentence between five and ten years. State v. Dunbar, 108 N.J. 80, 89 (1987).

After the court determined the sentencing range, it weighed the aggravating and mitigating factors, defendant's prior record, and defendant's character when imposing the sentence and period of parole ineligibility. State v. Pierce, 188 N.J. 155, 169 (2006); Dunbar, supra, 108 N.J. at 89; N.J.S.A. 2C:44-1(f)(1).

We find the court applied the appropriate standards when sentencing Sheffield, and we discern no abuse of discretion. Having reviewed the record and the arguments presented, we conclude Sheffield's sentence does not "shock the judicial conscience." See State v. Cassady, 198 N.J. 165, 181 (2009).

Finally, in his pro se supplemental brief, Sheffield also argues the cumulative effect of the court's alleged errors requires he receive a new trial, specifically: Hastu's statement at the scene was unreliable because Hastu had been drinking; the State was late in the production of certain discovery; the assistant prosecutor's summation prevented Sheffield from receiving a fair trial; and not all of the evidence was dusted for fingerprints.

A defendant is entitled to a fair trial but not a perfect trial. State v. Perez, 218 N.J. Super. 478, 486-87 (App. Div. 1987). As addressed above, the errors about which defendant complains were either not errors or, to the extent that the court determines that the court's rulings were errors, they were not harmful. See State v. Conway, 193 N.J. Super. 133, 174 (App. Div.) (finding cumulative error doctrine did not apply as the verdict was consistent with weight of evidence presented), certif. denied, 97 N.J. 650 (1984).

We do not find Sheffield's additional arguments to have sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2)(E).

II.

We now turn to the appeal of defendant Rainey. Rainey has raised the following arguments:

> POINT I.
> THE TRIAL COURT ERRED IN PERMITTING GPS EVIDENCE AT TRIAL WITHOUT EXPERT TESTIMONY BY THE STATE.
>
> POINT II.
> THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO SUPPRESS ALL EVIDENCE OBTAINED BY POLICE FOLLOWING THEIR WARRANTLESS ENTRY INTO A RESIDENTIAL GARAGE, AS INSUFFICIENT EXIGENT CIRCUMSTANCES WERE SHOWN TO JUSTIFY ENTRY.
>
> POINT III.
> IMPROPER OTHER CRIMES OR WRONGS EVIDENCE WAS PERMITTED AT TRIAL.

POINT IV.
THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

POINT V.
SEVERANCE OR MISTRIAL SHOULD HAVE BEEN ORDERED BY THE TRIAL COURT ONCE CO-DEFENDANT BORDEAUX TESTIFIED AND IMPLICATED MR. RAINEY IN THE OFFENSE IN QUESTION (PLAIN ERROR).

POINT VI.
THE JURY CHARGES WERE IMPROPER AND PREJUDICED DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT VII.
THE PROSECUTOR'S COMMENTS WENT BEYOND FAIR COMMENT ON THE EVIDENCE AND CAUSED AN UNFAIR TRIAL FOR DEFENDANT.

POINT VIII.
THE TRIAL COURT INFRINGED DEFENDANT'S RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE BY LIMITING THE JURY'S CONSIDERATION OF TESTIMONY THAT DEFENDANT WAS PRESENT AT THE ENGLEWOOD GARAGE NOT FOR ANY STOLEN SAFE BUT TO SMOKE MARIJUANA AT THIS KNOWN ENGELWOOD "WEED SPOT."

POINT IX.
DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

Rainey's first two arguments restate Sheffield's suppression arguments above, and therefore, these issues have already been addressed and further discussion is not necessary.

We turn to Rainey's argument the court erred when it permitted the disclosure of other crimes evidence. Rainey argues that, during opening statements, the prosecutor disclosed Bordeaux was the target of an investigation by the Morris County Prosecutor's

Office, the detectives placed a GPS tracking device on the van, and the entry into the Connecticut home was unlawful. Only Bordeaux objected at that time.[6] Rainey argues the court should have issued a limiting instruction sua sponte to inform the jury the remarks were not a reflection on Rainey. However, prejudice to Rainey is not evident. The prosecutor's disclosure of an unlawful entry into the Connecticut home was harmless to Rainey because the jury heard testimony from the homeowner that the residence was burglarized.

Moreover, the prosecutor's reference to the detectives' investigation of Bordeaux and the decision to place a GPS tracker on Bordeaux's van does not implicate Rainey for the crime of which he was charged, receiving stolen goods. The references to Bordeaux as the "target" of an unrelated police investigation do not amount to other crimes evidence.

We therefore reject Rainey's argument because the failure to give such instruction sua sponte did not constitute an error "clearly capable of producing an unjust result." See State v. May, 321 N.J. Super. 619, 633 (App. Div.) certif. denied, 162 N.J. 132 (1999). The court instructed the jury to consider the cases

[6] The court overruled Bordeaux's objection that the evidence of the burglary should not have been introduced without an N.J.R.E. 404(b) hearing.

and the evidence against each defendant separately, and courts presume jurors can follow instructions. See State v. Savage, 172 N.J. 374, 394-95 (2002).

Rainey next argues the court erred when it denied his motion for acquittal pursuant to State v. Reyes, 50 N.J. 454 (1967). We disagree. He contends he should have been acquitted because he was sitting on the couch in the garage when the police entered, there was no proof he was part of the crime, and he was only at the location to smoke marijuana.

When ruling on a motion for acquittal, a court must determine "whether the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn," is sufficient to allow the jury to find that the State's burden has been proven beyond a reasonable doubt. State v. Kluber, 130 N.J. Super. 336, 341 (App. Div.), certif. denied, 67 N.J. 335 (App. Div. 1975) (citing Reyes, supra, 50 N.J. at 459). Here, the trial judge weighed these factors and determined a jury could render a guilty verdict because Rainey was present in the garage with the safe. The evidence indicated the safe was stolen from a home in Connecticut, and when Rainey was in the garage, the detectives heard the sounds of metal hitting metal. As a result, the charges for receiving stolen goods

survived Rainey's Reyes motion.

In assessing a trial court's ruling on a motion for judgment of acquittal, an appellate court reviews the decision de novo. State v. Williams, 218 N.J. 576, 593-94 (2014).

To prove the crime of receiving stolen property, the state must prove the defendant knowingly received or brought into the State movable property of another knowing that it had been stolen or believing that it was probably stolen. N.J.S.A. 2C:20-7. "'Receiving' means acquiring possession, control or title, or lending to the security of the property." Ibid. The requisite knowledge is presumed in certain limited instances. Ibid.

Rainey contends his mere presence in the garage was not enough to convict him of receiving stolen property because the State needed to show he had knowledge he was receiving stolen goods. We disagree.

Testimony indicates when the police entered the garage they observed Rainey sitting on the couch next to the safe. Rainey had pulled his hood over his head and was trying to hide. The safe was partially covered by a blanket and protruding from under the blanket was a screwdriver, a knife, and a pair of scissors. Rainey was in the garage with two other people whom the police had followed to and from a home where a safe had been stolen. The safe had just been removed from the back of a rented van, and the

van itself was still running in front of the garage. Thus, the inference Rainey was part of the crime is supportable, and the State did not need to prove Rainey was in sole possession of the safe. See State v. Morrison, 188 N.J. 2, 14 (2006) (stating possession can be joint or constructive).

Although Rainey claims he was only in the garage to smoke marijuana,[7] there was no evidence in the record to support these claims. Rainey was not in possession of drug paraphernalia, he was not seen smoking marijuana, and there was no testimony the garage smelled like marijuana. Viewing the evidence in its entirety and giving the State the benefit of all the favorable inferences, there was sufficient evidence to convict Rainey of receiving stolen goods.

