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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1758-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMAL SHELLY, a/k/a  
JAMAL AL-KAREEM SHELLY,  
JAMAAL SHELLY, JAMAAL A.  
SHELLEY, and JAMAL A. SHELLY,

Defendant-Appellant.

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Submitted May 10, 2017 – Decided May 31, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New  
Jersey, Law Division, Essex County, Indictment  
No. 13-02-0293.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Lon Taylor, Assistant Deputy  
Public Defender, on the brief).

Carolyn A. Murray, Acting Essex County  
Prosecutor, attorney for respondent (Tiffany  
M. Russo, Special Deputy Attorney General/  
Acting Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Following a jury trial, defendant Jamal Shelly was convicted of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). Judge Martin G. Cronin imposed a ten-year term of imprisonment with a five-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6. On appeal, defendant raises the following contentions:

POINT I

THE TRIAL COURT'S IDENTIFICATION INSTRUCTION WAS NOT TAILORED TO THE FACTS OF [DEFENDANT'S] CLAIM THAT THE PHOTO LICENSE UNDERMINED THE RELIABILITY OF THE OFFICER'S OUT-OF-COURT AND IN-COURT IDENTIFICATIONS. (NOT RAISED BELOW).

POINT II

THE IMPOSITION OF A MAXIMUM TEN-YEAR TERM OF IMPRISONMENT, SUBJECT TO A MANDATORY FIVE-YEAR PAROLE BAR, WAS EXCESSIVE.

We affirm.

I.

We derive the following facts from the record. On October 12, 2012, Lieutenant Daniel Francis and Sergeant Marquis Carter of the Essex County Prosecutor's Office were on patrol in an unmarked patrol car when they saw a silver Lincoln LS with tinted windows and no license plates travelling on Fifteenth Avenue in Newark, a high-violence area. Francis activated the patrol car's strobe lights and "wig-wag" headlights and stopped the Lincoln.

As Carter was exiting the patrol car, the Lincoln sped away. Francis activated the patrol car's siren and proceeded to follow the Lincoln. Francis decided to discontinue the pursuit and turned off the strobe lights and siren when the Lincoln travelled the wrong way down a one-way street, but continued to travel parallel to the Lincoln and kept it in sight.

Francis resumed the pursuit when the Lincoln turned onto Muhammad Ali Boulevard and proceeded southbound on Bergen Street. He followed the Lincoln onto Custer Street, a very well-lit street, and saw the Lincoln stop and the driver and front seat passenger, later identified as defendant, attempt to exit and then re-enter the vehicle. Francis re-activated his headlights and strobe lights and pulled behind the Lincoln to prevent it from moving. The driver ran and Francis chased him approximately twenty-five to fifty feet, but abandoned the chase and returned to the Lincoln to assist Carter.

When Francis returned to the Lincoln, he saw that the driver and passenger side doors were open, and saw defendant standing by the passenger side trying to retrieve something from inside the vehicle. Francis saw defendant's face and believed he was reaching for a weapon. Fearing for his life, Francis drew his weapon, pointed it directly at defendant's face, and said he would shoot defendant in his face if defendant did not show his hands. Francis

saw that defendant had a "fat face" and dark circles around his eyes. Defendant fled. Francis did not pursue him because a third individual had exited the Lincoln and attempted to run, but was apprehended.

Francis looked inside the Lincoln to see if there were more occupants. He found no one inside, but saw in plain view a .357 caliber revolver on the driver's seat and a 9-millimeter semi-automatic handgun in an open box on the passenger-side floorboard, the area where he saw defendant reaching. Both weapons were loaded with hollow-point bullets.

Francis also found a photo driver's license in the cup holder and immediately recognized the person in the photo as the front-seat passenger he had seen just minutes earlier. The driver's license bore defendant's name. In addition to testifying about his out-of-court identification of defendant from the driver's license photo, Francis made an in-court identification. Defendant's sole defense was that Francis misidentified him as the passenger based on the photo driver's license.

## II.

Judge Cronin gave a jury charge on identification that mirrored Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (2012). The judge tailored that part of the charge concerning confidence and accuracy as follows:

You heard the testimony that Lieutenant Francis made a statement at the time he identified the defendant from a photo. His level of certainty that the photograph he selected was . . . in fact, the person who committed the crime.

The judge also tailored that part of the charge regarding the jury's evaluation of the reliability of a witness' identification as follows:

In evaluating the reliability of a witness' identification, you should also consider the circumstances under which any out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process. You should consider that the prior identification was made from a single photograph appearing on a driver's license.

