SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3675-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ADRIAN C. HICKEN,

Defendant-Appellant.

Submitted September 13, 2016 – Decided March 6, 2017

Before Judges Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 12-04-0584.

Joseph E. Krakora, Public Defender, attorney for appellant (Alyssa Aiello, Assistant Deputy Public Defender, of counsel and on the briefs).

Gurbir S. Grewal, Acting Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant, Adrian C. Hicken, appeals from a judgment of conviction entered by the Law Division after a jury found him guilty as an accomplice to five counts of second-degree robbery and related offenses, and of committing second-degree eluding. The court sentenced defendant to an aggregate sentence of twenty-four years imprisonment with 17.25 years of parole ineligibility. Defendant's conviction arose from his role as the "getaway" driver in a jewelry store robbery.

On appeal, he argues his convictions must be vacated because the five robberies occurred during one incident, the court erred in its jury instructions about accomplice liability, and his trial counsel was ineffective for raising defendant's prior juvenile arrests during his trial. Defendant also asserts that his constitutional rights were violated by various errors made by the trial court. As to his sentence, defendant argues that the court incorrectly relied upon inapplicable aggravating factors, failed to conduct a qualitative analysis of the sentencing factors, and failed to explain its reasons for imposing consecutive prison terms.

After considering defendant's arguments in light of the record and applicable legal principles, we agree that his conviction for five counts of robbery was in error and that he must be resentenced. We affirm his conviction as to two counts

of robbery, vacate his convictions and dismiss the other three counts, remand for resentencing and affirm the balance of his convictions for the reasons discussed in this opinion.

The facts developed at defendant's trial can be summarized as follows. Defendant drove his codefendants from Brooklyn, New York, to a jewelry store in Wyckoff. Defendant pulled into the parking lot behind the store and parked in a spot away from the store's entrance. The three codefendants exited the vehicle, telling defendant they would "be right back." The men walked towards the store's entrance, with one codefendant wearing a black hooded sweatshirt and white gloves; another wearing a flannel shirt, gloves, and a hat; and a third wearing a black hooded sweatshirt with the hood pulled up, a mask, and gloves, and holding a sledgehammer. Additionally, two of the men carried bags.

There were five people in the store at the time: the two storeowners, one employee, and two women shopping for watches. Over the course of the next two and a half minutes, the three assailants terrorized, confined, and physically assaulted the people inside the store. Two codefendants stole jewelry from display cases in the front of the store, forcing one of the owners to remain on the ground. The other perpetrator removed items from the vault in the office located in the back of the store, while the other owner was held to the ground in that area. During the

melee, one victim was able to trip the silent alarm and another called 9-1-1. Before police arrived, the three men ran out of the store with 86 Rolexes and 27 rings — valued at $958,910.

While his codefendants were in the store, defendant pulled out of the parking space and moved his vehicle closer to the store's and the parking lot's exit. Defendant remained there, with his car idling, until the men ran out of the store and into the car, at which point he sped off.

Police appeared and began to follow defendant's vehicle. Defendant led several police vehicles on a chase through at least three municipalities before colliding with a police cruiser,[1] at which point he and two codefendants jumped out of the vehicle and fled on foot.[2] Police apprehended two of the assailants quickly, each with a bag containing jewelry. Defendant was caught in a nearby wooded area. When an officer approached him, defendant stated, "I didn't know what was going on, they just told me to drive." After being advised of his Miranda[3] rights, he told the officer he "ran into the police car to stop."

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[1] Defendant was also involved in a minor collision earlier in the chase, but continued to flee.

[2] A third codefendant had jumped or fallen out of the vehicle earlier in the chase.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

After his arrest, a grand jury indicted defendant, charging him and his three codefendants with five counts of first-degree robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:2-6 (counts one through five); five counts of third-degree criminal restraint, N.J.S.A. 2C:13-2(a) and N.J.S.A. 2C:2-6 (counts six through ten); second-degree theft of movable property, N.J.S.A. 2C:20-3 and N.J.S.A. 2C:2-6 (count eleven); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) and N.J.S.A. 2C:2-6 (count twelve); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) and N.J.S.A. 2C:2-6 (count thirteen). The indictment also charged defendant alone with second-degree eluding, N.J.S.A. 2C:29-2(b) (count twenty-one); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(6) (count twenty-two); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count twenty-three).[4]

At his ensuing trial, defendant testified that he knew only one codefendant prior to the incident. He told the jury that he did not know of his codefendants' plan to rob the jewelry store, and that he drove them there in exchange for eighty dollars, as

[4] The indictment was a superseding indictment that contained twenty counts. The remaining counts, fourteen through twenty, pertained only to codefendants, who pled guilty and are not the subject of this appeal.

he sometimes drove people around for extra money.[5] He explained that he did not see codefendants wearing gloves or masks or with their hoods raised, or see the sledgehammer, when they exited his vehicle. Defendant explained that he moved his vehicle from where it was parked to closer to the store's entrance so that he could admire a pair of Cartier sunglasses in the window. He testified he did not know what had happened when they got back into his car, but that he just followed their orders to drive. Though eventually he saw the police following him, he kept driving because he saw one codefendant had something in his hand that looked like a knife.

After defendant testified and counsel gave their closing statements, the court charged the jury and provided it with a verdict sheet that outlined the various charges that the jury was to consider. As to the first five counts of the indictment, the verdict sheet instructed the jury to initially consider first-degree robbery and if it found the State had not met its burden, then it was to consider second-degree robbery as a lesser-included offense. It further instructed that if the State did not prove second-degree robbery, the jury was to consider whether defendant was guilty of theft of movable property.

[5] Defendant's fiancée testified at trial regarding his reputation for honesty and integrity, and that he occasionally "uses his car as a cab service."

The jury acquitted defendant of first-degree robbery, third-degree criminal restraint, and aggravated assault, but convicted him as an accomplice of five counts of the lesser-included offenses of second-degree robbery and false imprisonment as a disorderly persons offense, N.J.S.A. 2C:13-3 and N.J.S.A. 2C:2-6.[6] In addition, the jury convicted defendant of theft as charged, the two weapons offenses, eluding, and resisting arrest. The court sentenced defendant to an aggregate prison term of twenty-four years with a 17.25 year period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. This appeal followed.

On appeal, defendant argues:

> POINT I
>
> TRIAL COURT'S JURY CHARGE ON ACCOMPLICE LIABILITY FAILED TO COMPORT WITH THE REQUIREMENTS OF STATE V. BIELKIEWICZ, [267 N.J. SUPER. 520 (APP. DIV. 1993)] AND PREVENTED THE JURY FROM PROPERLY CONSIDERING THE LESSER-INCLUDED OFFENSE OF THEFT AS AN ALTERNATIVE TO ROBBERY. THE ERROR IN THE ACCOMPLICE CHARGE, WHICH WAS COMPOUNDED BY MISSTATEMENTS MADE BY THE PROSECUTOR IN SUMMATION, DEPRIVED [DEFENDANT] OF A FAIR TRIAL AND DUE PROCESS OF LAW, AND REQUIRES REVERSAL OF [DEFENDANT'S] ROBBERY CONVICTIONS. (NOT RAISED BELOW).

[6] The judgment of conviction incorrectly lists the false imprisonment convictions as third-degree crimes rather than disorderly persons offenses. See N.J.S.A. 2C:13-3.

POINT II

WITHOUT A REASONABLE STRATEGIC BASIS, DEFENSE COUNSEL INTRODUCED OTHERWISE INADMISSIBLE EVIDENCE OF [DEFENDANT'S] PRIOR ARRESTS, WHICH WAS SURE TO HAVE TAINTED [DEFENDANT'S] CHARACTER IN THE EYES OF THE JURY. BECAUSE [DEFENDANT'S] DEFENSE RESTED ON THE CREDIBILITY OF HIS TESTIMONY, COUNSEL'S INTRODUCTION OF THIS PREJUDICIAL EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, AND REQUIRES REVERSAL OF [DEFENDANT'S] CONVICTIONS. (NOT RAISED BELOW).

POINT III

[DEFENDANT] WAS IMPROPERLY CONVICTED OF FIVE COUNTS OF ROBBERY, WHERE EACH ROBBERY WAS PREDICATED ON THE SAME THEFT. (NOT RAISED BELOW).

POINT IV

IN SENTENCING [DEFENDANT], WHO WAS 37 YEARS OLD AND HAD NO PRIOR ADULT ARRESTS OR CONVICTIONS, TO AN AGGREGATE PRISON TERM OF 24 YEARS WITH A 17-YEAR PAROLE DISQUALIFIER, THE TRIAL COURT ERRONEOUSLY RELIED ON INAPPLICABLE AGGRAVATING FACTORS, FAILED TO ENGAGE IN A QUALITATIVE ANALYSIS OF THE SENTENCING FACTORS, AND FAILED TO ADDRESS THE CRITERIA SET FORTH IN STATE V. YARBOUGH[, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 1986)] BEFORE IMPOSING THREE CONSECUTIVE PRISON TERMS.

In a pro se supplemental brief, defendant also contends:

POINT I

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL INSTRUCTION ON THE LAW OF ACCOMPLICE LIABILITY (NOT RAISED BELOW).

POINT II

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON OTHER WRONG EVIDENCE (NOT RAISED BELOW).

POINT III

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON ORAL STATEMENTS OF THE DEFENDANT TO POLICE, I.E., [STATE V. HAMPTON, 61 N.J. 250 (1972)] AND [STATE V. KOCIOLEK, 23 N.J. 400 (1957)] INSTRUCTIONS (NOT RAISED BELOW).

POINT IV

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED

STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE PERMISSIBLE USE OF SGT. MICHALSKI'S EXPERT OPINION TESTIMONY (NOT RAISED BELOW).

POINT V

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE LAW OF RENUNCIATION (NOT RAISED BELOW).

POINT VI

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO PROVIDE A CLAWANS['S[7]] CHARGE (NOT RAISED BELOW).

POINT VII

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL INSTRUCTION ON THE LAW OF DURESS (NOT RAISED BELOW).

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[7] State v. Clawans, 38 N.J. 162 (1962).

POINT VIII

THE DEFENDANT'S RIGHTS TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPHS 1 AND 10 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE ADMISSION OF PREJUDICIAL HEARSAY TESTIMONY BY NUMEROUS STATE WITNESSES (NOT RAISED BELOW).

POINT IX

THE DEFENDANT'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPHS 1 AND 5 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY SELECTIVE PROSECUTION.

POINT X

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPHS 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO GRANT THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AND MOTION FOR A JUDGMENT OF ACQUITTAL.

A. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

B. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL.

POINT XI

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE CUMULATIVE EFFECT OF THE ERRORS LISTED IN POINTS 1 THROUGH X.

Defendant's contentions in Points I through III of his counsel's brief and in Points I through VIII of his pro se brief are raised for the first time on appeal and are therefore subject to review for plain error, that is, error "clearly capable of producing an unjust result." R. 2:10-2; see also State v. Munafo, 222 N.J. 480, 488 (2015). A conviction will be reversed under this standard only if the error is "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." State v. Taffaro, 195 N.J. 442, 454 (2008) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

We turn first to defendant's contention in Point III of counsel's brief that defendant was improperly convicted of five counts of robbery because there was only one theft from one victim - the jewelry store. In its first five counts, the indictment charged defendant with using force, as an accomplice, against each of the individuals who were inside the store. The counts do not specify the victim of the alleged thefts. The only theft victim identified in the indictment is in count eleven, which states the

victim was the jewelry store business. The State concedes the robbery convictions relating to the three victims must be vacated because they were not victims of a theft, but it argues the convictions relating to the two storeowners should be affirmed because the thefts from each storeowner were discrete, as they occurred in different areas of the store and involved force against the respective victims.

We conclude that the convictions for three of the robberies must be vacated. "[E]ach robbery is a separate crime, which entails a discrete theft from a single victim together with accompanying injury or force." State v. Sewell, 127 N.J. 133, 137 (1992). While the person threatened or against whom force is used during the course of the theft "need not be the victim of the theft" itself, the mere "presence of . . . threatened bystanders during theft from . . . other persons" does not support a separate robbery charge for each bystander. State v. Mirault, 92 N.J. 492, 497 n.4 (1983). Where an indictment for robbery charges a theft from one victim, the charge is not converted into multiple robberies where the requisite force is used on individuals other than the victim of the theft. "[I]nfliction of physical harm on . . . separate persons [during a single theft does not] constitute[] multiple robberies." Sewell, supra, 127 N.J. at 138; see also State v. Lawson, 217 N.J. Super. 47, 51 (App. Div. 1987).

On the other hand, theft from two different individuals provides the basis for separate robbery charges, even if the same person or entity owns the property taken from each victim. "The victim [of the theft] need not own the property taken or attempted to be taken. It is enough that the victim had a possessory or custodial interest in the property." State v. Carlos, 187 N.J. Super. 406, 412 (App. Div. 1982) (citing State v. Butler, 27 N.J. 560, 589 (1958)), certif. denied, 93 N.J. 297 (1983).

In this case, there was no evidence that any of the victims, other than the storeowners, were victims of a theft.[8] The storeowners were separately victims of a theft because each had a possessory interest in their business inventory, the thefts from them occurred in two distinct locations within the store and were from a different owner at each location. The thefts provided the requisite basis for two robbery charges. While the force used against them and the three other victims was properly relied upon to find defendant guilty of the two robberies from the storeowners, that force could not sustain a finding of separate thefts as to the three other victims. For that reason, defendant's conviction

[8] The two women shopping at the store evidently left their watches on a display case when the codefendants entered. The watches were scooped up and taken as if part of the store's inventory and thus were not stolen from their owners.

under counts three through five must be vacated and the indictment dismissed.

Next, we address defendant's contention in Point I of his counsel's brief that the trial court's charge on accomplice liability was deficient in failing to instruct the jury that it could find him "guilty of theft as a lesser-included offense of robbery even if it found that one or more" codefendants committed robbery. He asserts that this deficiency, together with the prosecutor's "misstatements on the law" during summation, deprived him of a fair trial and thus requires reversal of the robbery convictions. Those comments related to the prosecutor's argument that there was sufficient circumstantial evidence to support the jury's finding that the codefendants planned to use force during their theft from the store.

Before instructing the jury on accomplice liability, the trial court read verbatim the model charge for lesser-included offenses, see Model Jury Charge (Criminal), "Lesser[-]Included Offenses" (2002),[9] and told the jurors that these offenses would be explained in the instructions. The judge then charged the jury on accomplice liability, largely tracking Model Jury Charge

[9] This charge should not be given when "the lesser-included offenses are contained in the statute; e.g., robbery and robbery while armed." Ibid.

(Criminal), "Criminal Liability for Another's Conduct/Complicity — No Lesser-Includeds" (1995) (Charge # One). The charge included the instruction that the State had to prove that defendant "possessed the criminal state of mind that is required to be proved against the person who actually committed the acts" and "that it was defendant's conscious object that the specific conduct charged be committed." Ibid. The court told the jury as to first-degree robbery, "the State must prove beyond a reasonable doubt that the defendant was armed with, used or threatened the immediate use of a deadly weapon, while in the course of committing the robbery[,]" and that "the State alleges that the defendant was armed with a sledgehammer."

In addition to explaining the elements of first-degree robbery, the trial court charged the jury on the lesser-included offenses of second-degree robbery and theft of movable property.[10] The court instructed the jury that if it did not find defendant

[10] Robbery is a first-degree crime "if in the course of committing the theft the [defendant] . . . is armed with, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b). A defendant commits robbery in the second degree when, "in the course of committing a theft, he . . . [i]nflicts bodily injury or uses force upon another[,] or . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury." N.J.S.A. 2C:15-1(a)(1)-(2). Theft "is a lesser-included offense of robbery," State v. Ingram, 196 N.J. 23, 39 (2008), and is committed when a defendant "unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." N.J.S.A. 2C:20-3(a).

guilty of second-degree robbery, it could then consider the charge of theft of movable property. The court's instruction on theft of movable property as a lesser-included offense detailed the elements of the crime.[11] It did not include the portion of the model charge concerning the gradation of theft offenses and did not direct the jury how or whether to determine the degree of the lesser-included theft. The court further instructed the jury on second-degree theft as alleged in count eleven, and did so substantially in accordance with the model charge.[12] See Model Jury Charge (Criminal), "Theft of Movable Property" (2008).

As to the difference between first and second-degree robbery the court instructed:

> If you find that the State has proven beyond a reasonable doubt that the defendant committed the crime of [first-degree] robbery as I have defined that crime to you, but . . . you find that the State has not proven [beyond] a reasonable doubt that the defendant was armed with, or used, or purposely threatened the immediate use of a deadly weapon, or purposely engaged in conduct or gestures, which would lead a reasonable person to believe that the defendant possessed the deadly weapon at the time of the commission

[11] The court deviated from the model charge when it concluded that the State additionally had to prove "that the theft was from the person of the victim." See Model Jury Charge (Criminal), "Theft of Movable Property" (2008).

[12] Namely, he advised the jury that the State was required to prove that the property was valued at "$75,000 or more." See N.J.S.A. 2C:20-2(b)(1)(a); Model Jury Charge (Criminal), "Gradation of Theft Offenses" (2003).

> of the robbery, then you must find the defendant guilty of robbery in the second degree.
>
> If you find that the State has proven beyond a reasonable doubt that the defendant committed the crime of robbery, was armed with a deadly weapon, or used, or threatened the immediate use of a deadly weapon, or purposely engaged in conduct or gestures, which would lead a reasonable person to believe that the defendant possessed a deadly weapon at the time of the commission of the robbery, then you must find the defendant guilty of robbery in the first degree.

The court also addressed the facts testified to by defendant that amounted to a complete denial of any knowledge of what his codefendants planned to do at the jewelry store and his lack of intent to be part of any crime. In doing so, the court specifically reminded the jury of defendant's claim. The court instructed:

> In this case defendant contends that he is not guilty of robbery by accomplice liability because he was ignorant of the intentions of [the codefendants]. He merely acted as their cab driver. If you find that the defendant held this belief <u>then he could not have acted with the state of mind that the State is required to prove beyond a reasonable doubt</u>. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not believe that he was acting as a taxi service, then you must find him not guilty of robbery by accomplice liability.
>
> However, if you find that the State has proven beyond a reasonable doubt that the defendant did not believe that he was acting as a taxi service and you find that the State has proven all of the elements of the offense beyond a

> reasonable doubt, then you must find him guilty of robbery by accomplice liability.
>
> [Emphasis added.]

Defendant, relying on our opinion in Bielkiewicz, supra, 267 N.J. Super. at 528, argues that the court's instructions to the jury failed to inform the jury of the "distinctions between the specific intent required for the grades of the offense" and that "it [could] find . . . defendant guilty as an accomplice of a lesser-degree offense than the principal ha[d] committed if it finds that the defendant committed the offense with a different purpose than the principal." In addition, he argues that the court failed to tailor the charge to the particular facts and explain to the jury how the facts "could lead to [the] conclusion" that defendant did not share the same intent as his codefendants. He argues the jury had to decide whether he "shared [his codefendants'] purpose to use force during the commission of the theft" or shared only his codefendants' "purpose to steal," and that "[t]he circumstantial evidence clearly established" the latter. In so arguing, he highlights that, although the court instructed the jury on theft as a lesser-included offense, "it did not make specific reference to [theft] in the context of its charge on accomplice liability," nor did it "mention accomplice liability in instructing the jury on lesser-included crimes."

We agree with defendant's observations about the deficiencies in the court's instructions, but we conclude defendant did not establish that he suffered any prejudice from the omissions made by the court because the jury convicted him of the lesser-included offense of second-degree robbery rather than first-degree robbery as charged.