We also reject Rainey's argument the court should have ordered either a mistrial or severance once Bordeaux implicated him for

[7] Rainey also argues the court erred when it would not let the jury hear Rainey was only in the garage to smoke marijuana. At trial, Bordeaux testified he observed Rainey "at the weed spot" after Rainey's counsel asked why Bordeaux thought Rainey was in the garage. At the time of the "weed" statement, Rainey's counsel requested a side bar, objected, and specifically requested the testimony be stricken from the record. The court instructed the jury to disregard the reference to a "weed spot" and "smoking marijuana." On appeal, Rainey cannot now allege the court impermissibly limited his counsel's cross-examination of Bordeaux about the "weed spot" after intentionally asking the court to strike Bordeaux's comment. See State v. Jenkins, 178 N.J. 347, 358 (2004) (discussing whether error was invited or not).

receiving stolen goods. Rainey argues he was prejudiced when Bordeaux testified to the following information: Rainey was present in the garage before Bordeaux arrived while the banging sounds were being made and when the police entered; Bordeaux knew Rainey from Englewood; and Bordeaux had been incarcerated with Rainey pending the resolution of the present case.

The court instructed the jury to disregard the reference to Rainey's incarceration. Rainey did not move for a mistrial or request severance. Moreover, the court did not limit Rainey's cross-examination of Bordeaux. Finally, the judge charged the jury to treat each defendant individually. Because a motion for a mistrial and severance was not raised below, Rainey must show the court's failure to sua sponte declare a mistrial or sever the trial was plain error. R. 2:10-2; Macon, supra, 57 N.J. at 336-37.

Further, joint trials are preferred when the evidence against one defendant will also be used against the other defendants. State v. Sanchez, 143 N.J. 273, 281-82 (1996). Here, however, none of the defendants attempted to transfer the responsibility of the crime to the others. Each defendant argued the State presented insufficient proofs or denied involvement in the crimes altogether, and their defenses were not mutually exclusive. See Brown, supra, 170 N.J. at 160 (noting separate trials are necessary

if defenses are irreconcilable). Thus, the joint trial here was not plain error.

We also reject Rainey's challenge to the sufficiency of the jury charge. In particular, Rainey contends the court denied his request the jury be given a supplemental charge explaining a person being in close proximity with a stolen object does not mean the person knew the object was stolen.

The court denied Rainey's request for the supplemental charge and denied his motion for a new trial on the same basis. During the jury charge conference, Rainey's counsel did not request a supplemental charge. However, counsel for Bordeaux suggested the court provide a supplemental charge informing the jury an individual could be in close proximity to an object, know that the object is stolen, and still not criminally possess it. Bordeaux's counsel relied on State v. McCoy, 116 N.J. 293 (1989), and Rainey's counsel joined Bordeaux's argument. The court rejected the request explaining other jury charges dealt with knowledge, possession, and presence, and additional language from McCoy was not necessary. During the jury charge, the court defined possession for the jury and explained the State's burden to prove beyond a reasonable doubt a defendant is guilty of each element of receiving stolen property.

In McCoy, the Supreme Court held a defendant did not provide

an adequate basis for a plea of guilty of receiving stolen property in violation of N.J.S.A. 2C:20-7. Ibid. In particular, there was insufficient support for his "receipt" of a stolen automobile because he had placed his hands on the vehicle and had the intention to ride in it. Id. at 297-99. Additionally, the McCoy Court explained a defendant's mere presence in or near a stolen car will not create an inference of possession if there is no other evidence, connecting defendant to the vehicle. Id. at 300. Here, however, there was ample evidence to establish Rainey possessed the safe beyond his mere presence near the safe. Rainey was in the garage, the door was closed, the defendants asked Hastu to leave the area, and they were attempting to open a locked safe that had just been taken out of the back of the rented van. Additionally, we find the court's charge clearly defined basic legal principles concerning possession. Therefore, the court did not err when it declined to read to the jury a supplemental charge tailored to McCoy.