In Point I, defendant contends for the first time that the charge was not tailored to the facts of the case, and the vague references to the photo driver's license were misleading. Defendant argues Judge Cronin did not tailor the charge to instruct the jury: (1) that Francis' view of the photo driver's license was the identification procedure; (2) on how to assess whether Francis' in-court identification was a result of merely looking at the driver's license photo rather than his observation of the fleeing passenger; and (3) on how stress impacts the reliability of an identification in assessing Francis's testimony that he believed

the passenger was reaching inside the Lincoln for a weapon and he feared for his life. Defendant also argues the judge improperly omitted the show-up language in the charge.<sup>1</sup>

"Appropriate and proper jury charges are essential to 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. at 613).

A jury charge is required to be tailored to the facts when a statement of the law "divorced from the facts, [is] potentially confusing or misleading to the jury." State v. Robinson, 165 N.J. 32, 42 (2000) (citations omitted). A trial court is not required to comment on the evidence. Id. at 43. "[I]t is often important

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<sup>1</sup> Defendant relies on the unpublished opinion, State v. Orival, No. A-3410-12 (App. Div. Oct. 17, 2014), to argue that a photo driver's license has been recently viewed as the equivalent of a showup identification. However, unpublished opinions do not constitute precedent or bind us. R. 1:36-3; Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001).

to mold jury instructions so that the jury clearly understands how the evidence in [a] particular case relates to the legal concepts addressed in the charge." State v. Gentry, 439 N.J. Super. 57, 72 (App. Div. 2015) (citation omitted). On the other hand, tailoring of an instruction may not be essential if the facts, the parties' respective positions, and the legal principles are clear. State v. Angoy, 329 N.J. Super. 79, 85 (App. Div.), certif. denied, 165 N.J. 138 (2000). Also, a "party is [not] entitled to have the jury charged in his or her own words; all that is necessary is that the charge as a whole be accurate." State v. Jordan, 147 N.J. 409, 422 (1997) (citations omitted). There is also a presumption of correctness in the model jury charges. See State v. R.B., 183 N.J. 308, 325 (2005) (stating trial court's obligation to deliver model charges); Moquill v. CB Comm. Real Estate Grp., Inc., 162 N.J. 449, 466 (2000) (noting "[i]t is difficult to find that a charge that follows the Model Charge so closely constitutes plain error").

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

warrant reversal . . . an error at trial must be sufficient to raise 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

There was no error, let alone plain error, in the identification charge. The charge accurately instructed the jury on the law as it pertained to the facts. The charge specifically instructed the jury to: (1) consider Francis' level of stress and his confidence and accuracy in identifying defendant from the driver's license photo as the person who committed the crime; (2) evaluate the reliability of Francis' out-of-court identification; and (3) consider that Francis made the out-of-court identification from the driver's license photo. The charge was not potentially confusing or misleading, and it required no further tailoring.

A show-up instruction was not warranted. "Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission." State v. Henderson, 208 N.J. 208, 259 (2011).

Francis did not identify defendant through a showup procedure. He identified defendant from a photo driver's license he found in plain view inside the Lincoln after having seen defendant's face minutes earlier. Defendant cites to no authority



that Francis' out-of-court identification based on a driver's license photo required a show-up instruction. Further, there was no evidence whatsoever that the procedure was impermissibly suggestive. Defendant's identification originated from Francis' own observation of someone he believed committed the crime of unlawful possession of a weapon. See State v. Romero, 191 N.J. 59, 79 (2007). The identification charge was proper and provides no basis for reversal.

### III.

Defendant contends in Point II that his sentence is excessive. He does not challenge Judge Cronin's findings of aggravating and mitigating factors. Rather, he argues the judge failed to consider the minimal nature of the offense where there was no underlying crime, such as a robbery, no discharge of the weapon, and no injuries.

We review a judge's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014).

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.

[Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Applying this standard, we discern no reason to disturb defendant's sentence.


Defendant was eligible for an extended-term sentence as a persistent offender pursuant to N.J.S.A. 2C:44-3(a), which would have exposed him to a sentence of between ten to twenty years. The State moved for an extended-term sentence and requested a twelve-year sentence with a six-year period of parole ineligibility, but Judge Cronin denied the motion. Citing defendant's extensive criminal history, which included several convictions for unlawful possession of a weapon, and the fact that defendant was on probation when he committed the present offense, the judge found aggravating factors N.J.S.A. 2C:44-1(a)(3), "[t]he risk that the defendant will commit another offense;" N.J.S.A. 2C:44-1(a)(6), "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted;" and N.J.S.A. 2C:44-1(a)(9), "[t]he need for deterring the defendant and others from violating the law[.]" Because defendant accepted responsibility for his conduct, the judge found mitigating factor N.J.S.A. 2C:44-1(b)(9), "[t]he character and attitude of the defendant indicate that he is unlikely to commit another offense[.]" In imposing the maximum sentence, the judge

emphasized the significance of the aggravating factors and defendant's criminal record.

We have considered defendant's contention in light of the record and applicable legal principles and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons Judge Cronin expressed at sentencing. We are satisfied that 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.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION