SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5382-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

QUAMEIR T. WATERS, a/k/a
COO COO, QUAMEIER WATERS,

Defendant-Appellant.

Submitted September 12, 2017 - Decided September 21, 2017

Before Judges Carroll and Mawla.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 13-07-0595.

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

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Kim L. Barfield, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On November 13, 2012, defendant Quameir Waters, Octavis Spence, and others attended a gathering hosted by Anthony and

Thomas Nieves at the Nieves's apartment in Fairton. The following morning, defendant and Spence were involved in a heated argument, during which Spence locked defendant outside the apartment, but eventually let him back in. Defendant then fired two shots at Spence, hitting him once in the back and leaving him paralyzed from the waist down. Defendant left the scene, and the gun was never recovered.

Spence knew defendant for "[a] couple months" before the shooting and referred to him by his street name, "Cuckoo." Spence identified defendant as his assailant and described the gun defendant used as a dark semiautomatic handgun. At the scene, police found one bullet lodged in a wall and two empty shell casings, which they concluded were fired from a semiautomatic weapon.

That evening, defendant was arrested at his Bridgeton home by the Fugitive Unit of the New Jersey State Police (NJSP). Defendant gave a statement in which he initially denied being at the Fairton apartment on the morning of the shooting, insisting he had gone fishing. He later admitted he was present; that he and Spence had argued violently over a girl; and that he wanted to fight Spence. However, defendant continued to deny shooting Spence, and claimed "[s]ome other guy" came into the home and shot

Spence during the argument, but he could not provide police with a name or description of the shooter.

The police searched defendant incident to his arrest and recovered one Metro PCS Kyocera cell phone and a blue AT&T cell phone. After obtaining a Communications Data Search Warrant, the police downloaded the contents of the phones onto a flash drive. From the AT&T cell phone, they recovered a text message sent to a contact named "Marianna" at 1:01 p.m. on November 14, 2012, stating: "I got into some deep shit, bae. I need to know if you're going to be here for me or not. This shit crazy. Write down this address; 54 West Broad Street, Bridgeton, New Jersey 08302." The address referred to in the text message is that of the Cumberland County Jail.

Police also recovered approximately 2000 photographs from the cell phones, 200 of which had been deleted. Several deleted photos were admitted in evidence at trial, including a picture of a black, semiautomatic handgun with a magazine lying next to it, and a picture of defendant holding what appeared to be a black handgun and pointing it at the camera. The police could not determine the caliber of the gun displayed in the photographs or the location where the photos were taken.

On July 17, 2013, defendant was charged in Cumberland County Indictment No. 13-07-0595 with first-degree attempted murder,

N.J.S.A. 2C:11-3a(1) (count one); second-degree aggravated assault, N.J.S.A. 2C:12-1b(1) (count two); fourth-degree aggravated assault, N.J.S.A. 2C:12-1b(4) (count three); third-degree aggravated assault, N.J.S.A. 2C:12-1b(4) (count four); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b (count five); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a (count six); and second-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7b (count seven). Following a January 2015 jury trial, defendant was convicted on all seven counts.

On April 22, 2015, the trial court denied defendant's motion for a new trial, and granted the State's motion for a discretionary extended term sentence. On count one, the court imposed a fifty-year prison term with an eighty-five percent parole ineligibility period pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a). The court merged counts two through six into count one. On count seven, the court imposed an eight-year prison term with five years of parole ineligibility, consecutive to the sentence imposed on count one. The court also assessed the appropriate fines and penalties, and awarded defendant 890 days of jail credit for time already served.

In this appeal, defendant challenges his convictions and sentence. He presents the following arguments for our

consideration:

> POINT I
>
> THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT WHEN HE MADE TWO ARGUMENTS IN SUMMATION THAT HAD NO BASIS IN FACT. (PARTLY RAISED BELOW).
>
> POINT II
>
> BECAUSE THERE WAS NO BASIS FOR ANY INSTRUCTION ON CONSCIOUSNESS OF GUILT, IT WAS PREJUDICIAL ERROR FOR THE COURT TO CHARGE THE JURY THAT THERE WERE TWO REASONS IT COULD DRAW THE INFERENCE: 1) FROM CELL PHONE PHOTOGRAPHS THAT WERE DELETED BEFORE THE SPONTANEOUS OFFENSE AND 2) FROM [DEFENDANT]'S "FLIGHT," WHICH CONSISTED OF HIS GOING HOME.
>
> POINT III
>
> THE PROSECUTOR'S REPEATED USE OF DEFENDANT'S PEJORATIVE STREET NAME WAS HIGHLY PREJUDICIAL AND VIOLATED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL. (NOT RAISED BELOW).
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> POINT IV
>
> THE SENTENCE OF [FIFTY-EIGHT] YEARS, [FORTY-SEVEN AND ONE-HALF] YEARS WITHOUT PAROLE[,] IS BASED ON AN IMPROPER AGGRAVATING FACTOR, OVERLOOKS A RELEVANT MITIGATING FACTOR, AND IS EXCESSIVE.

We address each of these arguments in turn.

I.

Defendant contends the prosecutor committed reversible misconduct when he made two arguments in summation that had no basis in fact. First, defendant asserts the prosecutor misstated

facts in his summation when he argued that it was unknown whether defendant deleted the photos from his cell phone before or after the shooting. The prosecutor stated, in pertinent part:

> We have photographs on his phone.
>
> And I know it was probably kind of boring, hearing Detective Cavagnaro talk about the process and procedure [of recovering the photos] and going through the dates and times. And, yeah, there's a question; did he erase the pictures before or after he committed the crime?
>
> Well, the answer to -- whatever that answer is, it's not good for [defendant] because if he did it after the crime, he's trying to cover it up. If he did it before [the crime], it kind of says he knew it was coming.

At trial, Cumberland County Prosecutor's Office Detective Raymond Cavagnaro testified that the photos of the gun found on defendant's phone had been deleted at 12:00 a.m. on November 14, 2012, "plus or minus five hours." The testimony of Spence and NJSP Detective Arthur Barilotti was that the shooting occurred sometime between 7:30 a.m. and 8:30 a.m. on November 14, 2012. Thus, according to the State's evidence, the photos were erased before the shooting.

Defense counsel timely objected to the prosecutor's comment on this evidence, arguing that the photos were "off [defendant's] phone" by the time of the shooting, and accordingly, they "didn't have anything to do with this shooting." Defense counsel argued

that this misstatement of fact was improper and constituted grounds for a mistrial. The court disagreed, ruling that the prosecutor's remark was a fair comment on the consciousness of defendant's guilt. On appeal, defendant renews his argument that the prosecutor's remarks cannot "be considered fair comment on the evidence." He contends the State's evidence indicated that the pictures were deleted before the shooting, and because the argument between Spence and defendant was "wholly spontaneous," the shooting could not have been planned.

Second, defendant contends that the prosecutor committed reversible misconduct when he remarked that it took "courage" for Spence to testify at trial. During summation, the prosecutor commented:

> [Defendant] tried to kill him and ended up paralyzing him, putting him in a wheelchair for the rest of his life. So not only has he got that wheelchair and everything that's associated with it but he gets four years in prison.[1]
>
> What courage did it take to come in here? He could have been like Anthony Nieves. Taken the stand, looked over at [defendant], gotten a little shaky.
>
> Mr. Spence got up here and I ask you, when you evaluate his credibility, look at the

[1] At the time of trial, Spence was serving a four-year state prison sentence for a violation of probation and a controlled dangerous substances conviction.

> courage and ask yourself what courage that takes. And while you're at it, ask a very basic, fundamental question.
>
> Why in the world would Mr. Spence, who is in a wheelchair for the rest of his life, paralyzed from the waist down, get on this stand and [willfully] misidentify the person who put him in that wheelchair? That, ladies and gentlemen, makes zero sense, no sense.
>
> You want to look at credibility? You want to evaluate credibility? Look at the motives of the person taking the stand and ask yourselves, does this make sense?

Although defendant did not object at trial, he now argues that the prosecutor "implied damaging facts" by stating that Spence had "courage" for testifying in court. He contends the jurors "may well have understood that the prosecutor was insinuating that it took courage for Spence to testify because he had reason to fear . . . [defendant] would retaliate[.]" Defendant asserts that the prosecutor's statement improperly communicated to the jury that if Spence was willing to offer testimony under such circumstances, then it must be true, and thereby "violated the longstanding rule" that the prosecutor should not vouch for the credibility of the victim.

When "a claim [is made] of prosecutorial misconduct with respect to remarks in summation, the issue presented is one of law" and, thus, reviewed de novo. State v. Smith, 212 N.J. 365, 387 (2012), cert. denied, 568 U.S. 1217, 133 S. Ct. 1504, 185 L.

Ed. 2d 558 (2013). The issue raised in claims of prosecutorial misconduct "is two-fold: whether the prosecutor committed misconduct, and, if so, 'whether the prosecutor's conduct constitutes grounds for a new trial.'" State v. Wakefield, 190 N.J. 397, 446 (2007) (quoting State v. Smith, 167 N.J. 158, 181 (2001)), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

"[P]rosecutors are afforded considerable leeway" when they address the jury, provided "their comments are reasonably related to the scope of the evidence." State v. Cole, ___ N.J. ___, ____ (2017) (slip op. at 32) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). "Prosecutors should not make inaccurate legal or factual assertions during a trial. They are duty-bound to confine their comments to facts revealed during the trial and reasonable inferences to be drawn from that evidence." Frost, supra, 158 N.J. at 85 (citation omitted). In addition, a prosecutor may not express a personal belief or opinion as to the truthfulness of a witness's testimony. State v. Marshall, 123 N.J. 1, 156 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993); State v. Staples, 263 N.J. Super. 602, 605 (App. Div. 1993).

A prosecutor is, however, "entitled to argue the merits of the State's case 'graphically and forcefully,' and is not required

to present those arguments as if he were addressing a lecture hall[.]" Smith, supra, 212 N.J. at 403 (quoting State v. Feaster, 156 N.J. 1, 58 (1998), cert. denied, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001)). They "may strike hard blows [but] not . . . foul ones[.]" Feaster, supra, 156 N.J. at 59 (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 2d 1314, 1321 (1935)).

"Notwithstanding the high standard to which a prosecutor is held as he or she gives an opening statement or summation, 'not every deviation from the legal prescriptions governing prosecutorial conduct' requires reversal." State v. Jackson, 211 N.J. 394, 408-09 (2012) (quoting State v. Williams, 113 N.J. 393, 452 (1988)). A prosecutor's improper "comments are deemed to have violated the defendant's right to a fair trial when they 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. at 409 (alteration in original) (quoting State v. Koedatich, 112 N.J. 225, 338 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989)).

In our review of the prosecutor's comments, the factors to be considered include: "whether 'timely and proper objections' were raised; whether the offending remarks 'were withdrawn promptly'; . . . whether the trial court struck the remarks and

provided appropriate instructions to the jury [; and] . . . whether the offending remarks were prompted by comments in the summation of defense counsel." Smith, supra, 212 N.J. at 403-04 (citations omitted). Where there is no objection to the prosecutor's statements at trial, defendant cannot prevail without showing plain error – error clearly capable of prejudicing defendant's right to a fair trial. State v. Timmendequas, 161 N.J. 515, 576-77 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). A failure to object is relevant to the fair trial standard in two ways. It "indicates that defense counsel did not believe the remarks were prejudicial at the time[,]" and it "deprives the court of the opportunity" to address and cure the error injected by the prosecutor's deviation from his or her duty "'to ensure that justice is achieved,'" which exists whether or not defense counsel objects. Id. at 576 (quoting State v. Long, 119 N.J. 439, 483 (1990)).

Here, the fact the prosecutor's summation misstated the photographs may have been erased after the shooting is not a sufficient basis to reverse defendant's convictions. First, as a curative measure, the court reminded the jury that "[a]rguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence." Second, defendant's contention that the altercation that ultimately resulted in

Spence's shooting was purely "spontaneous" rather than "planned" was clearly an issue for the jury to decide. Importantly, Spence testified that the argument persisted for twenty to thirty minutes. After the argument, Spence locked the door, but eventually let defendant back in the apartment, at which time the shooting occurred. Moreover, a plethora of additional evidence, including the identification of defendant by Spence, who knew him well; defendant's incriminating text message to Marianna after the shooting indicating he "got into some deep shit" and providing her with the address for the county jail; and his inconsistent statements to police following his arrest, amply supported defendant's conviction and rendered admission of the challenged remark harmless.

