SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4514-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENNIS AIELLO,

Defendant-Appellant.

Submitted October 25, 2016 – Decided May 4, 2017

Before Judges Reisner, Rothstadt and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 10-06-0716.

Joseph E. Krakora, Public Defender, attorney for appellant (Susan Remis Silver, Assistant Deputy Public Defender, of counsel and on the brief).

Fredric M. Knapp, Morris County Prosecutor, attorney for respondent (Paula Jordao, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant, Dennis Aiello, appeals from a judgment of conviction entered after a jury convicted him of committing and

conspiring to commit second-degree failure to make proper disposition of property, N.J.S.A. 2C:20-9 and N.J.S.A. 2C:5-2, while acting as a licensed auto broker. His son was also charged, but pled guilty to a lesser offense in exchange for, in part, his agreement to testify against his father. The charges arose from defendant accepting payment of $95,000 for a luxury vehicle, without paying the vehicle's owner or delivering the car to the purchaser.

On appeal, defendant challenges the trial court's determination and jury instruction that the son was the father's agent in the transaction, and its allowing a telephonic recording of one of the son's conversations with the vehicle's owner to be admitted as evidence. Defendant also argues that the trial court should have charged the jury with accomplice liability on its own motion, and that the prosecutor committed misconduct during her summation when she described a receipt as being sent by defendant that was actually sent by his son. We disagree with these contentions and affirm.

The salient facts established at defendant's trial were not generally disputed and can be summarized as follows. Defendant was the owner of Any Auto Sales, a company through which he offered auto broker services, including searching auctions and market reports to find specific vehicles for his customers' purchase or

to arrange for the sale of their vehicles. Defendant's son initially worked for Any Auto Sales washing cars, but, eventually, he began to attend car auctions, buy and sell cars for defendant and help with internet marketing of vehicles. Ultimately, defendant's son opened his own brokerage, but he relied on his father's license in order to legally sell cars. He also used defendant's credit line to purchase cars for his business.

Despite opening his own business, the son continued to buy and sell cars with defendant and provide internet marketing services to defendant's company. Defendant's son would bring customers to Any Auto Sales, and, after defendant met with the customer to determine how the vehicle would be paid for, the son would locate and purchase the car. The money procured through the son's deals would go through Any Auto Sales' account and the son would share his profits with defendant.

The car sale that led to defendant's conviction was a transaction procured by his son. In early 2009, the seller asked the son to sell a 1987 Lamborghini. Although the son initially tried to sell the vehicle on his own, he later enlisted defendant's help in selling the vehicle. The son explained to defendant that they could share any profit over $90,000, which was the amount the son stated the seller wanted for the car. Defendant agreed and his son listed the vehicle on various websites, including Any Auto

Sales' website and eBay, and brought it to an auction in Atlantic City. The car did not sell at the auction, but he continued to market it through Any Auto Sales' eBay account.

Defendant attended the auction and delivered the original title for the Lamborghini to the auction's organizer. After the car did not sell, the auction's organizer mailed the original title back to Any Auto Sales.

During the same period, a California resident was seeking to purchase a Lamborghini. He searched on eBay and came across Any Auto Sales' listing for the Lamborghini. The listing contained both defendant's and his son's names as contacts. The purchaser first contacted the son by telephone to discuss the automobile's reserve price, i.e., the minimum bid that had to be met before the car could be sold on the eBay auction. When the car did not sell, the purchaser again contacted defendant's son to see if the car was still available for sale even though the eBay bidding period had ended. The son confirmed the vehicle was still available and the two of them negotiated a purchase price of $105,000.

The purchaser agreed to the son's request for a $10,000 deposit towards the purchase price and sent a check in that amount made payable to the son as requested. The son sent the purchaser an email as a receipt for the deposit, never told defendant about receiving the payment, and deposited the check into his personal

account. In the email, the son instructed the purchaser to wire the $95,000 balance to Any Auto Sales' bank account.

Defendant's son had previously told defendant that the purchase price was $95,000 and they discussed where the sale proceeds were to be deposited. According to defendant, his son told him he thought "[he] got the car sold for $95,000[] and [the son did not] know if [he was] supposed to put [the money] in [the seller's] account or [defendant's] account."

At the time defendant's son sent the email to the purchaser, he knew the seller would not receive any of this money. The $95,000 was to be wired into Any Auto Sales' account because the title to the car was in Any Auto Sales' name. Defendant, however, had already told his son to instruct the purchaser to deposit the balance in Any Auto Sales' account because defendant needed the money to resolve a financial problem he had with his finance companies. According to defendant, however, he did not intend to permanently deprive the seller of the money or to deprive the purchaser of the car. He explained that the money was automatically withdrawn from Any Auto Sales' account when the finance companies either cashed checks he previously issued in blank or withdrew funds directly, in accordance with agreements he signed with the finance companies. According to defendant, he tried to secure a loan to repay the purchaser. His application

was approved, but he never received the loan proceeds due to a down turn in the economy.

Before sending the balance, the purchaser called defendant at Any Auto Sales to make an appointment to inspect the car. Prior to that call, defendant never spoke to or negotiated with the purchaser, nor was he involved with creating the eBay listing for the car. During the phone conversation between defendant and the purchaser, defendant explained that the purchaser had been dealing with his son who worked for defendant and that the purchaser should send the money to defendant. Defendant assured the purchaser that after he received the $95,000, he would overnight the title to the purchaser. The purchaser did not arrange an inspection, wired defendant the funds as instructed, but did not receive the title as promised.

The purchaser called defendant and asked about the title. Defendant told him that there was a problem, but to give him one more day to straighten it out. When the purchaser still did not receive the title on the day following that conversation, he again spoke to defendant's son who assured him that he would ship the car to California, but that the purchaser was required to pay for transportation and insurance costs. Neither the title nor the car was sent to the purchaser.

Over the next two weeks, the purchaser continued to call both defendant and his son numerous times. When the purchaser spoke with defendant, he told the purchaser he was happy to send him the title, but that the vehicle's title was lost. Although defendant thought he had had the title in his possession, he told the purchaser to call the State to file a report to locate and obtain the title.

Defendant instructed his son to tell the purchaser "he was working on getting the car to him," which the son knew was not true. During his call with the purchaser, the son stated that he was watching the car being loaded onto the shipping truck and that the purchaser should receive the car in ten days. A few days later the purchaser spoke again with defendant and his son and was told that the car was fine and the title was being shipped with the car. The purchaser never received the car or its title, and the vehicle remained listed for sale on eBay.

All of this transpired without the seller's knowledge. According to the seller, defendant's son contacted him to advise that he had an interested purchaser, but the seller and the son could not agree on a sales price. The owner then left the country. When he returned, he learned for the first time that defendant's son had arranged for a sale and the purchaser was suing the owner,

defendant, and his son because the vehicle and its title were never delivered.

Defendant and his son were arrested. A Morris County grand jury indicted defendant and charged him with second-degree theft, N.J.S.A. 2C:20-3(a) (count one); second-degree theft by failure to make required disposition, N.J.S.A. 2C:20-9 (count two); second-degree conspiracy to commit theft, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:20-3(a) (count three); and second-degree conspiracy to commit theft by failure to make required disposition, N.J.S.A. 2C:20-9 and N.J.S.A. 2C:5-2 (count four). While the matter was pending trial, the State dismissed the first and third counts of the indictment.

At defendant's ensuing trial, the judge allowed the prosecutor to play a recorded phone call between defendant's son and the seller. In this conversation, the son admitted to taking the buyer's $10,000 and explained that he kept the eBay listing open because he wanted to sell the car for more than $105,000 to help make up for the losses and "straighten out" the situation with the purchaser.

The jury convicted defendant of committing the two charges, and the judge sentenced defendant to a five-year term on both counts, to be served concurrently, as well as appropriate

penalties, fines, and restitution in the amount of $95,000. This appeal followed.

On appeal, defendant argues:

> POINT I
>
> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT USURPED THE JURY'S FACT-FINDING FUNCTION AND INSTRUCTED THE JURY THAT CODEFENDANT[, DEFENDANT'S SON,] WAS THE DEFENDANT'S AGENT AND HAD ACTED WITHIN THE SCOPE OF HIS AGENCY WHEN HE SPOKE TO THE CAR OWNER ABOUT THE SALE OF THE LAMBORGHINI.
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> POINT II
>
> THE TRIAL COURT FAILED TO CHARGE ACCOMPLICE LIABILITY WHICH PREVENTED THE JURY FROM HAVING ANY GUIDANCE ON WHETHER CODEFENDANT['S] ACTIONS AND STATEMENTS SHOULD BE ATTRIBUTABLE TO THE DEFENDANT, AND THE TRIAL COURT ALSO FAILED TO INFORM THE JURY THAT THE DEFENDANT COULD HAVE A DIFFERENT INTENT FROM HIS CODEFENDANT WHICH COULD WARRANT HIS CONVICTION OF A LESSER CHARGE. THIS DEPRIVED THE DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL.
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> POINT III
>
> THE PROSECUTOR ENGAGED IN MISCONDUCT WHICH DENIED DEFENDANT A FAIR TRIAL WHEN THE PROSECUTOR WENT BEYOND THE FACTS PLACED IN EVIDENCE AND SIMPLY ATTRIBUTED TO THE DEFENDANT ALL THE STATEMENTS, ACTIONS, AND INTENT OF HIS CODEFENDANT . . . .

POINT IV

THE TRIAL WAS SO INFECTED WITH ERROR THAT EVEN IF EACH INDIVIDUAL ERROR DOES NOT REQUIRE REVERSAL, THE AGGREGATE OF THE ERRORS DENIED THE DEFENDANT A FAIR TRIAL. (NOT RAISED BELOW).

We first address defendant's arguments regarding the admission into evidence of the recording of defendant's son's conversation with the seller, and the judge's instruction to the jury about the son being an agent of defendant. When the prosecutor sought to play the recorded conversation, the trial judge conducted a hearing outside the presence of the jury and found that although defendant's son was not an employee of Any Auto Sales at the time of the transaction, he remained an authorized agent. Relying upon the Supreme Court's opinion in Spencer v. Bristol-Meyers Squibb Co., 156 N.J. 455 (1998), the judge concluded the statements made by the son were admissible against defendant under N.J.R.E. 803(b)(4).

After the judge made that determination, defense counsel agreed that the jury should be provided with a limiting instruction, and he had no objection to the entire recording being played to the jury. Specifically, defense counsel stated that the judge should "tell the jury that the statements of [the son] are admissible as substantive evidence."

The judge instructed the jury:

> I had previously made a ruling in this case that this tape is admissible. Now it is admissible with regard to the statements made by [defendant's son]. . . . You can consider the statements made by [the son] to bind the defendant as his agent. That's a ruling that I previously made in this case. You consider them to be direct evidence.

At the conclusion of the trial, the judge charged the jury as to their consideration of the son's conduct. The judge specifically told the jurors they could not rely upon the son's admission of guilt "as evidence that . . . defendant is guilty of the crimes that he is charged with." The judge also instructed them as to the law of conspiracy in accordance with the model jury charge.[1]

According to defendant, the judge's instruction removed from the jury an issue that was key to its determination — whether defendant's son was his agent — and deprived the jury from considering "when defendant would be criminally liable for his [son's] actions." Moreover, as a result of the judge's instruction, defendant was prejudiced by being tainted with all of his son's deceitful acts and statements made in connection with the subject sale, rendering defendant's trial "fundamentally unfair." We disagree.

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[1] Model Jury Charge (Criminal), "Conspiracy" (2010).