Rainey argues the court erred when it denied his motion for a new trial, arguing the prosecutor's summation was improper. We disagree.

On appeal, the trial court's decision on a motion for a new trial will not be reversed unless it clearly appears there was a miscarriage of justice under the law. R. 2:10-1. We defer to the

trial court with respect to "intangibles," such as witness credibility, demeanor, and "the feel of the case," but make an independent determination of whether an injustice occurred. Dolson v. Anastasia, 55 N.J. 2, 6-8 (1969). If a reviewing court decides the verdict was against the weight of the evidence, a new trial is mandated. See id. at 12.

The evidence in the record indicated Rainey was guilty of receiving stolen property beyond a reasonable doubt, and there was no manifest injustice to Rainey. The jury reached this conclusion logically, and the conclusion was reasonably drawn from the facts in evidence.

Rainey's counsel also objected to the prosecutor's suggestion the defendants knew each other. As we previously addressed this argument as it applied to Sheffield, we need not repeat the discussion here.

In addition, Rainey's counsel objected to the prosecutor's reference to the lack of a hand truck at the scene because the court observed there was no testimony about the existence of a hand truck. However, Rainey fails to explain the specific harm he experienced as a result of that statement as there was no testimony about the existence of a hand truck. Rainey's counsel contended a hand truck was depicted in the photographs of the scene.

Next, at trial, Bordeaux's counsel objected to the prosecutor's use of the phrase "cleverly crafted" in describing Bordeaux's testimony. Rainey now complains he was denied a fair trial when the assistant prosecutor described Bordeaux's testimony as "cleverly crafted," but again fails to explain what prejudice he experienced from the remarks.

In order for a statement of a prosecutor to constitute reversible error, the comment must "create a real danger of prejudice to the accused." Mahoney, supra, 188 N.J. at 376 (citing State v. Smith, 167 N.J. 158, 178 (2001)). As previously stated, the court instructed the jury each defendant was on trial separately, and thus, any reference to Bordeaux's testimony would have no impact on Rainey.

Similarly, Rainey argues he was prejudiced by the assistant prosecutor's statement it would have taken "[a]t least three, if not four [individuals] to move a 600-pound safe." The assistant prosecutor properly noted the physical difficulty in moving a large safe, and the remark was fair commentary. The court provided a proper instruction to the jury that protected Rainey from misstatements of counsel during summations.

Finally, Rainey argues his sentence was improper and excessive. Rainey contends the court imposed the maximum allowable extended term for a second-degree crime, even though he was only

convicted of a third-degree crime. Rainey also contends the court misapplied the aggravating and mitigating factors.

The court sentenced Rainey to ten years in prison with a four-year period of parole ineligibility, observing the crime was sophisticated in nature, akin to a business, and required extensive planning. The court determined aggravating factors one (the nature and circumstances of the offense), three (the risk defendant will reoffend), six (the extent of defendant's prior criminal record), and nine (the need for deterrence) applied. It applied mitigating factor eleven, finding imprisonment would cause hardship to the defendant's dependents. However, the court determined the aggravating factors substantially outweighed the mitigating factor. In particular, the court referenced Rainey's "recidivist history and [his] involvement in the criminal justice system."

Rainey argues the extended term sentence he received is comparable to that of an individual guilty of a second-degree crime. However, the trial court may impose an extended term based on a range in the statute. Dunbar, supra, 108 N.J. at 89. For third-degree crimes, the statute mandates the court impose a sentence between five and ten years. N.J.S.A. 2C:43-7(a)(4). Rainey received ten years in prison, which is within the allowable range for a persistent offender convicted of a third-degree crime.

We reject Rainey's contention the court erred applying

aggravating factor one. The court considered the nature of the crime when it determined Rainey participated in a sophisticated crime with considerable planning. In addition, the court discussed the detrimental effect the crime had on the homeowners.

Rainey also alleges the court erred when it applied the aggravating factors three and six, because the court did not explain the support for these factors and their assigned weights at sentencing. However, Rainey's pre-sentence report showed he had an extensive criminal background. At the time of sentencing, he had other charges pending. The court had ample evidence to support the application of the listed aggravating factors.

In sum, the sentence was not manifestly excessive, the guidelines were properly applied, the mitigating and aggravating factors were appropriate, the findings were supported in the record, and Rainey was a persistent offender subject to an extended sentence.

III.

Finally, we direct our attention to Bordeaux's appeal. He raises the following arguments:

> POINT I.
> DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.
>
> (A) THE PROSECUTOR COMMITTED MISCONDUCT IN HIS OPENING STATEMENT BY MAKING

REFERENCE TO DEFENDANT AS A TARGET OF AN INVESTIGTION IN ANOTHER COUNTY.

(B) PROSECUTORIAL MISCONDUCT DURING SUMMATION UNCONSTIUTIONALLY SHIFTED THE BURDEN OF PROOF AND IMPLICITLY COMMENTED ON DEFENDANT'S FAILURE TO PRODUCE EVIDENCE IN VIOLATION OF DEFENDANT'S FIFTH AMENDMENT RIGHTS.

POINT II.
DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE COURT IMPROPERLY ALLOWED THE STATE TO INTRODUCE A PRIOR CONSISTENT STATEMENT OF STATE'S WITNESS ROBERT HASTU.

POINT III.
PRECLUDING DEFENDANT FROM TESTIFYING AS TO HIS PRIOR RECORD ON DIRECT EXAMINATION HAD A CHILLING EFFECT ON DEFENDANT'S FIFTH AMENDDMENT RIGHT TO TESTIFY, DENYING DEFENDANT A FAIR TRIAL.

POINT IV.
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE GARAGE SHOULD HAVE BEEN GRANTED.

POINT V.
THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL AS A RESULT OF THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT THE GUILTY PLEAS ENTERED BY TWO CO-DEFENDANTS COULD NOT BE USED IN DETERMINING THE DEFENDANT'S CRIMINAL CULPABILITY TO THE SAME CHARGE (NOT RAISED BELOW).

POINT VI.
THE COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION FOR AN EXTENDED TERM.

POINT VII.
THE SENTENCE OF EIGHT YEARS IN NEW JERSEY STATE PRISON, WITH FOUR YEARS PAROLE INELIGIBILITY WAS EXCESSIVE.

Bordeaux argues he was denied a fair trial because the prosecutor mentioned Bordeaux was the target of an investigation in another county in his opening statement. Bordeaux also contends during summation the prosecutor shifted the burden of proof to Bordeaux and violated his Fifth Amendment rights. We disagree.

During opening statements, the prosecutor stated Bordeaux was the target of a police investigation. Bordeaux's counsel objected, and the court overruled. Later, Bordeaux requested a mistrial arguing it was improper for the prosecutor to state Bordeaux was the target of a police investigation. The court denied the request for a mistrial and noted Bordeaux's counsel similarly referred to Bordeaux as the "target" of a police investigation. Subsequently, Bordeaux sought a new trial alleging references to him being a "target" of a police investigation and any related evidence, including the testimony of Detectives Costello and Monrad, were improperly submitted to the jury. The court denied his request.

During an opening statement, the prosecutor is permitted to reference the facts "he intends in good faith to prove by competent evidence." State v. Wakefield, 190 N.J. 397, 442 (2007) (quoting State v. Hipplewith, 33 N.J. 300, 309 (1960)), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). A prosecutor is given great leeway in his or her comments, and he or she is allowed to be forceful. Id. at 443 (quoting State v. DiFrisco,

137 N.J. 434, 474 (1994)); State v. Pindale, 249 N.J. Super. 266, 285 (App. Div.), certif. denied, 142 N.J. 449 (1995). While it is true the prosecutor cannot impassion a jury or incite emotions, the prosecutor is allowed to comment on the evidence presented to the jury. State v. Black, 380 N.J. Super. 581, 594-95 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006).