With respect to the prosecutor's comments regarding Spence's "courage" in testifying, we begin by noting that defense counsel did not object at trial, and hence our analysis of these comments is governed by the plain error standard. R. 2:10-2. We conclude these comments did not rise to the level of vouching, nor did the State's comments mislead the jury or improperly bolster Spence's testimony. As the State correctly submits, courage and honesty are not synonymous.

We distinguish the present case from State v. Walden, 370 N.J. Super. 549 (App. Div.), certif. denied, 182 N.J. 148 (2004),

where we determined that the prosecutor's summation impermissibly commented on the credibility of a witness, Temil Green, so as to mandate a reversal. In Walden, the prosecutor stated:

> If a reasonable person were going to go to a store and buy a witness, I would suggest to you that reasonable person would buy Temil Green. That he was just a good, solid, decent, courageous, I suggest to you, honest kid. He is the type of kid that we hope our sons will grow up to be. Not having everything handed to him on a silver platter or on a silver spoon but when it comes down to your gut to do the right thing, to be honest, to be truthful, to not cave into the pressures, to not succumb to any of the fears, that's courage, ladies and gentlemen.
>
> That is a lot more courage than many of us will ever know and I suggest to you that when you determine the credibility of Temil Green, [] I'm going to suggest to you that Temil Green was as honest as could be when he gave that statement and was as courageous as could be and I will grant you he was uncomfortable and nervous there and I will talk about -- suggest to you why that's so."
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> [Id. at 560 (emphasis added).]

In Walden, the prosecutor directly stated to the jury his personal opinion that the witness was honest, contending that Temil Green was "as honest as he could be" and that he "gave you honest testimony." Ibid. Importantly, in analyzing this statement, we took issue with the prosecutor's suggestion that Green was honest and to be believed, and not with his suggestion that Green was courageous. Id. at 560-62. In contrast, in the

present case, the prosecutor merely stated that Spence was courageous for testifying, given the debilitating injuries he suffered in the shooting. When viewed in context, we find no plain error in these challenged remarks.

II.

Defendant next contends there was no basis for the trial court to instruct the jury on consciousness of guilt, either as to the deleted photographs or defendant's alleged flight from the shooting scene. Defendant's arguments on this point are unpersuasive.

At the charge conference, defense counsel objected to the flight charge, arguing there was no factual basis in the record to support it, and citing the prejudicial effect of such charge. In rejecting defendant's argument, the trial judge reasoned:

> [T]here's certainly an inference that can be drawn by the jury that [defendant] fled shortly after the alleged commission of the crime. So if [defendant] did it, [he is] the one that left. There's certainly evidence before the jury of that . . . but the charge also is very specific.
>
> It says that mere departure from a place where a crime has been committed does not constitute flight. The charge goes on to say that if you find that the [d]efendant, fearing that an accusation or arrest would be made against him on the charge involved in the Indictment [] [t]ook refuge in flight for the purpose of evading the accusation or arrest on that charge, then you may consider such

> flight, in connection with all the other evidence in the case, as an indication of proof of consciousness of guilt.
>
> Flight may be considered as evidence of consciousness of guilt if you should determine that the [d]efendant's purpose in leaving was to evade accusation or arrest to the offense charged in the Indictment.
>
> So . . . there's an adequate basis in the record for the jury to consider that. It's not a separate crime. It's just whether or not there's consciousness of guilt.
>
> [Defendant] didn't stick around. [He] wasn't found at the scene. I think that it's an inference that can be drawn. I'm satisfied that there's [a] sufficient amount of evidence before the jury to give that charge.

The judge subsequently instructed the jury consistent with Model Jury Charge (Criminal), "Flight" (May 10, 2010).

Pertinent to the deleted photographs, the judge instructed the jury as follows:

> [I]n this case, the evidence that has been offered to attempt to convince you that, in fact, the photos were deleted near the time of the events alleged, is evidence of a consciousness of guilt on the [d]efendant's part, regarding the Attempted Murder and/or Aggravated Assault, as alleged.
>
> You may not draw this inference, unless you conclude that the acts alleged were an attempt by the [d]efendant to cover up the crimes being alleged. Whether this evidence does, in fact, demonstrate consciousness of guilt is for you to decide.

> You may decide that the evidence does not demonstrate consciousness of guilt and it is not helpful to you at all. In that case, you must disregard the evidence.
>
> On the other hand, you may decide that the evidence does not demonstrate consciousness of guilt and use it for that specific purpose. However, you may not use this evidence to decide that the [d]efendant has a tendency to commit crimes or that he's a bad person.
>
> That is, you may not decide that just because photographs were found on the [d]efendant's phone, he must be guilty of the present crimes. I've admitted the evidence only to help you decide whether such evidence is evidence of consciousness of guilt.
>
> You may not consider it for any other purpose and may not find the [d]efendant guilty now, simply because the State has offered this specific evidence.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions. Correct jury instructions are at the heart of the proper execution of the jury function in a criminal trial." State v. Afanador, 151 N.J. 41, 54 (1997) (citations omitted). It is essential to the right to a fair trial that jury charges be accurate and appropriate, particularly in criminal cases. State v. Green, 86 N.J. 281, 289 (1981). Our courts "have always placed an extraordinarily high value on the importance of appropriate and proper jury charges to the right to trial by jury. Erroneous instructions on matters or

issues material to the jurors' deliberations are presumed to be reversible error." State v. Grunow, 102 N.J. 133, 148 (1986) (citing State v. Collier, 90 N.J. 117, 122-23 (1982)). That is, erroneous instructions are viewed as "'poor candidates for rehabilitation under the harmless error philosophy.'" State v. Belliard, 415 N.J. Super. 51, 70 (App. Div. 2010) (quoting Feaster, supra, 156 N.J. at 45), certif. denied, 205 N.J. 81 (2011).

Our Supreme Court has recently noted that "[o]ur jurisprudence regarding consciousness-of-guilt evidence derives from the principle that certain conduct may be 'intrinsically indicative of a consciousness of guilt,' and may therefore be admitted as substantive proof of the defendant's guilt." Cole, supra, ___ N.J. at ___ (slip op. at 34) (quoting State v. Phillips, 166 N.J. Super. 153, 160 (App. Div. 1979), certif. denied, 85 N.J. 93 (1980)). "Evidence of flight . . . by an accused generally is admissible as demonstrating consciousness of guilt, and is therefore regarded as probative of guilt." State v. Mann, 132 N.J. 410, 418 (1993); see also Cole, supra, ___ N.J. at ___ (slip op. at 34). "The most common example of conduct that can give rise to an inference of consciousness of guilt is flight." State v. Randolph, 441 N.J. Super. 533, 562 (App. Div. 2015), aff'd in part and rev'd in part on other grounds, 228 N.J. 566 (2017). Evidence of flight need not be unequivocal, but it "must be

'intrinsically indicative of a consciousness of guilt.'" Randolph, supra, 228 N.J. at 595 (quoting Randolph, supra, 441 N.J. Super. at 562).

In the present case, we are satisfied that the trial judge properly exercised his authority in administering the flight charge. Defendant's reason for promptly leaving the shooting scene was unexplained. It was not until later that evening that he was located and apprehended by the fugitive squad. In the interim, he texted a friend, indicating he was in "deep shit," and provided her with the address for the county jail. The jury was entitled to evaluate that evidence and determine defendant's actual motivation for fleeing. The judge did not abuse his discretion in providing the flight charge.

We reach the same conclusion with respect to the deleted photographs. As noted, the State's evidence indicated that the photos in question were deleted before the shooting occurred. Nonetheless, defendant's deletion of the photos arguably evidenced consciousness of guilt, since a jury could rationally infer defendant knew he illegally possessed a firearm that he intended to use against another. Accordingly, the judge did not abuse his discretion in issuing a consciousness-of-guilt instruction.

III.

Defendant next argues that the prosecutor's repeated reference to his street name, Cuckoo, was highly prejudicial and violated his constitutional rights to due process and a fair trial. Since defendant did not object to these references at trial, our review is governed by the plain error standard. R. 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. . . ." Ibid.; see State v. Galicia, 210 N.J. 364, 386 (2012).