"We begin [our review] by acknowledging our deferential standard for reviewing a trial court's evidentiary rulings, which should be upheld 'absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Perry, 225 N.J. 222, 233 (2016) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). We will not disturb a trial judge's rulings "unless [it] 'was so wide of the mark that a manifest denial of justice resulted.'" Ibid. (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Similarly, we will "uphold the factual findings underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Elders, 192 N.J. 224, 243-44 (2007) (citation omitted). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Ibid. (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Applying these standards, we conclude the trial judge did not abuse her discretion in admitting the recorded conversation because there was substantial evidence to support her determination that defendant's son was his agent in the transaction. Although defendant or his company no longer employed his son, the son brought the deal to defendant, who then directed his son and the purchaser throughout the transaction as to payment

of the $95,000, which was to be used for defendant's purposes. Under these circumstances, the trial judge properly determined that the agency existed and allowed for the playing of the recording.[2] See Griffin v. City of E. Orange, 225 N.J. 400, 419 (2016)(quoting N.J.R.E. 803(b)(4) and stating "a hearsay statement made by a 'party-opponent' will not be excluded by the hearsay rule if it constitutes 'a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship'").

Turning to the trial judge's limiting instruction, at the outset we note that defense counsel did not object to the instruction, but urged the court to give the limiting instruction. When a party does not object to the jury instruction at trial, we review the charge for plain error. State v. McKinney, 223 N.J. 475, 494 (2015) (citing R. 1:7-2; R. 2:10-2). Thus, "[t]o warrant reversal, the error must be 'clearly capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2); see also State v. Bueso, 225 N.J. 193, 202 (2016). In connection with a jury charge, plain error is a "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently

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[2] The statement was also admissible under N.J.R.E. 803(b)(5) applicable to coconspirators because there was evidence of the conspiracy other than the recorded statement. See State v. Savage, 172 N.J. 374, 402-03 (2002).

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. Adams, 194 N.J. 186, 207 (2008) (alteration in original) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

We conclude that the trial judge's instruction was not erroneous and, even if it was, it alone had no capacity to result in defendant's conviction in light of the other overwhelming evidence against him. Defendant's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say that defendant incorrectly views the ultimate issue before the jury as having been defendant's liability for his son's acts. That view conflates the concepts of accomplice liability with that of conspirator liability. See N.J.S.A. 2C:2-6; N.J.S.A. 2C:5-2.[3] The issue for the jury to decide was only whether defendant's actions established

[3] Theories of conspiracy liability and accomplice liability, although similar, "are not identical." State v. Samuels, 189 N.J. 236, 254 (2007). "The critical difference is that, as statutorily defined, conspiracy requires proof of an agreement to commit a crime whereas accomplice liability does not." Ibid. "[A]ccomplice liability . . . requires that a defendant act with a purposeful state of mind in furtherance of the crime." State v. Whitaker, 200 N.J. 444, 457 (2009); see also State v. Roldan, 314 N.J. Super. 173, 189 (App. Div. 1998) (noting differences between the theories of accomplice liability and conspiratorial liability).

he committed the crimes for which he was charged. The evidence of defendant's wrongdoing, without reference to his son's actions, was substantial and provided the jury with a sound basis for its ultimate decision. The judge's determination of agency for purposes of admitting a recorded statement by an agent did not usurp the jury's obligation to determine whether the State proved each element of the crimes charged.

We next consider defendant's contention that the trial judge should have instructed the jury as to accomplice liability, even though defendant was not charged with committing any offense as an accomplice, see N.J.S.A. 2C:2-6,[4] and he did not request the

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[4] The statute states in pertinent part:

> a. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
>
> b. A person is legally accountable for the conduct of another person when:
>
> . . . .
>
> (3) He is an accomplice of such other person in the commission of an offense[.]
>
> . . . .
>
> c. A person is an accomplice of another person in the commission of an offense if:

charge. According to defendant, "the State's case hinged on treating defendant as an accomplice, and the jury could only find him guilty if it attributed [his son's] actions and statements to him" as an accomplice to his son, who acted as the principal. He also contends that because he never formed an intent to permanently deprive the purchaser of the $95,000, had an accomplice liability charge been given, the jury could have returned a verdict for uncharged lesser-included offenses, even though he did not request that the jury be charged with those offenses. We disagree.

As defendant did not request the accomplice liability instruction, or object to its omission, we again review his argument under a plain error standard. See State v. Maloney, 216

> (1) With the purpose of promoting or facilitating the commission of the offense; he
>
> (a) Solicits such other person to commit it;
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
>
> (2) His conduct is expressly declared by law to establish his complicity.
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> [N.J.S.A. 2C:2-6.]