Bordeaux does not deny on appeal that he was the target of an investigation, only that the use of the term "target" was improper. During trial, the detectives testified they had been tracking Bordeaux because he was the target of a police investigation in another county. Thus, the prosecutor's reference to defendant's status as a target was consistent with the forthcoming testimony.

Additionally, Bordeaux's contentions the prosecutor's statements were impermissible other crimes evidence, violating N.J.R.E. 404(b), are not persuasive. The prosecutor's remark during opening statements explained why the police officers followed Bordeaux from New Jersey to Connecticut. Furthermore, both the State and Bordeaux's counsel stated Bordeaux was the target of a police investigation in front of the jury. The word "target" was used to explain why the police were following Bordeaux and did not indicate he was a criminal or had engaged in criminal behavior in the past. Moreover, the court instructed the jury

they should not consider the use of the words "subject," "defendant," or "target" as proof of the offenses for which defendants were charged.

Bordeaux argues the assistant prosecutor made comments during summation that were improper and deprived him of a fair trial. Similar to Sheffield and Rainey, Bordeaux argues on appeal the assistant prosecutor's statement that a hand truck was not present at the garage was improper. We have previously addressed these arguments and need not repeat our conclusions.

Next, Bordeaux argues the court erred when it allowed the State to introduce evidence of Hastu's prior statements and claims the evidence was used to impermissibly bolster Hastu's credibility in violation of N.J.R.E. 607. We disagree.

During the trial and after Hastu testified, counsel for all three defendants challenged Hastu's trial testimony as being fabricated and suggested Hastu had motive to lie to the jury. In response, the court permitted the State to introduce Hastu's entire recorded statement.

The Rules of Evidence allow the presentation of a prior consistent statement of a witness to "rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive." N.J.R.E. 607. In addition, N.J.R.E. 803(a)(2) excludes these statements from hearsay if used to "rebut

an express or implied charge against the witness of recent fabrication or improper influence or motive."

Here, the court properly allowed the admission of Hastu's prior consistent statement. Bordeaux's counsel suggested Hastu had motivation to lie because he was given Pre-Trial Intervention in exchange for testifying at trial. In addition, Bordeaux's counsel called Hastu's credibility into question, as well as the veracity of Hastu's statements by alleging he was too intoxicated on the day of the arrest to accurately recall the events in question. It was only after Bordeaux's counsel alleged Hastu was fabricating his testimony did the State seek to introduce the entirety of Hastu's prior recorded statement. Thus, the use of the statement is consistent with the purposes of the Rules of Evidence, and the court did not err.

Moreover, the court instructed the jury to "consider whether [Hastu] has a special interest in the outcome of the case and whether his testimony was influenced by the hope or expectation of any favorable treatment or reward . . . ." In response, Bordeaux's counsel again tried to undermine Hastu's testimony as being fabricated or imply Hastu had a motive to lie to the jury. Thus, the court provided the jury with appropriate instructions regarding its consideration of Hastu's prior consistent statement.

Bordeaux argues the court erred by precluding him from

testifying about his prior criminal record during direct examination. In particular, Bordeaux contends he wanted to show the jury he was not "hiding prior convictions," and therefore, the "negative" evidence should have been admitted to bolster Bordeaux's credibility.

During Bordeaux's direct examination, his counsel attempted to elicit testimony that Bordeaux had been in trouble with the law in the past and had "paid his debt" to society. The prosecutor objected, claiming a defendant's prior record could only be discussed to impeach a witness on cross-examination, and a discussion of a prior record on direct examination was inadmissible. The court ruled defense counsel could only ask Bordeaux about his prior record on redirect examination.

The court has discretion when deciding whether prior conviction evidence will be admissible. State v. Sands, 76 N.J. 127, 144 (1978). However, when a judge makes a discretionary decision but acts under a misconception of the applicable law, the reviewing court need not give the usual deference and must apply the applicable law to avoid a manifest denial of justice. State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966). The Court has stated "[o]rdinarily evidence of prior convictions should be admitted and the burden of proof to justify exclusion rests on the defendant." Sands, supra, 76 N.J. at 144.

Bordeaux contends he should have been permitted to testify during his direct examination about his prior criminal record, and the State concedes Bordeaux should have been able to do so. However, any harm Bordeaux experienced by being denied the opportunity to discuss his prior convictions during direct examination was harmless. Pursuant to Rule 2:10-2, "any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result." There was overwhelming evidence of Bordeaux's guilt of receiving stolen property based upon the detectives following Bordeaux from New Jersey to Connecticut and back to New Jersey, the officers finding Bordeaux in the garage with the stolen safe, and the van used to transport the safe being rented by an associate of Bordeaux's. Further, Bordeaux testified on cross-examination that the current case against him was not his first "run-in" with the law, and he had prior convictions. Therefore, even if the jury had heard about Bordeaux's prior criminal record during his direct examination, the information would not have prevented his conviction.

Bordeaux argues the court erred when it denied defendant's motion to suppress the evidence seized from the garage. Bordeaux also argues the court erred when it failed to instruct the jury that the guilty pleas entered by Singletary and Boone could not

be used in determining Bordeaux's criminal culpability for the same charge. These arguments largely repeat Sheffield's and Rainey's arguments. We reject this claim as a basis to reverse and rely on our prior discussion or the issues.

Bordeaux argues the court abused its discretion when it sentenced him to an extended term sentence, and his sentence of eight years in prison with four years parole ineligibility is excessive. We disagree.

The court granted the State's motion for an extended term sentence. The court found aggravating factors one (the nature and circumstances of the offense), three (the risk the defendant will reoffend), six (the defendant's prior criminal record and the seriousness of the offenses), and nine (the need for deterrence) applied. The court determined mitigating factor eleven (the hardship to defendant's dependents) applied, but the aggravating factors outweighed the single mitigating factor.

Bordeaux challenges the court's imposition of defendant's extended sentence based upon the aggravating factors leading to his sentence. First, he alleges aggravating factor one does not apply because his crime was neither heinous nor cruel. The court relied on credible evidence in the record when it determined substantial planning was involved in the commission of the crime from renting the van, the trip to Connecticut, and the

transportation of the safe to the garage in Englewood. The level of sophistication involved in committing the crime was enough to trigger the applicability of aggravating factor one, despite the lack of cruelty in the crime.

Next, he contends that factors three, six, and nine are duplicative because the court's decision to impose an extended sentence was also based on defendant's criminal history. According to Bordeaux's pre-sentence report, in 2005 he had a significant criminal history including various counts of aggravated assault in both the second-degree and the third-degree, numerous weapons charges in the third- and fourth-degree and possession of a controlled dangerous substance. We conclude the court had an independent basis for imposing factors three and nine upon Bordeaux.

Finally, Bordeaux alleges the court erred when it gave little weight to mitigating factor eleven. The record shows Bordeaux fathered minor children, but there is no evidence showing he was caring for his dependents. Moreover, Bordeaux did not report any income to attribute to assisting his family.

As to the length of the sentence, it was not manifestly excessive. As a persistent offender, N.J.S.A. 2C:43-7(a)(4) requires the court impose a sentence between five and ten years for third-degree crimes. Dunbar, supra, 108 N.J. at 89. Here,

Bordeaux received an extended eight-year term with a four-year parole disqualifier. Consequently, Bordeaux's sentence does not "shock the judicial conscience." Cassady, supra, 198 N.J. at 181. In sum, the sentence was not manifestly excessive, Bordeaux was a persistent offender subject to an extended sentence, and the court's analysis of the aggravating and mitigating factors was properly based on the evidence.

Affirmed as to all three defendants.