In support of his argument, defendant cites our decisions in State v. Salaam, 225 N.J. Super. 66 (App. Div.), certif. denied, 111 N.J. 609 (1988), and State v. Paduani, 307 N.J. Super. 134 (App. Div.), certif. denied, 153 N.J. 216 (1998). However, in Salaam, we recognized that "the majority of decisions involving this issue hold that the admission of irrelevant aliases into evidence will not afford a basis for reversal unless some tangible form of prejudice is demonstrated, i.e., where such names have been intentionally offered as indicia of guilt." Salaam, supra, 225 N.J. Super. at 73. We declined to reverse defendant's conviction, noting that the references to defendant's alias "neither compromised defendant's right to have the jury evaluate the merits of his defense nor prejudiced his right to a fair

trial." Id. at 76. Similarly, in Paduani, we stated "[t]he use of defendant's street nickname during trial cannot serve as a per se predicate for reversal." Paduani, supra, 307 N.J. Super. at 146. We found the reference to defendant's nickname was

> clearly relevant because each defendant was identified to the police by use of a nickname. In fact, defense counsel during trial referenced defendant by use of his nickname. Moreover, defendant has pointed to no tangible form of prejudice attributable to the use of his nickname during trial and our independent review of the record reveals none.
>
> [Id. at 147.]

In the present case, the admission of defendant's street name was proper because it was relevant to the State's case. As in Paduani, defendant was known to Spence by his street name, Cuckoo, and he identified to police by this name. Similar to Paduani, defense counsel on several occasions also referred to other persons present at the Nieves's apartment by their nicknames when questioning witnesses and during summation. Accordingly, we discern no plain error in the prosecutor's references to defendant's street name.

IV.

Finally, defendant argues that his aggregate fifty-eight year sentence with a NERA parole disqualifier is excessive. He further contends the trial court improperly applied aggravating factor

two, N.J.S.A. 2C:44-1(a)(2), the gravity and seriousness of harm inflicted upon the victim, while failing to apply mitigating factor four, N.J.S.A. 2C:44-1(b)(4), that there were grounds tending to excuse or justify defendant's conduct. We disagree.

Sentencing determinations are reviewed on appeal with a highly deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014). "The appellate court must affirm the sentence unless (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)). Once the trial court has balanced the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and -1(b), it "may impose a term within the permissible range for the offense." State v. Bieniek, 200 N.J. 601, 608 (2010); see also State v. Case, 220 N.J. 49, 65 (2014) (instructing that appellate courts may not substitute their judgment for that of the sentencing court, provided that the "aggravating and mitigating factors are identified [and] supported by competent, credible evidence in the record").

In sentencing defendant, in addition to aggravating factor two, the court found significant the following aggravating factors: (1) the risk of re-offense (factor three), N.J.S.A. 2C:44-1(a)(3); (2) the extent of defendant's prior criminal record and the severity of those offenses (factor six), N.J.S.A. 2C:44-1(a)(6); and (3) the need for deterrence (factor nine), N.J.S.A. 2C:44-1(a)(9). The court found no mitigating factors.

The court appropriately pointed out several important considerations bearing on its sentencing analysis. First, the court noted that defendant had both a lengthy juvenile and adult criminal history. The court further noted that defendant "has been offered diversionary opportunities, probation, and state-level incarceration. Nothing has deterred him from his life of crime. He is a persistent and violent offender with weapons offenses and the only way that this [c]ourt can protect society from him is to impose an extended term."

Contrary to defendant's argument, "a conviction for attempted murder does not require as one of its elements that any injury be inflicted." State v. Noble, 398 N.J. Super. 574, 599 (App. Div.), certif. denied, 195 N.J. 522 (2008). Here, the trial judge "note[d] that the victim has sustained a gunshot wound. The bullet is still lodged in his body. He is paralyzed essentially from his mid-section down[.]" Accordingly, the extent of the injury

defendant inflicted on Spence is a substantial aggravating factor, as the judge properly found. Ibid.

The judge found no mitigating factors applied, and we find no basis in the record to disturb that reasoned conclusion. As the court applied correct legal principles, and the sentence, while undoubtedly severe, is amply supported by the record and does not shock our judicial conscience, we decline to disturb it. Roth, supra, 95 N.J. at 363-64.

Affirmed.