As noted, defendant did not raise any objection to the charge at trial. "Generally, a defendant waives the right to contest an instruction on appeal if he does not object to the instructions as required by Rule 1:7-2." State v. Adams, 194 N.J. 186, 206-07 (2008). "Where there is a failure to object, it may be presumed that the instructions were adequate" and "that trial counsel perceived no prejudice would result." State v. Morais, 359 N.J. Super. 123, 134-35 (App. Div.), certif. denied, 177 N.J. 572 (2003). However, as "[a]ppropriate and proper charges to a jury are essential for a fair trial," State v. Daniels, 224 N.J. 168, 180 (2016), and "are especially critical in guiding deliberations in criminal matters, improper instructions on material issues are presumed to constitute reversible error." State v. Jenkins, 178 N.J. 347, 361 (2004).

Review of errors in a jury instruction not raised at trial is for plain error. R. 2:10-2. Error in a jury instruction is "plain" only where "[l]egal impropriety in the charge

prejudicially affecting the substantial rights of the defendant [is] sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970)); accord State v. Singleton, 211 N.J. 157, 182-83 (2012). The prejudicial effect of the error "must be evaluated in light of the totality of the circumstances – including all the instructions to the jury, . . . the arguments of counsel," Adams, supra, 194 N.J. at 207 (quoting State v. Marshall, 123 N.J. 1, 145 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993)), and "the overall strength of the State's case." State v. Chapland, 187 N.J. 275, 289 (2006).

The trial court here erred by not adequately instructing the jury as to the level of defendant's accomplice liability. The court's error, however, did not give rise to plain error. R. 2:10-2.

When a prosecution is based on a theory of accomplice liability, the court is required to provide the jury with "full, accurate, and understandable instruction." Daniels, supra, 224 N.J. at 185. Where accomplice liability is charged, "the jury must be instructed on the necessary findings of a shared intent

between accomplice and principal and that the accomplice directly or indirectly participated or assisted in the commission of the criminal act." Id. at 179; see also State v. Whitaker, 200 N.J. 444, 458 (2009) ("An accomplice is only guilty of the same crime committed by the principal if he shares the same criminal state of mind as the principal."). The central concern is that "[i]f a trial court submits lesser[-]included offenses to the jury but fails to give accurate and complete instructions regarding accomplice liability for these lesser offenses, there is a . . . risk that the jury will compromise on a guilty verdict for the greater offense." Bielkiewicz, supra, 267 N.J. Super. at 534.

"[J]ury instructions on accomplice liability must include an instruction that a defendant can be found guilty as an accomplice of a lesser[-]included offense even though the principal is found guilty of the more serious offense." State v. Norman, 151 N.J. 5, 37 (1997). "The driver of a vehicle spiriting away the culprits who committed a robbery is . . . guilty of that crime if he had [the] intent to participate in the theft at or before the time of its occurrence," Whitaker, supra, 200 N.J. at 463, but the driver may only be guilty of a lesser-offense, depending on his or her intent. "[A] principal and an accomplice, although perhaps liable 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. Ingram, 196 N.J. 23, 41 (2008). "[A]n accomplice who does not share the same intent or purpose as the principal may be guilty of a lesser or different crime than the principal." Whitaker, supra, 200 N.J. at 458.

"[W]hen . . . lesser[-]included offenses are submitted to the jury, the court has an obligation to 'carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense.'" Bielkiewicz, supra, 267 N.J. Super. at 528 (alteration in original) (quoting State v. Weeks, 107 N.J. 396, 410 (1987)). Courts are required to instruct the jury that "an accomplice can have a different mental state from that of the principal." State v. Savage, 172 N.J. 374, 389 (2002).

Moreover, the court should also explain to "the jury what . . . facts could lead to this conclusion." Bielkiewicz, supra, 267 N.J. Super. at 533. Thus, if lesser-included offenses are also "submitted to the jury, the court has an obligation to carefully impart to the jury the distinctions between the specific intent required for the grades of the offense." Ingram, supra, 196 N.J. at 38 (quoting Bielkiewicz, supra, 267 N.J. Super. at 528).