N.J. 91, 104 (2013) (applying plain error standard to argument that court failed to sua sponte deliver accomplice liability instruction); State v. Jenkins, 178 N.J. 347, 360 (2004) (applying plain error standard to argument that court failed to sua sponte deliver instruction on lesser-included offense); see also Adams, supra, 194 N.J. at 207.

"An erroneous jury charge 'when the subject matter is fundamental and essential or is substantially material' is almost always considered prejudicial." Maloney, supra, 216 N.J. at 104-05 (quoting State v. Green, 86 N.J. 281, 291 (1981)). We apply a presumption that improper instructions are reversible error in criminal cases. Id. at 105. However, that presumption is overcome if the error is "harmless beyond a reasonable doubt." Ibid. (quoting State v. Collier, 90 N.J. 117, 123 (1982)).

Where the prosecution pursues a theory of accomplice liability against a defendant,[5] "the court is obligated to provide

[5] To commit a crime as an accomplice, a defendant must act with the purpose of aiding the substantive offense. State v. White, 98 N.J. 122, 129 (1984). The court must therefore instruct the jury "that to find a defendant guilty of a crime under a theory of accomplice liability, it must find that he 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.'" State v. Bielkiewicz, 267 N.J. Super. 520, 528 (App. Div. 1993)(quoting State v. Fair, 45 N.J. 77, 95 (1965)). "[W]hen an alleged accomplice is charged with a different degree offense than the principal or lesser[-]included offenses are submitted to the jury,

the jury with accurate and understandable jury instructions regarding accomplice liability even without a request by defense counsel." Bielkiewicz, supra, 267 N.J. Super. at 527. When a defendant requests a jury instruction, the trial court should give that instruction if "there is a rational basis in the record to give it." State v. Walker, 203 N.J. 73, 87 (2010). "[I]f counsel does not request the instruction, it is only when the evidence clearly indicates the appropriateness of such a charge that the court should give it." Ibid.

"[T]he obligation to provide the jury with instructions regarding accomplice liability arises only in situations where the evidence will support a conviction based on the theory that a defendant acted as an accomplice." State v. Crumb, 307 N.J. Super. 204, 221 (App. Div. 1997), certif. denied, 153 N.J. 215 (1998). "When the State's theory of the case only accuses the defendant of being a principal, and a defendant argues that he was not

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the court has an obligation to 'carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense.'" Ibid. (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." Savage, supra, 172 N.J. at 389. Thus, if lesser-included offenses are submitted to the jury, "the trial court's failure to refer to accomplice liability while giving the lesser-included charge [is] reversible error." State v. Walton, 368 N.J. Super. 298, 307 (App. Div. 2004).

involved in the crime at all, then the judge is not obligated to instruct on accomplice liability." Maloney, supra, 216 N.J. at 106.

Applying these guiding principles, we conclude the trial judge did not commit an error by not charging accomplice liability or any uncharged, unrequested lesser-included offenses because the evidence did not support either. Rather, the evidence focused on whether defendant committed a theft by failure to make required disposition of property received. N.J.S.A. 2C:20-9. The statute provides in pertinent part:

> A person who purposely obtains or retains property upon agreement or subject to a known legal obligation to make specified payment or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition.
>
> [N.J.S.A. 2C:20-9.]

All that is required is proof that a defendant used the property as his own and failed to make the required payment or distribution. N.J.S.A. 2C:20-9. "The heart of the N.J.S.A. 2C:20-9 crime is the actor purposely obtaining or retaining property subject to either an agreement or a known legal obligation to make a specified payment or disposition but then 'deal[ing] with the property obtained as his own and fail[ing] to make the required

payment or disposition.'" State v. Damiano, 322 N.J. Super. 22, 41 (App. Div. 1999) (alteration in original), certif. denied, 163 N.J. 396 (2000). Even if "the initial taking [of the property] is authorized[,] . . . at a later time a theft occurs when the property is converted to the possessor's own use." State v. Dandy, 243 N.J. Super. 62, 64-65 (App. Div. 1990). It is therefore the State's burden to prove a defendant "intended to divert the money or property [taken] entirely to his own purposes or that thereafter he purposely failed to make the required disposition during the period of his possession." Damiano, supra, 322 N.J. Super. at 41.