The issue of intent is addressed in an alternative model jury charge relating to accomplice liability, designed to be used when a "defendant is charged as [an] accomplice and [the] jury is

instructed as to lesser[-]included charges." Model Jury Charge (Criminal), "Criminal Liability for Another's Conduct/Complicity — Lesser-Includeds" (1995) (Charge # Two). Charge # Two, which the court did not deliver here, contains the same language as Charge # One, which the court followed, but adds language informing the jury that it should consider whether an accomplice participated in a crime "with the purpose of promoting or facilitating the commission of some lesser offense(s) than the actual crime(s) charged in the indictment." Ibid. (emphasis added). It further instructs:

> Our 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. The 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.
>
> . . . .
>
> In considering whether the defendant is guilty or not guilty as an accomplice on this lesser charge, remember that each person who participates in the commission of an offense may do so with a different state of mind and the liability or responsibility of each person is dependent on his/her own state of mind and no one else's.
>
> [Ibid. (emphasis added) (footnote omitted).]

A court's failure to deliver Charge # Two does not automatically give rise to plain error. See Weeks, supra, 107 N.J. at 405. In Ingram, the Supreme Court held:

> 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."
>
> [Ingram, supra, 196 N.J. at 39 (quoting Charge # Two).]

Nevertheless, even where "the trial court gave a proper model jury charge of the lesser-included offense . . . reversible error [is] committed [where] the charge [is] not tied to the facts of the case [or where] . . . the accomplice liability charge [is] given completely separately from the lesser-included offense charge." State v. Walton, 368 N.J. Super. 298, 308 (App. Div. 2004).

Here, the court instructed the jury on first-degree robbery and the lesser-included offenses of second-degree robbery and theft. The court also charged the jury as to accomplice liability, albeit without precision as to its application to lesser-included offenses. Moreover, though the indictment charged defendant with only first-degree robbery, the court's verdict sheet gave the jury the option of convicting defendant of either first-degree or second-degree robbery or theft for each of the victims. Despite

that lack of precision, the jury clearly understood its instructions because it acquitted defendant of the more serious first-degree charge and convicted him of second-degree robbery as a lesser-included offense.

In addition, defendant told the jury he lacked any intent to commit any crime when he testified that he did not know anything about his codefendants' plan to rob the jewelry store. While that testimony did 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 did 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 properly instruct the jury on accomplice liability. State v. Maloney, 216 N.J. 91, 105-06, 109-10 (2013); see also State v. Rue, 296 N.J. Super. 108, 115-16 (App. Div. 1996), certif. denied, 148 N.J. 463 (1997). The risk of prejudice was not only reduced by defendant's testimony, but also by the court charging the jury that defendant could not be found guilty of robbery if the State failed to prove he had an intent to commit a crime. In doing so, the court tailored its instruction to the facts alleged by defendant that he acted only as a taxi cab driver.

Considering the totality of the circumstances, we find defendant failed to demonstrate that the trial court's omission of Charge # Two for accomplice liability was "clearly capable of producing an unjust result." R. 2:10-2. The absence of prejudice is confirmed by defense counsel's failure to request specific instruction or to object to the instructions given. Defendant has failed to show plain error.

Our decision to vacate defendant's convictions on counts three though five mandates that defendant be resentenced by the trial court. As a result, we do not need to address defendant's arguments regarding his sentence as advanced in Point IV of counsel's brief.

Finally, although defendant also raises the issue of ineffective assistance of counsel in Point II of counsel's brief, "[w]e decline to address that argument because it is better suited for review on post-conviction relief and not direct appeal." State v. Mohammed, 226 N.J. 71, 81 n.5 (2016). Also, to the extent we have not addressed any of defendant's remaining arguments, we find them to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part, vacated and dismissed in part. The matter is remanded for entry of an order vacating defendant's convictions

on counts three through five, which are to be dismissed, and for resentencing. We do not retain jurisdiction.