A defendant, however, may not have the criminal intent required for conviction under N.J.S.A. 2C:20-9 if, due to cash-flow problems, he does not immediately make a required disposition of the property of others, but intends to make those dispositions as soon as he has sufficient funds to do so. See Id. at 41-42. An absence of criminal intent can be found if a jury believes a "defendant was in no way conferring or intending to confer a personal benefit on himself, that he was attempting to deal with serious cash flow problems . . . that all available cash went into the meeting of business obligations, and that defendant was paying off these obligations as soon as [he experienced] sufficient cash flow[]." Ibid.

As we have already observed, there was substantial, credible evidence of defendant's guilt as principal and no evidence of defendant acting as an accomplice. Equally true was that defendant presented evidence that it was not his intention to deprive the purchaser of the car or the seller of his money. According to defendant, he did not have the requisite state of mind as he never intended to keep the money. Defendant relied upon his testimony that he tried to borrow money after the fact in an attempt to make the purchaser whole. That allegation amounted to a denial of guilt that would have led to his acquittal if accepted by the jury. It was a complete defense to the crime charged, undermining any need for an accomplice charge.

Also, there was insufficient evidence that defendant acted as an accomplice to his son. Rather, the substantial credible evidence adduced from both defendant and his son established that defendant acted at all times as a principal in deciding to retain the money paid by the purchaser and not delivering the vehicle. It was defendant's decision to deprive the purchaser of the $95,000 for defendant's sole benefit, and he instructed both his son and the purchaser in their actions in order to achieve that result. Defendant cites to no evidence that supports a contrary view of the proofs, other than his intention to return the money, and the prosecutor never argued otherwise. The evidence simply did not

warrant an accomplice charge. As a result, because the charge was not warranted, and no lesser-included offense charge was requested by either party, the judge did not commit any error by not charging any such offenses. See Bielkiewicz, supra, 267 N.J. Super. at 527-28.

Finally, defendant argues his right to a fair trial was denied when the prosecutor engaged in misconduct — specifically, when in her summation the prosecutor went beyond the facts by conflating defendant's statements and actions with his son's. Although defendant did not object to the prosecutor's remarks, defendant now contends the prosecutor "merged the two codefendants' identities and attributed [the son's] conduct to defendant" during summation by mentioning the email receipt the son sent to the purchaser without explicitly stating that the son sent the email as compared to defendant. We find no merit to this contention.

"[P]rosecutorial misconduct can be a ground for reversal where the prosecutor's misconduct was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999). While a prosecutor "in . . . summation may suggest legitimate inferences to be drawn from the record," a prosecutor "commits misconduct when [the summation] goes beyond the facts before the jury." State v. Harris, 156 N.J. 122, 194 (1998). To warrant reversal of a conviction, "the prosecutor's conduct must

have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 575 (1999) (quoting State v. Roach, 146 N.J. 208, 219, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996)), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001).

In our review of a claim of prosecutorial misconduct, we engage in a three-part inquiry when determining whether the prosecutor's conduct was sufficiently egregious to warrant a new trial. Id. at 575-76. We "must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Frost, supra, 158 N.J. at 83.

Where defense counsel does not object to the challenged comment during summation, it "suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. . . . [and] deprives the court of an opportunity to take curative action." Id. at 84. Under those circumstances, the comment should be deemed harmless, if comments were not "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. Bakka, 176 N.J. 533, 548 (2003) (quoting State v. Bakston, 63 N.J. 263, 273 (1973)).

We conclude that the prosecutor's failure to specify that defendant's son sent the email receipt to the purchaser did not amount to prosecutorial misconduct. Not only did defendant not object to the lack of specificity as to this one fact, but the overwhelming evidence as to who sent the email insured that any possible confusion would not have caused the jury to reach a different verdict. We therefore reject defendant's contention that the prosecutor's remarks were improper and denied him a fair trial.

Affirmed.